INTRODUCTION TO ISLAMIC JURISPRUDENCE

al-Madkhal al-Fiqhī al-ʿĀm

By | SHAYKH MUṢṬAFĀ AḤMAD
AL-ZARQĀ

INTRODUCTION TO ISLAMIC JURISPRUDENCE

(al-Madkhal al-Fiqhī al-ʿĀm)

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CONTENTS

FOREWORD xiii

Preface: Islamic Jurisprudence in Its New Garb
by 'Abd al-Qādir 'Awdah xv
Foreword: Introduction to *al-Madkhal al-Fiqhī al-'Ām*
by Dr. Munīr al-'Ajlānī xxi
Introduction to the First Titles of the Series . . . xxv
Introduction to the Third Edition xxxi
An Introductory Discourse of the Book . . . xxxvii
The Division of this Book, Its Symbols and
Terminologies xliii

PART 1
A DEFINITIVE AND HISTORICAL INTRODUCTION TO ISLAMIC JURISPRUDENCE

Chapter One
PRELIMINARY, DEFINITION, DIVISION . . . 3

Section 1: General Overview of Islamic Law . . . 5
Section 2: The Meaning of *Fiqh*, Its Devision and Rulings . 27

Chapter Two
SOURCES OF THE ISLAMIC JURISPRUDENCE . . 33

Section 3: The Primary Sources of *Fiqh* 35
Section 4: The Secondary Sources 48
Section 5: The Secondary Sources (of Legislation) . . 59
Appendix to Section 5: *Al-Istiṣlāḥ* and *al-Siyāsah al-Shar'iyyah* . 92
Section 6: The Secondary Sources: Custom *('Urf)* . . 95
Section 7: The Historical and Consideration Sequence
of the Sources of Islamic Jurisprudence . . . 102
Section 8: The Differences between *Sharī'ah* and *Fiqh* . . 105

Chapter Three
THE PHASES OF DEVELOPMENT OF ISLAMIC JURISPRUDENCE AND ITS FEATURES IN EACH PHASE 109

Section 9: About the Expansion of *Fiqh*, Its Development and Historical Roles 111
Section 10: Phase 1: The Prophetic Era 115
Section 11: Phase 2: The Era of the Rightly Guided Caliphs until the Middle of the First Century . . 122
Appendix to Section 11: 'Umar's *Ijtihād* on the Conquered Lands 128
Section 12: Phase 3: From the Middle of the First Century to the Beginning of the Second Century . . . 132
Appendix to Section 12: Clarifications about the Difference between the School of *Ḥadīth* and the School of Opinion . 140
Section 13: Phase 4: From the Beginning of the Second Century to the Middle of the Fourth Century . . 146
Section 14: Phase 5: From the Middle of the Fourth Century to the Middle of the Seventh Century . . . 150
Section 15: Phase 6: From the Middle of the Seventh Century to the Emergence of *al-Majallah* in 1286 A.H. . 157
Appendix to Section 15: Authority of the Ruler: Its Extent and Restriction 162
Section 16: Phase 7: From the Emergence of *al-Majallah* to the End of the Second World War (1287-1354 A.H.) . 170
Appendix to Section 16: *Majallah al-Aḥkām al-'Adliyyah*: Its History, Description, Evaluation and Fate . . 178
Section 17: Phase 8: From the Post Second World War until Present 189

Chapter Four
DERIVING CONTEMPORARY CODIFICATION FROM ISLAMIC JURISPRUDENCE . . . 199

Section 18: Contemporry Perspective for Benefiting from the *Fiqh* through the Schools of Islamic Law . . . 201
Appendix to Section 18: Contemporary Examples of Codification of *Fiqh* in Its Various Schools . . . 205
Section 19: Necessity and Value of the Differences in *Ijtihād* . 207

Section 20: The Merit of Religious Attribute in Islamic Jurisprudence 214
Section 21: Contemporary Challenges Facing the Implementation of the *Sharīʿah* 218
Appendix I to Section 21: The Penalty for the Crime of *Zīnā* . 225
Appendix II to Section 21: The Problem of Interest-Based System 228
Section 22: Civil Laws in Islamic Countries and the Merit of Founding Them on *Fiqh* 234
Appendix I to Section 22: Resolutions of International Law Conferences and Testimonies of Law Leaders on the Merit of Islamic Law 240
Appendix II to Section 22: Codification of Islamic Law and Codifying from It 244
Appendix III to Section 22: Unification of Criminal System in the Arab World Based on *Sharīʿah* . . 251

PART 2
FUNDAMENTAL THEORIES OF *FIQH* IN ESSENTIAL RULINGS

PREFACE TO PART TWO 259

Chapter Five
THE THEORY OF OWNERSHIP (*AL-MULKIYYAH*) IN ISLAMIC LAW 261

Section 23: Definition of *al-Mulk* and Explanation of Its Causes 263
Section 24: Division of Ownership and Its Causes . . 274
Section 25: Distinct Features of Ownership . . . 283
Section 26: The Differences between Ownership and Permission and between Ownership and Right to Benefit . 293

Chapter Six
THEORY OF CONTRACTS AND ITS DECLARACY IN ISLAMIC LAW 297

Section 27: General Introductory and Historical Information . 299
Section 28: Five Terminologies of the Concept of Contract . 308
Section 29: Component of Contract 316

Section 30: Text of the Contract and Related Matters . . 320
Appendix to Section 30: Is 'oral' formalism available in Islamic jurisprudence? 335
Section 31: General Condition for Sealing Contracts . . 339
Section 32: Contract Intention 349
Section 33: Contract Formality 354
Section 34: Defects of Consent – Coercion 360
Section 35: Defects of Consent – Misleading 368
Section 36: Defects of Consent – Mistake 380
Section 37: Unexpected Defects of Consent due to the Deficiency in the Implementation of the Contract . . 394
Section 38: Effects of the Contract – Enforceability . . 402
Section 39: Effects of the Contract – Obligation . . 417
Section 40: Effects of the Contract – Binding Nature . . 424
Section 41: The Authority of the Contractual Intention A General View 438
Section 42: *Ijtihād* in the Authority of the Contractual Intention 446
Section 43: Types of Conditions of Contract . . . 466
Section 44: Authority of Contractual Intention in Foreign Jurisprudence 477
Section 45: Decomposition of the Contract . . . 482
Section 46: Summary of the Most Important Named Contracts 491
Section 47: Classification of the Contracts . . . 513

Chapter Seven
THEORY OF CORROBORATIONS IN ISLAMIC LAW . 529

Section 48: The Origin of Corroborations, Its Definition and Classification 531
Section 49: The Prescribed Punishment: The Ordained Puuishment 540
Section 50: The Prescribed Punishmeut: The Mandatory Punishment 554
Section 51: The Concept of *Buṭlān* 564
Section 52: The Reasons for *Buṭlān* 571
Section 53: The Consequences of *Buṭlān* 576
Section 54: The Concept of *Fasād* 589
Section 55: The General Reasons for *Fasād* 601

Section 56: The Consequences of *Fasād* and the Related Things 608
Section 57: The Attitude of Law about Invalidity and Our Opinion on the Matter 617
Section 58: Null Theory in Foreign Jurisprudence, Illustration, Criticism, and Comparison of Nullity and Annullability Theory in Islamic Jurisprudence . . 627

Chapter Eight
THEORY OF LEGAL CAPACITY AND GUARDIANSHIP . 633

Section 59: Structure of Legal Capacity, Its Definition and Kinds 635
Phases on Human Legal Capacity According to Life Stages . 643
Section 60: The First Phase of Legal Capacity: The Embryonic Phase 644
Section 61: The Second Phase of Legal Capacity: The Childhood Phase 646
Section 62: The Third Phase of Legal Capacity: The Discerning Phase 650
Section 63: The Fourth Phase of the Legal Capacity: The Puberty Phase 660
Section 64: The Fifth Phase of the Legal Capacity: The Adulthood/Maturity 663
Section 65: Capability Incidences 674
Section 66: Guardianship or Legal Representation . . 683
Appendix I of Chapter Eight: References for Traditional Juristic Study on Contingencies of Legal Competence . 691
Appendix II of Chapter Eight: Salient Features of Our New Academic Focus on the Theory of *Ahliyyah* . . 696

Chapter Nine
THE THEORY OF *'URF* 699

Section 67: The Basic Concept of *'Ādah* and *'Urf*: Their Definition and Relationship 701
Section 68: Division of *'Urf* 709
Section 69: Authority of *'Urf* 713
Section 70: Conditions for Considering the Custom . . 730
Section 71: Circumstances in which Custom Contradicts with Legal Evidence 736

Section 72: Comparative *'Urf* which is Contrary to the Generic Text 744
Section 73: *'Urf* Occuring after the General Opposing Text . 748
Section 74: Conflicting Situation of *'Urf* and *Ijtihād* . . 757
Section 75: Comparison with Customary Circumstantial Evidence and the Time Variatiou 761
Section 76: *'Urf* aud Time Changing: General View . . 766
Section 77: Change of Diligent Legal Rulings through the Time Degeneration 769
Section 78: Reversion of the Diligent Effort Made Rulings as a Result of the Development of Means and the Difference of situations 776

PART 3
THE GENERAL PRINCIPLES OF ISLAMIC JURISPRUDENCE

Chapter Ten
THE GENERAL PRINCIPLES OF ISLAMIC JURISPRUDENCE 783

Section 79: The Meaning of Legal Maxims and Their Juristic Positions 785
Section 80: Historical Brief ou the Formatiou of the Normative Maxims 789
Section 81: Presentation of the Principles which are Mentioned by *al-Majallah*, Arranged and Categorized into Basic aud Branch, which Its very Brief Explanation . 796
Appendix to Section 81: New Formation with Examples for the Maxim: *"Whoever Hastens Something..."* . . 876
Section 82: An Analytical View in the Principle of Affirmation, the Primary Probabilities and the Legal Substantive 879
Appendix to Section 82: Collection of Maiu and Subsidiary Maxims of the *Majallah* 891
Section 83: Other Maxims which Exquisitely Supplements the Previous Maxims 897

INDEX 905

FOREWORD

Dissemination of printed knowledge is an essential element in the move to make Malaysia as an intellectual epicenter in Islamic finance. Since books and intellectuality are synonymous, IBFIM embarked on publishing and distributing books on Islamic finance. From the treasure trove of Islamic finance, titles were carefully selected with a view to translate classic titles manifesting precious thoughts of early wise men of Islam.

Bank Negara Malaysia (BNM) is instrumental in this initiative for kindly consenting to sponsoring the translation aud publication of eight *Sharīʿah* titles from Arabic into English. This project is funded by the "Fund for Scholars in Islamic Finance" which was established by BNM in June 2005. IBFIM humbly records its utmost appreciation and indebtedness to BNM for the generosity.

I want to thank IBFIM's Knowledge Management Centre (KMC) for this noble initiative. In executing its role developing human talent in Islamic finance, IBFIM's hands-on training programs are being supported by its business and *Sharīʿah* advisory functions and its KMC. True to its name, KMC is not merely a depository of books and documents but a place where knowledge is managed. It is this role, together with the fact that IBFIM is industry-owned and regulator-linked, and coupled with KMC's well niched collections that set IBFIM and its KMC apart from the other institutions.

May the translations and publications of these highly regarded books hasten the pace and strengthen the vibrations of Malaysia's iutellectual epicenter in Islamic finance, *in shā' Allāh*.

Dato' Dr. Adnan Alias
Chief Executive Officer
IBFIM

PREFACE

ISLAMIC JURISPRUDENCE IN ITS NEW GARB

by
'Abd al-Qādir 'Awdah[1]

This title was just a dream before it became a reality. It was a dream in which souls and hearts were attracted to, and then, it became a reality represented in a book with which every reader may approach and enjoy its beauty.

Before the publication of this book, enthusiasts of *fiqh* (jurisprudence) were attempting to acquire the knowledge but only a few of them managed to do so because *fiqh* has been confined in the classic texts *(mutūn)* and commentaries *(shurūḥ)*, and has remained difficult for students because of its complex language and outdated style.

Everyone who are familiar with *fiqh* and has endured reading books of *fiqh* had wished that they are simplified for people to easily read and study so that they may compare the modern *fiqh* with the classical *fiqh* which is full of topics, theories, and terms and distinguished by its precision and dynamism. Such a comparison would increase people's cultural knowledge, broaden their horizons, increase their awareness, and direct them to the right path.

These problems that the enthusiasts and propagators of *fiqh* face have been solved by a book that has also made them achieve their heartiest aspirations. This book is *al-Fiqh al-Islāmī fi Thawbihi al-Jadīd* (Islamic Jurisprudence in its new garb) which we have made the name of the title of this article.

If it is correct that a book may be interpreted from its title, then this book, in my opinion, is the first one to be represented and

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1 This testimony was published by Prof. 'Abd al-Qādir 'Awdah (may Allah have mercy on him) in *Majallat al-Muslimūn*, year 2, no. 5, Cairo, 1372H/1953, pp. 497-500. We are publishing it today as an introduction to this book.

expressed clearly by its title. Its title is *al-Fiqh al-Islāmī fi Thawbihi al-Jadīd*, and every sentence, paragraph and page of this book is Islamic jurisprudence in a new style, presentation, order, and guide. In other words, it is Islamic jurisprudence in its new garb as dictated by the precision and vastness labeled by its author.

The book is a series of titles of which the following have been published: *al-Madkhal al-Fiqhī al-ʿĀm: Kitāb al-Ḥaqq, wal-Iltizām, wal-Amwāl, wal-Ashkhāṣ)* (Introdnction to General Jurisprudence: The Book of Right, Obligation, Properties and Persons), and *Kitāb 'Aqd al-Bay*ʿ (The Book of Sales Contract). The author is still working on his new book, *Kitāb Naẓariyat al-Iltizām fi al-Fiqh al-Islāmī* (The Theory of Obligation in Islamic Jurisprudence). The author's way of publishing indicates that he will add numerous other books to the series.

I have come across the book entitled *al-Madkhal al-Fiqhī al-'Ām* (Introduction to General Jurisprudence) and I have found it a new and noble work. It is, in my opinion, new because Islamic jurists were neither accustomed to the modern method of writing used by the author nor did they follow the author's contemporary classification. In this new methodology, the problems are consolidated, generalities are presented, theories are simplified, and terminologies are explained. Then the branches are extracted from their roots or the portions are related to their whole or the theories are applied to their relevant topics. Thus, the student eventually comes out from his study while he is well acquainted with the generalities and theories having strongly grasped the juristic problems, and understood the way of relating the branches (*furū*ʿ) to the roots (*uṣūl*). He will also have gained the ability of solving problems and distinguishing between similar problematic cases.

This work is also noble because it is an unprecedented work. It requires the authors comprehension, intellect, endeavour, and patience until he reached this high level. It is normally not achieved except by the geniuses after a way is made for them and preceded by the leaders. But if the author was able to reach this level by himself after all his perseverance, and by being a leader for himself and others, then this is the great brilliance or it is the bounty of Allah which He bestows on whomever He wishes, and Allah is the owner of the great bounties.

Among the factors that have helped the author to reach where he has reached is that he is man of purpose in this life, and is among the people with the highest qualities who acts and utters for the sake of Allah the Almighty, and thus Allah the Most High, granted him His help and bestowed on him the understanding of His religion and laws.

It also appears that the author suffered the pain of looking into the books of *fiqh*, and thus he vowed to make the *fiqh* easy for its students. He also saw that the *fiqh* - in terms of its sequence, chapters, and coherence between its branches and roots - is behind by centuries from the modern *fiqh*. He therefore, vowed to deliver the *fiqh* over the centuries, through a single transition to make it at par with the modern *fiqh*. Allah helped him to achieve his ambition. He simplified the *fiqh* for every student and transformed it from the Abbasid era to our modern age, and this in itself is a marvelous effort. The result is that this rich and powerful *fiqh* that was concealed in its ancient cover comes out today in its new garb and shining form while announcing to people that the *fiqh* is the [real] *fiqh* and its laws are the [real] laws, and that which Allah has chosen for people is the *crème de la crème* if they only knew.

The respectable author knows while embarking on this noble work that he is embarking on a task that is so sublime and great to be done by one person, and that this task requires the help of a group of scholars who are well-versed in *fiqh* and modern rights in their foreign sources and styles. But the pressing need and the lack of time ruled that he alone, while seeking Allah's help, should assume the responsibility of performing this task that would burden a band of strong men.

Allah the Almighty has helped him and supported him to write a comprehensive book of the fundamentals of *fiqh* and the general theories on which the rulings are established using strong and yet tender language while maintaining an accurate coordination, innovative sequence, a relationship between the roots and the branches, and a logical sequence of theories and rulings. This is the first book that the Islamic library lacks, and after its existence, it will be the first book that will form the basis of the Islamic juristic revolution. The learner of *fiqh* is in a dire need of this book in order

to know the foundations of *fiqh* and the way they are interrelated so that he moves after that towards the right direction of study.

The most important feature of this book is that the students of law colleges in the Islamic world are able to read it without feeling that they are reading something strange or far from their speciality. In fact, by reading this book they will find scientific pleasure, jurisprudential depth, and precision of linguistic and terminological expression that will make them prefer this book to other books of law which are translated for them and not compiled. They may in fact find in this book the art and spirit that they have not found in any other book.

Using what Allah has granted the author of the power of understanding the depth of jurisprudence, he has been able to present the general Islamic theories like the way how the legal theories are presented; to relate each generality with its subsidiaries; and to extract from the subsidiaries their generalities while basing his work on the Ḥanafī School *(madhhab)* although he compares, in some issues, between the Islamic schools of thought *(madhāhib)* and does not forget in most of the cases to compare between the *Sharīʿah* ruling and the Syrian laws.

In addition, the book follows a logical sequence. Its first part discusses on *fiqh:* its sources and the historical order of these sources, and the jurisprudential development: the stages that it passed through and the distinguishing features of each stage. The second part handles the basic general theories: the ownership theory and what comes under it such as the causes of ownership, division of ownership, and characteristics of ownership; the theory of contracts and what it contains of rulings such as the formation of contracts, the will and its anomalies, the effects of contracts, termination, invalidity and other issues that are usually mentioned in law books, and the theory of capacity and guardianship, etc. This way the book moves from one theory to another, but does not move to a new theory until the previous one is thoroughly discussed and all its subsidiaries mentioned.

The book's author does not forget to mention, along with the legal terms, the Islamic terms in order to show the precise difference in appellation between the two terms thus enriching the reader's

information and alerting his mind to the comparison and depth of understanding.

The great author who has exerted this enormous effort and published this valuable book is Professor Shaykh Muṣṭafā Aḥmad al-Zarqā, the Professor of Civil Law and Islamic Law in the Faculty of Law in Damascus.

Perhaps, this *tawfiq* that has remained with the Shaykh in the publication of this book is attributed firstly to his closeness to Allah, as no one gets such *tawfiq* except he whom Allah shows the right way. Secondly, to what Allah has granted Shaykh Muṣṭafā of the merits of combining the knowledge of both Islamic Law and Civil Laws. All these reasons have helped Shaykh al-Zarqā to attain this high elevation, and to introduce to Islam and the Muslims the grandest service through this noble book.

May Allah reward the Shaykh for what he does for the sake of Islam and Muslims bountifully, help us to make use of his knowledge, grant him dynamism and *tawfiq*. Allah is the All-hearing and the ready to answer.

FOREWORD

INTRODUCTION TO *AL-MADKHAL AL-FIQHĪ AL-ʿĀM*

by

Dr. Munīr al-ʿAjlānī[2]

This book is regarded, in our opinion, as the best book for the preparation of the study of *Majallah al-Aḥkām al-ʿAdliyyah* the classical civil law of the Ottoman era. In addition, it is a glorious defence of the greatness of the *fiqh*. The author has conveyed to us three significant international texts that commend the merits of our *fiqh*, and it pleases us to reproduce them in this foreword:

The First Resolution: It was made by the Conference on Comparative Laws, which was held in the Hague in August 1937 and included three principles:

1. The Consideration of the *Sharīʿah* as one of the sources of general legislation;
2. that it is alive and progressive; and
3. that it is an independent legislation that is not taken from any other legislation.

The Second Resolution: It was made by the International Conference of Lawyers in 1948 and the following is its translation: "Because of the recognized flexibility and importance of Muslim law, the comparative study of the Islamic legislation by the International Bar Association must be adopted and encouraged".

The Third Resolution: It was made by the International Academy of Comparative Law held in Paris in 1952 and the following

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[2] This article was published in the *Majallat al-Majmaʿ al-ʿIlmī al-ʿArabī*, v. 28, Damascus, 1373 A.H. (1953).

is its translation: "The conference participants, based on the benefit gained through the studies presented during "The Islamic Jurisprudence week" and the concomitant discussions, which clearly stated that:

a. the principles of Islamic *fiqh* has an undisputable value;
b. the disagreement among the schools of Islamic law in this tremendous body of laws contains abundant concepts and information, as well as the fundamental rights. This is a source of admiration with which the Islamic *fiqh* is able to fulfill all the demands of the modern life and to reconcile its [different] needs;

Declaring their willingness to allow the "Islamic Jurisprudence Week" to proceed with its duties each consecutive year, and assign the conference office the task of listing the topics which the discussions have identified as necessary to be made as fundamental topics of discussion in the forthcoming session.

The participants hope that a committee will be formed to compile a lexicon of *fiqh* that will facilitate the process of referring to the literature of this jurisprudence (*fiqh*), and thus become an encyclopedia of *fiqh* in which the Islamic legal information is presented according to the modern methodologies.

...and Professor al-Zarqā had responded to this request when he wrote a book in Islamic *fiqh* based on the modern style!

He started his book by defining *fiqh* then stating its first four primary sources: the Holy *Qur'ān*, the *Sunnah*, *ijmāʿ* and *qiyās* followed by the secondary sources: *istiḥsān, al-maṣāliḥ al-mursalah*, and *'urf*. He then discussed the stages (or phases) of the *fiqh* and he made them seven: starting with the Prophetic period and ending with the Ottoman period. We do not however, agree with him in this division even though the number (7) has its secret and fascination. Then, he started the backbone of his theme, that is, the fundamental jurisprudential theories such as the theories of ownership, contract, capacity...etc. He did not follow the method adopted by his predecessors i.e. the *Majallah* commentators who made *fiqh* in the form of *fatāwā* (sing. *fatwā*), "issues" and "specifics", instead; he attempted to study the *Majallah* in the same way the French professors teach civil law in the College of Law in Paris. He gathered

from the Qur'ānic rulings, the *ḥadīth* and the opinions of scholers (*fuqahā'*) from different *madhāhib* that forms general theories which resemble the modern European theories. He has been bestowed with a great *tawfīq* in his attempt. Thus, he who reads his book will come out with two benefits: the new jurisprudential theories for which he takes the credit of extrapolating them, and the opinions of scholars of *fiqh* that have been summarized for the reader, and therefore, sufficed for him from reading dozens of books of *Fiqh*.

Despite our impression with this magnificent book, we refer to a tiny weak aspect which serves as al-Zarqā "bead" or protection against an evil eye. This aspect is that Professor al-Zarqā always says that the opinions of our scholars are better than those of the Westerners, and I agree with him that our classical legacy is better than theirs but not always better than their modern [invention]!

This is one observation. The other observation is that Professor al-Zarqā has burdened some texts more than what they can bear in the development of general theories that resemble the Western theories. Take for example, his argument of this verse: "*Eat not up your property among yourselves unjustly except it is a trade amongst you, by mutual consent*" (al-Nisā', 4:29) as evidence to support the principle of sovereignty of the will. However, this verse does not contain anything of this principle. The principle of sovereignty of the will declared the liberation of the people from the protocols and forms that were depriving contracting parties – under the ancient Roman Laws - of much of their freedom, and considered their contracts void just because of not completing certain "forms". So what is the connection between this principle and the glorious verse?

Nonetheless, these two observations do not reduce the value of the book and the utmost praise that the author deserves. The book is strong in its contents, and its author is a sharp-witted writer who combines both the religious and legal cultures with a strong command of his language. Professor al-Zarqā is a *Faqīh* and a man of letters, and his style of writing almost makes you forget the difficulty and the aridity of the material.

INTRODUCTION TO THE FIRST TITLE OF THE SERIES

al-Fiqh al-Islāmī fi Thawbihi al-Jadīd wa-Ṭalī'atuhā: al-Madkhal al-Fiqhī al-'Ām

Praise be to Allah who has completed to us His bounty, and may blessing and peace be upon our master Muḥammad, the Messenger of guidance, and upon he who follows his right path, and upon his household and companions. Thereafter, this *al-Madkhal al-Fiqhī al-'Ām* is built on three parts:

A definitive and historical introduction on the sources of *fiqh* and the stages of its development, then, a presentation of the main jurisprudential theories of the rulings, and finally, an explanation of the general maxims of *fiqh* with their brief explanation.

My teaching at the university level prompted me to teach and write this *al-Madkhal,* and at the same time print what I was writing and distribute it among students in the form of booklets since 1363 A.H. (1944).

Then, I made addition and revision in every ensuing edition depending on the need of the university teaching. In the fourth edition, this *al-Madkhal al-Fiqhī al-'Ām* became two volumes taught at the university level over the first two years. The editions of the book were successively published up to the revised eighth edition which was published in the late 1966 when I retired from the University of Damascus after reaching the legal retirement age. The teaching of the *al-Madkhal* at the university continued for several years after my retirement and during this period there were many new editions of the book containing numerous printing errors. The Damascus University then stopped using the book, and all the editions that appeared after that until today were stolen and published without permission, besides their numerous printing errors.

During my teaching of this *Introduction* in the faculty of *Sharī'ah* at the University of Jordan since early 1970s, I have accumulated corrections, revisions and additions which I have embedded into this new publication.

The first editions of this *al-Madkhal* appeared while we were using the *Majallah* which was equal to the Civil Law in the Ottoman state. This book was then an introduction to the *fiqh* in general, and to the *Majallat al-Aḥkām al-'Adliyyah* in particular.

Then, the Syrian Civil Law which emanated from the *Uṣūl al-Fiqh al-Qānūnī al-Ajnabī* (principles of foreign jurisprudence) appeared in 1949, and I also taught it in place of the *Majallah al-Aḥkām al-'Adliyyah.* We continued teaching the introduction to jurisprudence *(fiqh)* under the subject of *al-Sharī'ah al-Islāmiyyah*.

By the grace and *tawfiq* of Allah, *al-Madkhal* has opened up a radical style of teaching *fiqh* at the universities, in a manner that was not known before. This new approach of presenting *fiqh* to students who have no background in *Sharī'ah* received a wide acceptance such that it has become a common method. This approach, which I have decided to adopt since then in the series of *al-Fiqh al-Islāmī fi Thawbihi al-Jadīd* is based on framing the jurisprudential rulings, which explain the *Majallah,* in the form of modern legal jurisprudence. The purpose of doing so is to adorn the *fiqh* a new garb that is compatible with the contemporary legal experience in its wording and fashion while preserving its essence and origin in the jurisprudential rulings and perspectives. This is what the contemporary need and university teaching requires.

Part of what I have written on the new format of this book in my introduction to the third volume of this series in 1365 A.H. (1946) is the following:

"I am aware of what this step has of great efforts and seriousness. Indeed, the legal jurisprudence and the modern laws originated from its foundation, in a specific order, move from the fundamentals and general principles to secondary rulings that are either based on the general principles or exempted from them. Our jurisprudence, including the *Majallah,* moves in the opposite direction. It deals with the secondary matters immediately, and scatters the general principles and collective fundamentals according to the relevant occasions.

However, gathering the parts of these general principles from different sections and deriving them often from the causes and the subsidiaries of rulings then affixing each part to its corresponding part - to deduce the jurisprudential ruling on every group and

deriving the subsidiaries thereof – demands of effort and time that necessitates the cooperation of a group of *Sharīʿah* and legal scholars who devote themselves with all their talents to this task".

This present new publication of the book, after all its previous editions, is distinguished in its form and content.

a. The Content

I have adhered to the teaching nature and style of this book so that it remains easy for students of the faculties of *Sharīʿah* and law who come from secondary schools without *Sharīʿah* background. I have resisted all temptations of turning this book into an encyclopedia of jurisprudential rulings or *fatāwā* or an in-depth reference of subtle and detailed issues of *fiqh*. Thus, the book is still in the same way I originally wished it to be: a simplified introduction that teaches the university student the basic jurisprudential concepts and a sound methodology of jurisprudential thought, and not jurisprudential details and rulings found in the classical books of *fiqh*. The jurisprudential rulings contained in this book are basically aimed at serving its teaching goal through examples, quotations, depiction of the abstract concepts and establishing the maiu issues in the mind of the student. I have added a number of clarifying examples that I have selected carefully so as to suit the beginner's need for clarification.

Furthermore, in this new edition, I have also added, at the end of some chapters, some appendices in which I have composed the detailed issues that exceed the need of the beginner but they benefit the advanced student and the reviser who seeks extensiveness. These appendices basically exceed the need of the students at the bachelor degree level, and thus they are not required to study or be examined in them. Some of the appendices were originally lengthy annotations amidst the chapters. As for the rest of the detailed annotations that do not deserve to be separated in an appendix because of their small size, I maintained them in their respective places and distinguished them with an asterisk (*) so that the student may skip them without any difficulty and to inform him that they are not included in his exams.

I have also focused in this new edition on bringing *al-Madkhal* – as much as its teaching nature may allow – close to the contemporary

reality and its issues. This is because *fiqh* is not a heritage that we should keep in a museum and undust it when presenting it to visitors. Rather, it is a comprehension of the *Sharīʿah* which Allah the Almighty has chosen for people so as to guide them in their practical life and guide with it the humanity.

Part of what has been added to this *al-Madkhal* for the above purpose is a new section about the merits of the eighth jurisprudential phase that we currently live in. Also, several appendices that have discussed – among many other issues – the ruling on the bank interests, the authority of the supreme (Islamic) leader, legal policy, codification of *fiqh* and codifying from it, unifying the legislations in the Arab countries, the punishment for adultery, and the difference between the school of *ḥadith* and the school of (opinion) *ra'y* (and this is an old issue around which many contemporary questions arise).

The detailed alphabetical index of the topics and figures has been completely formatted following the numerous mistakes in the previous editions.

b. The Form

Based on the new format, the sections of *al-Madkhal al-Fiqhī al-ʿĀm* have been arranged sequentially from the first section to the last one without any repetition of the section numbers. For example, the first chapter includes the first and the second sections followed by the second chapter that starts with the third section and ends with the eighth, while the third chapter starts with the ninth section and so on.

Among the merits of this method of dividing the book, besides its clarity, is the ease of reference. Thus, the section number is sufficient without adding the chapter and the part in which they appear.

In this new edition, the sequential sections, from the beginning of the book to its end, have replaced the sequential paragraphs in the previous editions such that every section has its own paragraphs which start from number one in the following section.

We have also put above every page of the book the chapter and the section in which the page belongs so that the reader or reviser is guided [to the location] from the first look, and to help him move to any chapter or section he wants. We vowelized necessary letters in

every word that need vowellization to make reading easy in right way for students.

As for the noble Prophetic traditions mentioned in this book, they have been source-verified with the help of an intellectual young man, Shaykh Majd Makkī al-Ḥalabī, a doctorate student in *ḥadīth,* who also helped us in correcting the print-out tests. May Allah reward him abundantly.

Finally, I would like to commend the great effort exerted by my son, Dr. Muḥammad Anas who helped me with his views, experience and deeds in a way that without such help, this new edition would never have appeared. This is in addition to what he offers me of help in the rest of my life affairs especially after I reached my decrepit old age. Thus, I ask Allah the Almighty to reward him in the same way He rewards His righteous and virtuous servants.

And the last of our call is our praise is due to Allah, the Lord of the Worlds.

Muṣṭafā Aḥmad al-Zarqā
Riyād, 12 Shawwāl 1416 H / 1 March 1996)

INTRODUCTION OF THE THIRD EDITION

On the Occasion of the Issuance of the Syrian Civil Law

We started this edition of *al-Madkhal al-Fiqhī al-ʿĀm* whilst we were under the influence of *Majallah al-Aḥkām al-ʿAdliyyah* which was derived from the Ḥanafī School, and which constituted our general civil law and our reference in all aspects where there is no legal ruling that contradicts it.

It was our wish that this jurisprudential series entitled *al-Fiqh al-Islāmī fi Thawbihi al-Jadīd* becomes an introduction to a modern civil law that we establish in Syria derived from the different schools of thought which are full of Islamic law, and that is founded on the best of what is in the schools of the eternal theories and principles of *fiqh*. Such theories and principles are the ones which the great Muslim scholars successively revised throughout the thirteen centuries, and from the themes and chapters – in addition to the rulings that they consolidated their rules and format – they generated a metalanguage and terminologies that the history of law has yet known anything of that vast, precise and well-derived.

Our hope is to enact a Civil Law that connects our legislative laws and our modern needs of the laws with our glorious jurisprudential legacy, which, based on its great principles and flexible rules, is capable of fulfilling all the needs of a righteous civil society with all its economic, social and traditional developments as we shall see in this *al-Madkhal*.

Towards this direction, we have written in this *al-Madkhal* a guiding research entitled *Qānūnu-nā al-Madanī al-Muntaẓar wa-Faḍl Binā'u-hu min al-Fiqh al-Islāmī* (Our awaited Civil Law and the merit of developing it from Islamic Jurisprudence).

While we were heading towards this direction with our eyes focusing on its end, and while the Syrian Ministry of Justice was assigning to the specialists the task of establishing a Civil Law derived from the *fiqh* that would fulfill the needs of time, we were surprised by the issuance of the Syrian Civil Law during the first military coup that

occurred on 30th March 1949. The issuance of this law was due to the efforts of al-Sayyid Asʿad al-Kawrāni who was appointed by the coup leader as the Syrian Minister of Justice. Al-Kawrānī seized the opportunity of the coup and the terrorist regime, and convinced the leader of the coup - who assumed both the legislative and executive authorities – that establishing a foreigu Civil Law instead of the Islamic legislation and its jurisprudence in this country, is the best way to earn long lasting fame and high status in the eyes of the foreigners. He misled the leader that this act will make him like Napoleon, who earned more reputation from the French Civil Law than his couquests.

They found out that the new Egyptian Civil Law fulfilled this purpose because it is of foreign and European origin. In one night, they issued the Civil Law with which they destroyed the greatest jurisprudential edifice in the world and established a law that had no reference for a judge, a lawyer or a student except its foreign fundamentals and terminologies.

They forgot that the way to eternity is not by adopting a foreign law that has no impact on us except to detach us from our roots that has an influence on every part of the earth and every kind of civilization. The foreign law has no outcome other than turning a blind eye to self respect and leading a superficial and meaningless life. The real way to eternity is to establish from our own *fiqh* whose books have filled the libraries of the world, and to derive from its pure source, a new law that fulfills our modern needs. In this way, its root will be firmly held in our *fiqh*, and its branches will be shining in the sky like what our great preceding jurists did with their jurisprudential extrapolations and updates in response to the needs of every time and place until they accomplished this vastness that is beyond limits. Indeed, this is the eternal way which, if we follow and become productive in it, will guarantee the return of Egypt itself to the right path after it has been dragged into the foreign legislation thus wasting its efforts and neglecting the glorious legacy of the predecessors.

We do not object the borrowing from other sources, for wisdom is the desire of the believer, but we are rich in our content. What we are in need of borrowing are the modern methodologies of jurisprudential research and its sequence, and some of the new

rulings organized by legislations for modern legal and economic conditions such as joint-stock companies and insurance contracts on condition that we have to appropriately extrapolate them based on our own *fiqh* principles as was done by our great jurists *(fuqahā)'* in response to the new situations and incidents that they faced.

However, neglecting the jurisprudence that was served by tens of generations from among the genius and master jurists who devoted themselves and their talents to it, and replacing it with a totally foreign law that ties us with the foreign jurisprudence and legislation and makes our great heritage disappear completely, is a declaration of bankruptcy rather than borrowing. It is a failure rather than innovation. This of course does not befit a nation that has a huge jurisprudential legacy like ours, and a glorious legislative past like our past.

Having said this, and after the crimes committed against the Arabic jurisprudential glory by sinful hands of nations, we have seen that the best action that we can do is to proceed with the drafting of this new jurisprudential series with simplicity and precision so that the new Arab generation will be aware of what has been gained and what has been lost. Thus we open for them the way back after acquiring knowledge that will enable them to judge the crimes committed and the culprits.

Thus, we have expanded this third edition of *al-Madkhal al-Fiqhī al-ʿĀm* during which time the Syrian Civil Law was issued so that the book along with the successive volumes become a the Arabic Islamic jurisprudential proof against its enemies, and a wake-up call for the young Arab generation to protect our jurisprudential legacy that no other nation in the history of legislation has achieved.

In this respect, we would like to mention that on this day last year (2nd July 1951), the Eastern Law Division of the International Academy of Comparative Law held a conference in the Faculty of Law at the University of Paris to research on *fiqh* under the title "The Islamic Jurisprudence Week", under the presidency of Milliot, a professor of Islamic legislation at the Faculty of Law, University of Paris. A number of people were invited including professors from the Arab and non-Arab faculties of law, the Al-Azhar colleges, and lawyers from France, Arabian countries and other countries, and orientalists. From Egypt, there were four members: two of them from Fuād

University, the dean of the faculty of law at Ibrāhim University,[3] and a member from the council of supreme scholars representing al-Azhar. Professor Dr. Maʿrūf al-Dawālibī and I participated on behalf of the Syrian Faculty of Law.

The members delivered lectures on five jurisprudential topics that were chosen by the office of the International Academy of Comparative Laws a year before. The topics fall under public and private laws (including the civil, the criminal, the administrative and the economic) and the history of legislation. Then the invitation to deliver lectures on the following topics was made: (1) confirmation of possession; (2) acquisition of ownership for public interest; (3) the criminal responsibility; (4) the impact of the schools of *ijtihād* on each other; (5) the theory of *ribā* in Islam. All the lectures were delivered in French and one day was assigned for each topic. After every lecture, open discussion was conducted among the lecturer and among the participants, which either prolonged or was short depending on the situation, and the summaries were recorded.

In the middle of some discussions, one of the participants, former President of the Paris Bar Association, stood and said: "I actually do not know how to harmonize between what was narrated to us about the rigidity of Islamic *fiqh* and its inability to meet the needs of the developed modern society and what we are now listening in these lectures and discussions. All what we hear now proves that *fiqh* is valid for our age with evidences and proofs."

At the end of the conference, the participants unanimously came up with a report translated as follows:[4] "The participants – based on

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3 The two universities now became University of Cairo and University of Ain Shanis respectively. Likewise, the University of Farūq in Alexandria becanie University of Alexandria.

4 This is the original text of the French report mentioned above:
Les Congressistes,
Etant donné l'intérét suscité par les problèmes évoqués au cours de la SEMAINE DE DROIT MUSULMAN, et par les discussions auxquelles ils ont donné lieu, don't i lest résulté clairement que les principes du droit musulman on tune valeur indiscutable, et que la variété des écoles à l'intérieue de ce grand système juridique implique une richesse de notions jurisdiques et de technique remarquable qui permet à ce droit de répondre à tous les besoins d'adaplation exigés par la vie modern.
Emettent le vaeu que la SEMAINE poursuive ses travaux d'annee en auneé.

the benefit realized from the research presented during The Islamic Jurisprudence Week and all the concomitant discussions which clearly state that:

a. The principles of *fiqh* have their undisputed value (legal rights).
b. The difference between the schools of Islamic law encompasses a treasure of concepts, information, and fundamental rights that make up a source of admiration, and with which the *fiqh* is able to meet all the demands of modern life and to reconcile its needs.

Declaring their willingness to allow the "Islamic Jurisprudence Week" to proceed with its duties each consecutive year, and assign the conference office the task of listing the topics which the discussions have identified as necessary to be made as fundamental topics of discussion in the forthcoming session.

The participants hope that a committee will be formed to compile a lexicon of *fiqh* that will facilitate the process of referring to the literature of this jurisprudence (*fiqh*), and thus become an encyclopedia of *fiqh* in which the Islamic legal information is presented according to the modern methodologies.[5]

It is understood that the conference's hope of compiling a jurisprudential encyclopedia similar to the encyclopedias of foreign laws such as the Daloz encyclopedia is a new phase through which the

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Chargent le Bureau de la SEMAINE d'établir la liste des sujets qui, à la suite des discussion ayant eu lieu au cours de la SEMAINE, devront faire l'objet d'un examen au cours de la session prochaine.

Souhatent qu'un Comité soit formé pour rétablir un dictionnaire de droit musulman destiné à faciliter l'accès aux caurages de droit musulman et constituent un repertoire des connaissances juridiques musulmanes, exposees suivant les methods modernes.

Paris, 7 juillet 1951.

[5] The International Academy of Comparative Law has summarized the events of the Islamic Jurisprudence Week and researches that has been discussed along with the comments in a way that = shows its great importance in the law domain. This summary was published in thirty pages of the Academy's journal (*The International Journal of Comparative Law*) in the 4th issue of the 3rd year in September - October, 1951. The Institute of Comparative Law in Paris University also published the full texts of the lectures that were delivered in this conference with their discussions in a special book published by Serey Group for Legal Researches in 1953 under the supervision of *Milliot*, the conference head.

documentation of *fiqh* must pass so as to prove its essence and fruits. This is one of the greatest [issues] which the League of Arab States must ponder. It is possible that this task is assigned to a committee that consists of several jurists and legists who would devote themselves along with a number of assistants for several years. The cost of such a project is nothing compared to its great benefit and impact.[6]

It is now time to let the *al-Madkhal al-Fiqhī* express by its pleasant academic language, its new but soft and expository methodology and its humble jurisprudential harmony that it reveals on this great jurisprudence to the reader. I pray to Allah to grant us *tawfiq* to achieve the best way for He is the Guarantor of guiding people to the right path.

Muṣṭafā Aḥmad al-Zarqā
Damascus, 10 Shawwāl 1371H / 2 July 1952

6 This dream is about to materialize. A faculty of Islamic law was established in the beginning of the academic year 1954 of the Syrian University after the third edition of this Introduction. This faculty adopted a project of creating an encyclopedia of the *fiqh* (*Dā'irat al-Ma'ārif*) in the same manner proposed by the conference. In 1956 a budget was set aside for this great project and a committee was formed which started its contacts with scholars from different countries for this very purpose.

In the Name of Allah, the Most Gracious,
the Most Merciful, and To Him is Our Recourse

AN INTRODUCTORY DISCOURSE OF THE BOOK

Our civil rulings are indeed not compiled together like the Civil Laws of other nations, rather; our Civil Law is as wide as the ocean. It is the *Majallah al-Aḥkām al-'Adliyyah* selected from the Ḥanafī School.[7] Besides the *Majallah*, there are other *fiqh* rulings scattered in the books of the *madhhab* which are not mentioned in the *Majallah*, and also the laws that cover most of the *fiqh* rulings through abrogation or modification.

These Islamic civil laws which are found in the books of *fiqh* and our *Majallah* have not, until this day, been presented in an orderly manner in the same way we witness the Civil Law books prepared for lectures at the universities of foreign nations such as the books of Josran and Capitan in the French Civil Law. Instead, all the commentaries of the *Majallah* and other books of *fiqh* were based on the method of explaining the articles in the *Majallah* separately and mentioning different rulings.

The student who graduates the public high school and subsequently joins the faculty of law is not able to uuderstand and digest such *fiqh* rulings so long as he is facing from the beginning the secondary issues whose understanding is dependent on the knowledge of the *fiqh* maxims, causes, theories, priuciples, language, and *fiqh* terms which the student is not aware of. Thus he is forced to memorize these secondary issues and their rulings without the basics that put together in his miud all the branches, and the link that achieves the required unity.

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[7] We draw the attention of the reader to the fact that this book and its introduction were written and publisbed before the *Majallah* was repealed and replaced with new Civil Law of foreign origin in 1949 as we have mentioned in the introduction to the third edition.

The *fiqh* books that we have and all the commentaries of the *Majallah* not suitable as references for the courts, just like all the commentaries of the laws to enable judges to refer to them whenever they need to know the details and explanation of every ruling. They are not suitable as educational books for studying the *Majallah* and its *fiqh* principles for law students in universities.

We are in a dire need of new books which are compiled on the basis of objective research method in the rulings of the *Majallah* and its *fiqh* principles so that they become, through simplicity, focus and coordination, easy for the students to understand and memorize. The aim is to realize, in the compilation of this subtle and significant knowledge, the distinction between the educational need in the universities and the practical need in the courts, to present the *fiqh* in an attractive garb and a new style that is congruent with the contemporary experience and language, and to be able to compare its theme with other similar themes and legal theories so as to depict what our noble *fiqh* contains of hidden treasures in the eyes of legislation.

Since I was assigned the teaching of Civil Laws whose origin were the *Majallah* at the Syrian Faculty of Law in 1363 A.H (1944), I directed my ambition towards presenting *fiqh* of the *Majallah*, through teaching and authoring, using this necessary methodology, and tried my best to get closer to it.

Thus, I began to compile these series of the book about obligations and contracts in the *fiqh* so as to open with it a new way of teaching of Civil Laws in Syria. I compiled in it the general civil rulings applied here in Syria that are contained in the *Majallah*, and what is related to it from discussions and important *fiqh* issues while at the same time indicating the legal modifications on the original *fiqh* rulings since the reign of Ottoman period in this country until today.

I have made the Ḥanafī School of Islamic law as the basis of the research because it is followed by the judiciary along with the acquaintance of other schools in some places according to the need of the research.

My aim in this book is to transform the compilation of *fiqh* by building from its foundations and principles a general theory similar to the general theory of obligation in the modern foreign legal

jurisprudence,[8] as a service for our noble *fiqh*. The purpose is to reveal the precious gem that was hidden under the old style which has become difficult for contemporary men to comprehend, and to fulfill the need for a wise methodology of teaching at the university-level this knowledge that contains precise issues, numerous branches, wide horizons, and great significance and status. This is because the natural rights, which are termed as "the Civil Law" are the foundation of all the legal studies and perceptions, and that the educational need of the natural rights necessitates an objective method that moves from the simple to the complex. The obsolete style where the branches are not based on their roots in a collective general theory is no longer digestible.[9]

One of the main causes of the obscurity of *fiqh* for the students during their university studies is that its sub-issues are linked with the general fundamentals and basic general theories that all are interrelated with many chapters of *fiqh*. An understanding of these theories rests on comprehending the issues and the rules, and a student at the beginning of his study is ignorant of both of them. Examples of this is the theory of ownership, its types and causes; the theory of contracts and their general principles; the theory of contractual conditions including suspension, restriction and addition; the theory of the legal sanctions and its subsidiaries in the civil environment: the issue of nullity, invalidity, and suspension; the

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8 See the definition of the general foreign commitment theory in the third part of this series.

9 Attribution is permissible to a plural word when its form is used as the proper noun, for example, *anṣārī* is used for attribution of *al-anṣār*. Thus, if it is attributed to the singular, it creates an ambiguity in the meaning. For example, if it is said *farʿī* meaning a combination of branches will not understood. On the other hand, it will be understood when compare of *aṣlī*.

Likewise, the civil law terminology, *ḥuqūqī*, is attributed to *ḥuqūq* which mean knowledge. If it attributed in singular form, it will read *ḥaqqī* and its intended meaning will be confused with another.

Classical scholars of jurisprudence and principles of jurisprudence used the word of *al-furūʿ* in the form of plural, so they said *furūʿī* either the word *al-farʿ* became proper noun in jurisprudence or to remove ambiguity from this. See the statement of Abū Isḥāq al-Shāṭibī in passage 19/1. Of course, the attribution in plural form is absolutely permissible. See, *Ḥāshiyah al-Ṣabbān ʿalā al-Ashmūnī* in the discussion on *yāʾ al-nasab*.

theory of legal capacity; the theory of security; the theory of custom and its authority; and other basic principles and theories which represent the pillars of Islamic jurisprudence. They are scattered in many of the *fiqh* books in different chapters, but they can be gathered from their different places and then a chain of theories be formed from them that would be the key to the hidden aspects of *fiqh*, and would provide the student with a quick power of understanding, which would have taken him a long way in achieving it in all the sections of *fiqh*.

Therefore, I found it necessary to present before this series of *al-Madkhal al-Fiqhī al-ʿĀm* that comprises three divisions:

1. A definitive and historical introduction about the *fiqh*, its sources, the emergence of the different schools of *ijtihād* in it, reasons for their differences, the value of these differences in the legislative treasures, the documentation stages of *fiqh*, the stages of *fiqh* works till the appearance of the *Majallah*, and the vastness of the *fiqh* as a total of all the *ijtihādāt*. It also discusses the development of *fiqh* and its ability to respond to the needs of all the ages if its benefit is sought, and if the concerned researchers expended their effort for a new service and a modern cultivation that would result into the production of buried treasure and valuable minerals.

2. The basic theories that build the *fiqh* rulings: These are general fundamental systems and pillars, which are considered the pillars of *fiqh*, and we have previously referred to the significance of compiling them and using them to introduce the *fiqh*.

3. The general maxims which constitute the opening chapter of the *Majallah*, sequenced in a new order, and clarified with a brief explanation.

I have chosen for these series a general serial name that combines together all its portions, which is *al-Fiqh al-Islāmī fi Thawbihi al-Jadīd*.

Then, I made for every part a special title that denotes its theme and topics. Thus, the first and the second parts (volumes) are *al-Madkhal al-Fiqhī al-ʿĀm*.

The third part is *al-Naẓariyyah al-ʿĀmmah lil-Aḥkām al-Madaniyyah fī al-Fiqh al-Islāmī* which is like an introductory chapter to the formulation of general collective theory. It consists of three chapters that provide a general view of the idea of the right, obligation, property, and people in the *fiqh*.

The fourth part is "*The General Theory of the Civil Rulings in the Fiqh*" in the same format of the general theory of obligations in foreign jurisprudence.[10]

With the completion of these four parts *in shā' Allah*, which include the general rulings and discussions, the general theory of the civil rulings in our *fiqh* will appear in a complete form, and will stand firmly on the ground like the way it is known today in the modern legal jurisprudence with two great and significant introductions.

In the subsequent parts of the series, we discussed the coomunicative contracts, upgraded and improved using the modern objective method beginning with the contract of sale. Again, jurisprudential applications of the principles and the general rules of specific contracts become apparent.

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10 The fourth part whose subject matter is introducing the general theory of rights and commitments in *fiqh*) was not released because of the issuance of the Syrian Civil Law which replaced *Majallah al-Aḥkām al-ʿAdliyyah* in addition to our devotion to teaching the general theory of the mentioned Civil Law. But afterwards, some of the contents of the general theory were published separately and among them are: (1) The theory of abusing the use of rights in Islamic law (a legal formation for it and for a project of civil law derived from *fiqh*); (2) The harmful act (from the sources of commitment) established and derived from different opinions of *fiqh*.

A committee of experts of the Arab league was established (in the Legal Division) to begin a unified civil law for the Arab countries on the basis of *fiqh* in the late 70s and 80s. I was one of the members of this committee and we put a project for a complete general theory with its texts and consolidation. Among what I presented was: (1) The preparatory section about the right, commitment and persons in addition to the abovementioned theory of abuse; (2) The harmful act from the sources of the abovementioned commitment.

In the end, the complete texts of the general theory were published (the preparatory section, the sources of commitment then the rulings till the termination of commitment and the causes of this termination).

Then, the Legal Division discontinued the project on the unified Civil Law established on *fiqh* in the ideal form with which we compiled the general theory. Therefore, I published the texts of the general theory at the end my book mentioned above (the harmful act) so as to protect the fruits of this glorious act against loss.

I took the task of attributing the rulings to their original sources and places in *fiqh* books except those which are well known and do not need any attribution. The objective of this task is to allow the reader to refer to the jurisprudential sources, and this new style of writing does not become the reason for the student's inability to refer to and benefit from the original classical *fiqh* books.

This new task of presenting the Islamic jurisprudence in a method that involves the movement from the subsidiary form to the topical form necessitates the cooperation of a group of scholars who are well versed in the *fiqh* and the science of modern law in its foreign sources and styles. It also necessitates a great deal of time in planning, comprehending, sequencing, correcting, and revising.

This task is too great and huge to be carried out by one person, but the pressing need for speed and competing against time made me to undertake this heavy responsibility that would defeat a band of strong men. Thus, I combine the preparation, presentation, revision, and publication at the beginning of my work, according to my ability, in all parts of the book at one time, to respond to the need of the three grades together at the Syrian Faculty of Law.

From Allah I seek help, and unto Him is the guidance to the straight the way, He is sufficient for me, and the best disposer of affairs.[11]

Muṣṭafā Aḥmad al-Zarqā
Damascus, 8 Ṣafar 1354H / 22 January 1945

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[11] We needed to renew the publication of this book before its completion until it was complete with the publication of the third edition.

In this new edition, we have cited from recent books that appeared after the second edition of this book or appeared before that but I have came across them recently such as *Kitāb Abū Ḥanīfah, Kitāb Mālik, Kitāb Ibn Ḥanbal, Kitāb al-Mulkiyah wa-Naẓariyat al-'Aqd fī al-Sharī'ah al-Islāmiyyah* which all of them are written by Professor Muḥammad Abū Zahrah; and *al-Ḥaqq wal-Dhimmah* by the eminent Professor Shaykh 'Alī al-Khafīf, and both the two are professors of Sharī'ah in the Faculty of Law, Cairo University, and *al-Naẓariyat al-'Āmmah lil-mūjibāt wa-al-'Uqūd fī al-Sharī'ah al-Islāmiyyah* by solicitor Dr. Subḥī al-Mahmaṣānī, Professor of the *Majallah* and Roman Law at the American University of Beirut.

In addition, since the Syrian Civil Law was issued in 1949 during the publication of this third edition, we cited from and referred to it several things.

THE DIVISIONS OF THIS BOOK, ITS SYMBOLS AND TERMINOLOGIES

In this new sequence, the small basic units that constitute the book become the sections. Each group of sections with related themes constitute a chapter, and every group of chapters with related themes make up a part.

The sections of the book are numbered sequentially from the beginning of the book to its end. The first introductory chapter for example, includes the sections (1-3), followed by the second chapter that begins with section (4) and ends with section (8), such that the third chapter starts with section (9), and so on.

Likewise, the chapters are numbered sequentially from the beginning of the book to its end. The first part of the book ends with the fourth chapter, and the second part starts with the fifth chapter, and so on.

This modern method of dividing the book is much easier for the reader and for reference purposes than the mixed-up descending subdivision method that was used in all the previous editions of the *al-Madkhal*.

We have also separated the topic sentences and research headlines, and distinguished them with paragraphs that have serial numbers within the chapter so as to help the reader and to facilitate referencing and revising.

We have used certain terms for citation and referencing, and we explain them as follows:

1. The two numbers that appear after the name of the Qur'ānic chapters. The first number refers to the chapter number while the second refers to the verse number. Where only one number is mentioned after the chapter name, then, it refers to the verse.
2. Small italicized letter (*s*) stands for the command verb "see".
3. Italicized capital M in a bracket refers to the *Majallah* (The Civil Code of the Ottoman Empire).
4. Whenever cite a page from the book, *al-Durr al-Muḥtār* and its commentary, *Radd al-Mukhtār*, without specifying the edition,

then we refer to the first Royal edition, and when citing from "*Tanqīh al-Fatāwa al-Hāmidiyyah*", we refer to the 1280 A.H. edition, and from *al-Durar Sharḥ al-Ghurar,* we refer to the Istanbul edition.

5. The letter *jīm* is the symbol for volume of the book which has many volumes and the letter *ṣād* is the symbol of page. We will only mention number of volume and page, differentiating between them by sign of slash, for example (*al-Badā'iʿ*, 5/67) the first number being the volume and second is for page. If the book is only in one volume, the number after that would be for the page.
6. Letter *qāf* with *mīm* (*Qum*) is succeeded by number is symbol of new Syrian civil law, and number of intended article.
7. If we mention two numbers to describe and refer to data, pages or articles and between them is a horizontal sign, like (16-20) we mean this reference includes all of what is between the two numbers.
8. If we refer to page from the books *(al-Durr al-Mukhtār)* and its commentary, *Radd al-Muḥtār,* without mentioning the edition, it means the first edition of al-Amīriyyah press with full size. If we ascribe to *Tanqīh al-Fatāwā al-Ḥamīdiyyah*, we mean the Kastiliyyah edition 1270 A.H. If we refer to *al-Durar Sharḥ al-Ghurar*, it means the Istanbul edition.
9. For the repetition of a reference to a book after a slight distance, if we write (*ibid*) it means the same volume and page referred before. For example, if it is said, see, *jīm* 3 para 27, *al-majallah* 250, personal law articles 50-55; *Radd al-Muḥtār* 3/200/ and Qum 384)... it means: see passage 27 in third volume for this book, article 250 in *Majallah*, articles 50 to 55 in Personal law, page 200 volume 3 in *Radd al-Muḥtār*, and article 384 in Syrian civil law.
10. Distinguish footnotes with (*) besides of its number that is required by students. But it is for whom want deep sight like appendix in the last of chapters.

PART
1

A DEFINITIVE AND HISTORICAL INTRODUCTION TO ISLAMIC JURISPRUDENCE

CHAPTER ONE

PRELIMINARY, DEFINITION, DIVISION

Outline of the First Chapter

Section One:	Overview of Islamic law
Section Two:	The Meaning of *Fiqh* and the Divisions of its Rulings

SECTION 1

GENERAL OVERVIEW OF ISLAMIC LAW

GENERAL OVERVIEW OF THE POSITIVE LAWS

1/1 The positive laws or the laws in the primeval human societies are composed gradually in the form of traditions and customs. Then, when the life of the people advances, along with their mental faculties and knowledge, and after establishing a ruling authority, they resort to the codification of the customs, and create from it a commanding system that dictates people's acts, dealings and relations. Thus, the law then replaces these customs and abrogates them. What is seen as not good is discarded, and what is seen as good is affirmed. Eventually, what is considered are the contents of the law, its spirit, and the objectives of its legislator.

Then, the legislation advances further by laying down the legal foundations and the general legal maxims. The customs and traditions are then left to draw the demarcation line for the rights and obligations pertaining to minor details, which canuot be captured completely by the legislation. In fact, it is not commendable to capture all the minor details.

With this advancement of legislation and its formulation of general maxims, the customs and traditions retain their consideration in the context of supporting the law, which is differeut from their former role of being the law themselves.

1/2 The most important stages of the legislative advancement is the stage in which the statutory legislation known as the Coutract Act is materialized, systematized, and their results honored. This is the stage which allows the freedom of contracts and couditions in everything that does not violate the general system, morals, and the principle objectives of the legislator.

Moreover, the nations that have a sublime legislative legacy, possess, in addition to the texts of the laws, the jurisprudence of the legislative scholars (i.e. theory of rights aud explanations), and the *ijtihād* of judges iu understanding and implementing the texts, as well as using *qiyās* in such a way that widens the scope of

understanding the limited texts to an unlimited extent, while at the same time observing the effective causes that were considered by the legislator, and using the evidences of its texts as judgments.

1/3 The legislation generally, in any given nation, is not but a true reflection of the real and social life. Its general objective in that nation is to establish justice, maintain the balance between rights and obligations, and protect people's individual rights and the common good through the legal principles. These principles are temporary and not permanent as long as they express particular conditions and customs of a region. They are permanent if they express firm and universal realities which are acceptable to everyone such as the principle of preventing harm and obligating its compensation; principle of limiting the rule of contract to only the contractors, without impacting the rights of others, and so on.

Thus, the legislation in a nation is like the literature of the social and economic reality of the nation. They also express the extent to which the development and social awareness of life has reached. The level of advancement of a particular legislation and the permanence of its principles is determined by the extent of its maxims that contain general legal conceptions of universal consideration, and also by the extent of guiding its folk to continuous good.

1/4 The differences in laws among the nations are not but an expression of the differences in their social and economic life, their goals of life, and their ideals that emanate from their creed. When a nation reaches the peak of intellectual elevation, its legislative maxims also reaches the climax of elevation and strength, and enjoys the permanence. For instance, when the Romans were living in isolation while adhering to their own traditions, their laws were mere custom or tradition, which then became temporary legislation for a limited life. But when the Romans crossed their borders and moved towards the east, and established their authority on other people, they were forced to abandon their narrow legislation. Thus, they developed and expanded their legislation although it was still considered temporary and unfit for permanence. This is because they had two kinds of legislations: one of them applicable to the original Romans, and the other to the foreigners. It was not until they reached a high level of civil and intellectual advancement after the third century (A.D.) when they had established their second

authority in the Middle East – the cradle of ancient civilization, legislations and religions – and after they have been refined by the basic principles of humanity left over from the teachings of Prophet 'Īsā (a.s.), their legislative thinking reached the peak of advancement. Thus, in the fifth century A.D., Emperor Justinian embarked on codifying the Roman legislation and editing it anew. Eventually, it became the foundation for most of the European legislations until today.

1/5 We conclude from the previous brief and general overview at the positive law the following reality: The legislation in general has three main roles in a nation: remedy, protection and guidance.

- It is a remedy for the occurring social and economic drawbacks and problems.
- It is a protection against anticipated drawbacks and problems, and
- It is a guide and a preliminary for perfection, until the rights, obligations and interests are organized into a perfect level, just like how a mountaineer reaches the mountain's peak by gradually heading towards it.

In order to achieve these three roles, the legislation must be obligatory, or else, it will only be an admonition and moral guidance.

Furthermore, the fundamental legislation requires another type of legislative rules known as sanctions in order to guarantee its compliance and implementation. These sanctions are either civil restraints such as nullification of contracts that are non-compliant with the system, or disciplinary penalties such as imprisonment and fines imposed on aggressive crimes so that the *mukallaf* (responsible person) is forced to abide by the boundaries of the law.

It is also noted that if the legislation differs from the moral principles in terms of power of authority, then, for its implementation, it always required such morals that are different in terms of conception. This is because the door to circumventing the law cannot be closed on the face of those cunning people who are barred from their illicit benefits and greediness by the law. Unless they are of sound moral characters, respectful and honouring the laws, they would override the rights of others or the state even if they

have to achieve their greed through narrow loopholes unnoticed by the anthority and being safe from the consequences of the same.

The necessity of having a strong link and cooperation between legislation on one hand and the mental, social and moral training on the other is very much evident here.

After this quick general look at the law, its components and complimentary attributes, we move to discuss the Divine laws then followed by the Islamic law, so that we see its position in the components of the complete legislation, and the value of its contribution therein.

AN OVERVIEW OF THE DIVINE LAWS

1/6 Along with the positive laws, there are Divine laws that came through the Messengers who conveyed Allāh's revelation to humanity, as guides, reformers and correctors of the deviated human path. These divine laws are of three types:

- A divine law that comes for the purpose of correcting moral behavior, purifying the souls, and emphasizing virtues. It does not include the legal system like the positive law. An example of this type is Christianity.
- A divine law that comprises of a particular legal system pertaining to a certain environment or people such as Judaism, which was brought by Prophet Mūsā (a.s.) to the children of Israel. It included a legal system and practical judicial rules that were compatible with the place and time they were living.
- A divine law that comprises of a legal system established on the basis of comprehensiveness and applicability for all types of environments and conditions because it contains static principles, timely procedures, and rules of exemptions for cases of necessity. It also contains rules that are linked with the customs and specific circumstances, which change and develop according to the changes in those customs and developments while preserving its fundamental idea of justice and equity.

This third type of the divine law is the Islamic law, which came after the previous laws as a call for the entire humanity when their intellectual readiness and development reached an appropriate level

of receiving such final rulings in the form of principles and constant collective rules. In addition to these principles and generalities, the Divine law gave an ample opportunity to *ijtihād* and gave ample space for the human mind. It also coupled the rulings with their effective causes and reasons so that the responsible people contemplate them and built an analogy on them according to the objectives of the law pertaining to *'adl* and *iḥsān*, promoting the benefit and preventing the evil.

THE GENERAL FRAMEWORK OF THE ISLAMIC LAW OR THE ISLAMIC SYSTEM

1/7 The Islamic law is a compilation of commands, rules of the creed and practical deeds that Islām obligates their implementation to achieve its reformative goals in the society.

Islām has three basic reformative goals arranged in a sequential order; each of them is a result of the previous goal and a foundation for the subsequent one.

a. To liberate the human mind from the slavery of imitation and superstitions. This is achieved through the conviction and belief in Allāh alone, and directing the mind towards proof, evidence, and free scientific thought. For this purpose, Islām is against idolatry in all its forms because it degrades the mind and deludes the insight. Similarly, Islām established the conviction in Allāh, the Most High, His Attributes and the Final Day on the basis of logical evidence from the observations the universe and its signs. This way, the Islamic creed became logical and lucid, with no complexities in it or arbitrariness. Nor does it contradict the mind although it may contain something with a hidden wisdom among the unseen matters and matters related to Allāh's Will, which are inevitable in any Divine law.

b. To reform an individual psychologically and morally, and direct him towards virtue, benevolence and obligation so that his desires and greed do not overpower his mind and duties. This is achieved by the individual's performance of legitimate acts of worship which remind him of his Creator and by the individual's belief in the reward and punishment in the Hereafter; so that the

believer is in constant monitoring of his actions, and careful not to fall short of his duties.

c. To reform the society, that is, the societal life in such a manner that there is prevalence of order, public security, justice among people, protection of reasonable freedoms and human dignity.

In order to accomplish this last societal goal, Islām comes with a civil order that includes a legislation which encompasses all the necessary legal foundations for the establishment of a social life in a state, organization of interrelationships among people, and the protection of private individual rights as well as collective public rights.

The three Islamic goals aforementioned define the meaning of Islamic Law, and make it clear that the law stands on three pillars: intellectual creed, spiritual worship, and judicial legal system. This is the intended meaning of the saying, 'Islām is religion and state'.

Nevertheless, a difference must be made between the order and the implementation, because it cannot be denied that in real practice and history there has been a lot of misconception about the reality of Islām in some of the above three pillars, or poor implementation leading to a distorted image of Islām.

It is this third aspect only, that is, the legal system of the Islamic law, which is aimed for in this series of *al-Fiqh al-Islāmī fī Thawbihi al-Jadīd* (Islamic Jurisprudence in its new grab).

THE LEGAL SYSTEM IN *AL-SHARĪ'AH AL-ISLĀMIYYAH*

1/8 The judicial legal system in the *Sharī'ah* includes principles and essential rulings in both the fields of private rights with its two branches of civil and criminal, and public rights with its two branches of internal and external, that is, the constitutional, the administrative, the financial and the international.

For all these groups, fundamental texts in the *Qur'ān* and the Prophetic teachings have laid down the basic principles, and left further details to *ijtihād* in the implementation as per the contingent benefits of time and place, save for few rulings which the texts explain in detail such as inheritance and some penalties.

Concerning these legal principles in their various fields, and as a result of their implementation in an Islamic country where Muslims

encountered the impacts of ancient civil laws, and as a consequence of development in different economical conditions, a great *(fiqh tafsīrī)* and *(fiqh tafṣīlī)* related to the fundamental texts of the *Sharīʿah* (the *Qur'ān* and the *Sunnah*) emerged through the efforts of jurisprudential commentators and ruling judges. This Islamic *fiqh* was the greatest and the most comprehensive legal jurisprudence ever known in the history of legislation until today. Many legal schools of jurisprudence have emerged in it, the most famous of which are the four schools prevailing until today namely, the Ḥanafī, Mālikī, Shāfiʿī and Ḥanbalī. Therefore, the difference among these schools is not a religious difference, but a legal and judicial difference from which a great legislative fortune of theories of *fiqh* has emanated.

THE MOST IMPORTANT BASIC PRINCIPLES OF THE LEGAL SYSTEM IN *AL-SHARĪʿAH AL-ISLĀMIYYAH*

PART I: PRIVATE RIGHTS OF DIVISION

A. THE RIGHTS OF THE FAMILY (PERSONAL AFFAIRS)

1/9 The legal aspect of the *Sharīʿah* comes with a comprehensive system for organizing all the family affairs and its relationships, which are known today as personal statutes. It started inilially to save the woman from the oppression she suffered in her family, that she did not even enjoy the right to live, let alone other rights. Thus, the *Qur'ān* prohibited the killing of (infant) daughters which was common in the ignorance period of the Arabs, and strongly condemned it. This itself "is sufficient to guarantee Muḥammad a fame that will not be forgotten among the reformists of his era", as stated by Professor Montet, Deau at the University of Geneva, in the introduction to his translation of the *Qur'ān*.

Not only this, the Islamic law also assigned the woman all the legal rights which were given to the man. Islamic law established for her the right to inheritance, which she was deprived of; the freedom to get married and choosing the husband; the capacity of custodianship for her children or others; the right to manage and invest her wealth and the power for its disposal; and the rest of the actions, without any form of control over her by the man, whether relative or husband in any of these rights.

Islamic law has preserved for the man the supreme authority in managing the family affairs because he is more capable of it, but without interfering with the specific rights of the wife.

Moreover, the *Sharīʿah* has organized the rest of the family rights in a new way without abidiug to any customary rights on which the family was based before Islām. This system encompassed the family rights with its three natural stages:

1. Marriage, its dissolution and their wider consequences.
2. Guardianship and custodianship for those incapable either due to underage or mental disorder.
3. Inheritance.

We shall refer briefly to some remarks and important foundations for each of these three stages.

We also point out beforehand that the *Sharīʿah* maiutains that non-Muslim subjects in an Islamic country are allowed to implement their religious rulings concerning personal laws among themselves owing to the connection of these laws with the religion whose *Sharīʿah* protects its freedom of every sect.

I. MARRIAGE, ITS DISSOLUTION AND THEIR OUTCOMES

The Marriage Contract

1/10 The *Sharīʿah* has made marriage a pure civil contract like the rest of the contracts. Thus, it is contracted, completed and made to realize all its results as soon as both partners consent in the presence of two witnesses without being dependent on a religious reference. This is because in Islām there is no such class of clergymen who have a religious authority not found in others. In the *Sharīʿah*, no oue is a mediator between Allāh and the people. Even the Prophet (s.a.w) himself who came with the *Sharīʿah*, his religious mission is confined to the propagation while his temporal authority is limited to the implementation as he was told in the *Qur'ān*: "*...And if they turn back, then upon you is only the delivery of the message...*" (Āl ʿImrān, 3:20) "*...You are only a warner and there is a guide for every people*" (al-Raʿd, 13:7).

Thus, the Prophet (s.a.w.) himself has no religious authority to judge a person's destiny in the sight of his Lord. Every person is

admitted into the religion by his faith and expelled from it by his denial of the same. The Prophet (s.a.w.) once said to his daughter, *"O Fāṭimah, daughter of Muḥammad! Ask me of my wealth whatever you wish, I cannot avail you against Allāh at all"*.[1] Therefore, in Islām people are distinguished, from the religious perspective, on the merit of knowledge and deeds. The most proficient in Islamic rulings (which are not secret but established, written and exposed) irrespective of who the person is, is the most qualified to speak on Islamic matters, and his opinion is subject to critique and evaluation using the permanently established legal texts as the criterion.

This context, marriage in Islām is not conceived as religious the way religious marriage is understood today (that is, its completion and effect is dependent, from a religious view, on the interference of one of the religious authorities in its process). With this, the *Sharīʿah* becomes the pioneer of civil marriage that has been adopted by all nations that use modern positive laws.

The Kindship That Prevents Marriage

1/11 As for the kinship that prevents a marriage, in terms of the person's relatives, it is absolutely prohibited for him to marry any of his ascendants or his descendants or his parents' children (that is, siblings and their children). It is also prohibited for him to marry the first level of his grandparents' children. Thus, it is permitted for him to marry the daughter of his father's brother or the daughter of his mother's brother.

In terms of the relatives of one of the spouses, it is prohibited for any spouse to marry any ascendant or descendant of the other spouse.

From this dimension comes the issue of polygamy, which is an issue of complex connections and considerations. Yet, the Islamic legislation has chosen a middle position between absolute permissibility and absolute prohibition. It permits polygamy within boundaries and conditions while looking at the reality, social facts and the anticipated necessities.

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[1] Reported by al-Bukhārī (4771) in *Kitāb al-Tafsīr*; Muslim (206) in *Kitāb al-Īmān*; al-Tirmidhī (3184) in the *Kitāb al-Tafsīr*, and al-Nasā'ī (3648) in *Kitāb al-Waṣāyā*.

Marriage Outcomes

1/12 Marriage in Islamic law leads to the emergence of financial and non-financial duties:

a. In terms of financial duties, the husband is obligated to support his wife and children within a level that matches his peers. Marriage does not result in a financial duty on the wife so as to allow her to dedicate herself to managing the home and internal affairs, and taking care of the children.

b. In terms of non-financial duties, Islamic law obligates the wife to obey her husband within the legal boundaries, and obligates her also to follow him and live with him. The *Sharīʿah* also obligates each of the spouses to treat each other with honor and love. As for the children's lineage, like what is a consequence of a valid marriage, it is also proven or established in an invalid marriage in order to protect the rights of the children. The *Sharīʿah* also prohibited unclear descendents through adoption (*tabannī*), and has limited descendents and its rights to the actual reproduction *(al-tanāsul al-ḥaqīqī).*

Dissolution of Marriage

1/13 The *Sharīʿah* permits the dissolution of marriage between the spouses through divorce and not to force them to proceed with marriage when there is the disagreement between them. Nonetheless, the *Sharīʿah* has enclosed the divorce with religious restraints so as not to use it except under crucial necessity, and the Prophet (s.a.w.) has described divorce as "the most abominable permission in the sight of Allāh".[2]

The *Sharīʿah* assigns the authority to initiate divorce initially to the husband because in that way it will be exercised less than if it is

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[2] Reported by Abū Dāwūd (2178); Ibn Mājah (2018); al-Ḥākim 2/196; al-Bayhaqī 7/322, from the *ḥadīth* of Muḥārib ibn Dathar from Ibn 'Umar (may Allah be pleased with them). Al-Ḥāfiẓ Ibn Ḥajar said in *al-Talkhīṣ* 3/205: "It was narrated by Abū Dāwūd and al-Bayhaqī as *mursal ḥadīth*, without Ibn 'Umar. Abū Ḥātim and al-Dāraquṭnī in his *al-ʿIlal* preferred that it is *mursal*.

in the authority of both spouses, and also because marriage costs the husband certain amount of wealth known as *mahr* (dowry) which he offers to the wife as required in Islām. However, the *Sharīʿah* has also paved way for the wife to dissolve the marriage contract through the court process in many situations snch as when the husband mistreats her.

Outcomes of the Dissolution of Marriage

1/14 For the dissolution of marriage through death or divorce *(ṭalāq)*, the *Sharīʿah* has set a specified waiting period during which the woman cannot marry. This is to ensure that she is not pregnant in order to avoid the mixing or loss of lineage. This waiting period is known as *'iddah*, which in the case of divorce, is connected to menses, and normally does not exceed three months. In the case of the husband's death, the period is four months and ten days. If the woman (during this period) is found to be pregnant, then she is not allowed to marry until she delivers.

II. GUARDIANSHIP AND CUSTODIANSHIP

1/15 The *Sharīʿah* differeutiates between guardianship and cnstodianship. Guardianship is an authority over a minor to raise him, educate, and control all other characters related to his personality. This type of guardianship has been assigned by the *Sharīʿah* as a special system where the preferable person for it is the closest relative to the ward as long as the guardian has legal capacity and sound character. Thus, the father precedes the grandfather, and the brother precedes the father's brother, and so on.

On the other hand, custodianship is an administrative authority over the wealth of a minor to protect, manage, and invest it. In this type of custodianship, preference is given to the one whom the father chooses before his death as a custodian of his children. Then, the preference goes to the grandfather and whoever he chooses before his death. If the father dies without assigning custodianship to anyone, then the right to assign a custodian of the minors goes to the *qāḍī* (judge).

The custodians have certain legal and detailed jurisdictions and responsibilities, and each of them is answerable to the *Sharīʿah* court for any negligence or dishonesty.

When dishonesty cases became rampant in the final days of the Ottoman rule, the custodians' jurisdictions were tied with a special system, due to numerors cases of breach of trust and they (custodians) were linked to a council formed under the presidency of a *Sharīʿah* judge. Such a policy is required by the law according to the situation, and falls under the authority of the ruler in accordance with the principle of *al-maṣāliḥ al-mursalah* (public interests).

III. INHERITANCE

1/16 The *Sharīʿah* resolves the inheritance between spouses and among relatives with principles and rulings which are completely new compared to all other customs and laws. These rules were established by the *Sharīʿah* on the following grounds:

1. The inheritance is, by the law, coercive through the liberty of the the deceased. Thus, the deceased has no authority to deny his legal heir the right to inherit, although he is able to dispose of all his wealth during his lifetime. Even when a sick husband divorces his wife during his terminal illness without her consent, it is considered as an abuse of his right to divorce and a proof of his intention to deny his wife the inheritance, and thus her right to inherit is legally established.

   A coercive inheritance does not mean that the heir bears the debts of the deceased as it is the case in some modern legislation today. In Islām, inheritance was legislated as a grace to the heir and not as a burden on him. However, the debts of the deceased are associated with his estate, and therefore, deducted from it before inheritance is carried out. If anything remains, a third of this remainder is used to execute the wills of the deceased after deducting the debt, and the remaining two thirds are disbursed as inheritance. If the deceased makes a will exceeding one third, then the execution of anything beyond it is dependent on the consent of the heirs.

2. A special system has been used by the *Sharīʿah* to determine the inheritance of the relatives by taking into account the closeness of blood relationship with the deceased. Sometimes, the closer relative blocks the farther, and sometimes, they both share the inheritance but the closer relative takes the biggest share based

on to how close or far he is. The foetus in the womb is also taken into account when here deceased passes away, and her share is given to him if she is alive.

3. An elder brother does not have any priority in inheritance over his younger brother nor is he put ahead of him. This is in contrast to some European laws which have been using, until today, the principle of prioritizing the eldest son in inheritance, which is known as primogeniture.

4. A daughter is entitled to half the share of her brother.

This issue is often misconstrued and thought to be unfair to the female in the *Sharīʿah*. However, the truth is that this issue is associated with the system of financial responsibility in the family. The *Sharīʿah* holds man responsible for the support of his wife and children. Thus, before her marriage, the daughter's expenses is due upon the closest male of her family, and after marriage, her expenses is due upon her husband. As a wife, she is not obliged to support her children. Therefore, if she inherits half of what is inherited by her brother, who is responsible for the expenditure of himself, wife, and children, and for his sister if she becomes a widow, then the daughter in this case has a bigger portion of inheritance than her brother.

It is noted at this juncture that the details of the rulings on personal laws, which we have presented here some of their essential points contain differences of opinion in some of their substantial branches. Every school of Islamic law contain rulings and theories in some branches which are better and of more beneficial results in their implementation than others. For instance, the right to end marriage through the court by the request of a woman whose husband has dishonored her is found in the *ijtihād* of the Mālikī. Also, the revocability of divorce in most cases is found in the *ijtihād* of the Shāfiʿī. This means that the husband can reunite with his divorcee within the period of *'iddah*.

B. CIVIL RIGHTS (TRANSACTIONS)

I. OBLIGATIONS

1/17 In the *Sharīʿah*, any harm done to others imposes a responsibility on the doer or the causer and an obligation to compensate for the damage caused even if it was done mistakenly. If done deliberately, it also imposes also a penalty on the doer. This principle is contained in the Prophetic teaching that says, "Harm should not be inflicted nor reciprocated".[3] This is different from what the *Sharīʿah* compels in other types of obligations which emanate from an individual's free will such as endowment or legislator's free will such as providing maintenance for relatives.

All these obligations have been rendered secure with the judicial support. Thus, the *qāḍī* has an unlimited authority in compelling a person to execute his obligation even if he is a Caliph. There are numerous famous incidents in the Islamic history where judges adjudicated against the caliphs and the kings.

II. CONTRACTS

The *Sharīʿah* approves the following basic principles of contracts:

1. The lawful contract which is binding only on its contractor, like how a person's confession applies only on the confessor and his rights. The contractor's obligation transfers to his successor such as the heir or the custodian. This principle is contained in the Qur'ānic verse in the beginning of *Sūrat al-Mā'idah*: *"O you who believe! Fulfill your contracts..."* (al-Mā'idah, 5:1).

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[3] Reported by Mālik in his *al-Muwaṭṭa'* (2/745) in *Kitāb al-Aqḍiyah: Bāb al-Qaḍā' fil-Marfiq* from ʻAmr ibn Yaḥyā from his father as *mursal ḥadīth*. Reported also by Ibn Mājah from the *ḥadīth* of ʻUbādah ibn al-Ṣāmit (2340), and this narration has a discontinuity (of transmitters), and from the *ḥadīth* of Jābir al-Juʿfī (2341), but he is weak; reported also by al-Dāraquṭnī, al-Ḥākim and al-Bayhaqī from the *ḥadīth* of Abū Saʿīd al-Khudrī. Al-Nawawī in his *al-Arbaʿīn* (no. 32) said: "It has ways which support each other". Ibn al-Ṣalāḥ said: "This *ḥadīth* was reported by al-Dāraquṭnī with chain of transmitters from different ways, and they altogether support the *ḥadīth* and render it *ḥasan* (good). And the majority of scholars have accepted it and used it as evidence".

2. Contractual conditions are unrestricted and binding on the contractors except what contravenes the public order and morals. This principle is contained in the *ḥadīth*: *"Muslims are bound by their conditions except the condition that makes the unlawful lawful or the lawful unlawful"*[4] (see footnote para 10/2).

3. All contracts are based on mutual consent, that is, they are established by unrestricted mutual agreement between the two parties without any formal ceremony. Even a marriage contract is established by a mere agreement between the man and the woman through *ijāb* and *qabūl* (offer and acceptance) in the presence of two witnesses. This is contrary to all the contracts of the Romans and some contracts of the Arabs which were formalities subject to ceremonies and weird actions that had to be done by the contracting parties. Mere mutual agreement was not sufficient to them. The remains of contract formalities continued in the European laws as a legacy from the Romans until the end of the eighteenth century, and only then was the mutual agreement in modern laws decided.

4. The Islamic law has made good faith compulsory for initiating and executing contracts, and has subsequently made cheating *(ghishsh)*, concealing *(tadlīs)*, and uncertainty *(taghrīr)* from one of the contracting parties, as a reason for the other party's option *(khiyār)* and a justification for him to terminate the contract due to the breach of mutual agreement.

5. The *'urf* (custom) and *'ādah* (tradition) have been regarded as a foundation for defining the boundaries of obligations and contractual rights in everything that the text of the contract has kept silent. For example, the method of using rented properties and how to pay the rentals follow the custom of the people.

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4 Reported by al-Tirmidhī in the *Kitāb al-Aḥkām* (1352) where he said: "It is a good and sound *ḥadīth*". Reported also by Abū Dāwūd (3594) in the *Kitāb al-Aqḍiyah* and its chain of narrators is good (*ḥasan*). Both of the reporters narrated the *ḥadīth* with the words: "Muslims are bound by their conditions" although Abū Dāwūd's narration ended at "their conditions".

Custom has a wide judicial consideration in every place as long as it does not contradict Islamic legal text that is particular in its theme. For instance, the custom of taking an obligation for a debt meant for gambling has no consideration.

C. THE CRIMINAL RIGHTS (CRIMES AND PENALTIES)

1/18 The *Sharīʿah* has established the penal system on two bases:

1. Every forbidden action is considered a crime, and every crime necessitates a punishment in a fair manner that is suitable with the action; sufficient to ensure internal security; and serves as a disciplinary action against the perpetrator, even if the legislation has not determined in advance a specific punishment for that action.

2. The *Sharīʿah* has left the punishment of most of the crimes (except five of them) undetermined because the punishment of these crimes must differ due to the differences in circumstances. It is, therefore, the right of the ruling authority to codify the penalties on this basis. Where there is no codification, the judge has the right to decide a penalty taking into account the time, place and social conditions. These penalties are not determined by the law, and instead are entrusted with the authorities, are known as *taʿzīr* (discretionary punishment).

The *Sharīʿah* has also allocated to the crime of murder an identical penalty known as the death penalty. The *Sharīʿah* has prescribed the death penalty for an intentional murderer if the heirs of the victim insist on their right for the death penalty. However, if the heirs forgive, the death penalty changes to a discretionary penalty whose determination is delegated to the authorities. All this is made for the purpose of protecting the public right in disciplining and deterrent factors.

PART 2: GENERAL RIGHTS DIVISION (PUBLIC RIGHTS)

A. THE INTERNAL RIGHTS

I. THE CONSTITUTIONAL DIMENSION

1/19 The *Sharī'ah* has affirmed in this aspect three basic principles:

First: Complete freedom for people without breaching the public order and general moral behavior, and without breaching the freedom of other people.

Second: Equality in all the rights before the law. There is no privilege of lineage or class of people contrary to what was practiced by the Arabs, Romans and Persians. It is stated in the *Qur'ān*: "*Verily, the most honorable of you with Allāh is that who has taqwa*" (49:13) that is, the best in his deeds and compliance with the laws of Allāh. It is also mentioned in the *ḥadith* that *"there is no superiority for an Arab over a non-Arab or for a red over a black except in taqwā"*.[5]

Among the applications of these two principles in the early Islamic history, is the incident of the second caliph, 'Umar ibn al-Khaṭṭāb, who disciplined the son of the ruler and conqueror of Egypt with a severe punishment because he breached the freedom of a Christian Egyptian (Copt) in horse-racing. In this famous incident, the son of the governor assaulted the Copt for defeating him and said, 'It was not proper for you to defeat the son of the most honorable.' 'Umar punished the son of the governor and told him and his father his famous statement: *"Since when have you enslaved people while their mothers have born them free?!"*.

From here comes the issue of slavery. Islām came with an improved status of the slaves, and it organized legal rights for them guaranteed by the judiciary. It enjoined on them, and considered them brothers to their masters as demanded by the Islamic faith. In addition, Islām cousidered the manumission of the slave as one of the acts of worship highly rewarded by Allāh, and it obligated the

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[5] Reported by Aḥmad (5/411) from Abū Naḍrah, who reported it from a companion who heard the sermon (*khuṭbah*) of the Prophet during the days of immolation *(ayyām al-tashrīq)*. It was also reported by al-Ṭabrānī and al-Bazzār from Abū Sa'īd, and the men (narrators) of al- Bazzār are the men of *Ṣaḥiḥ*, as in *al-Mujma'* (8/84).

manumission in many situations and incidents. It also abolished all the sources of slavery that were then common to the early Arabs, Romans, and others except by legitimate war. It did not however, abolish slavery completely at that time because the nations neighboring the Muslims were all adhering to it, and were enslaving any Muslim whom they captured. Thus, Islām retained slavery resulting from legitimate war temporarily as a way of equal retaliation, and this is an established international rights principle until today. However, the *Sharīʿah* paved way for the absolute abolishment by entrusting it to the leader (the supreme ruling authority) such that when the ummah agrees to abolish slavery, then, there is no need for equal retaliation.

On the other hand, it is noted that not even one of all the other religious and positive laws came with the abolishment of slavery or improving the status of slaves. In fact, none paved the way to abolish slavery like how Islām did. Rather, slavery with its brutality, continued in all parts of the non-Islamic world until the nineteenth century.

Third: The governance in an Islamic state must be based on the principle of *al-shūrā* (mutual consultation). This principle is embodied in the *Qur'ān*, and implemented by the Messenger (s.a.w.) throughout his life with his companions. Thus, it is not permissible for the governance to be dictatorial. Islām, however, did not specify the method of realizing mutual consultation as this depends on the possibility of time and place, and new emerging and useful procedures. It is therefore, possible to establish the methodology of governance according to the demands of the *maṣlaḥah* (interest), either on the basis of the constitutional monarchy system, the republic system, the parliamentary or presidential system, or on any other procedure within the boundaries of the general principle of people's wish and mutual consultation. Whoever is elected to a position in the supreme authority is considered a representative of the Islamic state in everything based on the fact that the entire state is a legal entity *(shakhṣ iʿtibārī),* and his act is enforceable on the Islamic state within the boundaries of the *Sharīʿah*.

The *Sharīʿah* completely disagrees with the principle of hereditary succession. Rather, it is upon the nation to always choose the most competent for the supreme authority. The Messenger (s.a.w.) has explained to his companions that corruption of a governance system in an Islamic state happens when the system

converts from the caliphate and mutual consultation system to "a biting monarchy [system]",[6] meaning it severely bites the nation and impose its force on it. The same applies to every dictatorial system of governance that rules people by the force of its authority and power, regardless of the name, even if it is a republic.

II. THE ADMINISTRATIVE DIMENSION

1/20 The *Sharīʿah* has established unlimited administrative and executive jurisdictions for the representative of the nation's supreme authority *(imām)*. In his hands lies the entire executive authorities, including the authority to issue periodical orders (regulations), which according to the modern terminology is understood as the legislative authority of the states. Nonetheless, the *Sharīʿah* confers the *Imām* this organizational authority under the consideration that it is actually an implementation of the general legal texts that have been established in the *Sharīʿah* in advance, and an execution of the general objectives of the *Sharīʿah* in organizing the benefits of the nation according to the demands of the conditions.

Nonetheless, this does not contradict the possibility of separating the authorities and conferring the right to issue periodical regulations on a special elected authority like the present parliaments if it is for the nation's common good. This is because the essential aim of the legal system in the *Sharīʿah* is to protect the general interest of a nation and transform with it.

The *Sharīʿah* has also enjoined on everyone who takes over the governance to act according to what is most beneficial to the subjects as a result of the principle of mutual consultation which is obligatory. The Messenger (s.a.w.) has also established in his well-established

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[6] Reported by Aḥmad in his *Musnad* from the *ḥadīth* of Hudhayfah (Allah be pleased with him), that the Prophet (s.a.w.) said: *"The prophethood will be among you as long as Allah wills, then, He will eliminate it if He so wills. Then, a khilāfah (caliphate) on the model of prophethood will prevail so long as Allah wills, then, He will eliminate it if He so wills. Then, there will be a biting monarchy as long as Allah wills, then, He will eliminote it if He so wills. Then, there will be an oppressive monarchy as long as Allah wills, then, He will eliminate it if He so wills. Then, a khilāfah on the way of prophethood will prevail".*

Al-Haythamī said in *Mujmaʿ al-Zawā'id* (5/189): "Reported by Aḥmad in the biography of al-Nuʿmān ibn Bashīr". Al-Bazzār reported a more complete narration than this, and part of it was reported by al-Ṭabrānī in *al-Awsaṭ*, and its men (narrators) are reliable.

ḥadīth[7] that the ruler (governor) is like a shepherd, and he will be questioned before Allāh and the nation about the most beneficial procedures he applied on his subjects; and that the subjects will also be questioned on their obedience [to the ruler]. This is the basis of all the administrative and government affairs such as imposing and collecting taxes, establishing all types of public services and the obligatory possession of public benefits, among others.

Along with instructing the subjects to obey their governor, the *Sharīʿah* also aroused their feeling of responsihility for the governors' deviation, and their continuous monitoring. This is why the Messenger (s.a.w.) has established that *"there shall be no obedience to a human being if it would involve disobeying or displeasing Allāh"*.[8] On the basis of this principle and its legal texts, the first Caliph, Abū Bakr said in his first sermon: *"If I do well, help me; and if I do wrong, set me right"*.

III. THE GENERAL FINANCIAL DIMENSION

1/21 The *Sharīʿah* came with the principle of separating *Bayt al-Māl* (the treasury) from the authority of the supreme ruler, which is contrary to what was common during the advent of the *Sharīʿah*. Thus, the wealth of the public treasury comes from the nation and belongs to it, and is dedicated for its welfare. The ruler is entrusted and answerable for the method of collection and expenditure of the wealth on the general welfare purposes, and for its management. He has no other right in the wealth except his salary, which is determined in a reasonable way.

In this context, 'Umar, the second caliph, accounted one of his governors on whom he saw signs of new fortune. He confiscated the extra wealth he gained during his tenure that had no new legitimate source. When the governor told him, "I was involved in trade and

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[7] Reported by al-Bukhārī and Muslim from Ibn 'Umar (Allah be pleased with them). He said: "I heard Prophet (s.a.w.) saying: *"All of you are shepherds and each of you is responsible for his flock. The leader is a shepherd and he is responsible"*. Also reported by Ibn Ḥibbān in his *Ṣaḥīḥ* (1562) from Anas ibn Mālik (Allah be pleased with him) said: *"Verily, Allah will ask every shepherd about his flock"*.

[8] The *ḥadīth: "There shall be no obedience to a creature if it would involve disobeying or displeasing Allah"*. It was reported in this words by Aḥmad from the *ḥadīth* of 'Alī (1/131), Ibn Masʿūd (1/409), 'Imrān ibn Ḥusn (5/66) and al-Ḥakam ibn 'Amrū al-Ghifārī.

made profit", 'Umar replied: "By Allāh, we did not send you to trade".

B. THE EXTERNAL RIGHTS

1/22 In this respect, the *Sharī'ah* approved the following principles:

1. All the nations have equal human rights (contrary to the notion of the chosen people) that is found in some religions and nations.

2. The conduct between an Islamic state and others must be based on the principles of justice in peaceful and war conditions. In a peaceful condition, the Islamic state honors all the acquired rights of the states and their subjects. Conversely, in a war condition, it is not allowed to exceed the limit with which the enemy's harm can be extracted. Based on this, it is not allowed to mutilate the bodies of those killed or to torture the prisoners of war or to kill gradually by cutting organs or to damage fruitfull trees except for a military necessity or to kill animals except for consumption or military necessity or to harm the religious men who have secluded themselves in their places of worship and monasteries or to harm people incapable of carrying weapons including women, children, old aged, and sick.

   The basis of the aforementioned principles is Allāh's saying, "*And surely We have honored the children of Adam, and We carried them in the land and the sea, and We have given them of the good things, and We have made them to excel by an appropriate excellence over most of those whom We have created*" (al-Isrā', 17:70).

   Thus, the human being, in the theory of Islām, is honoured for his humanity. The war was legitimised to drive out harm; not to cause it. This is as per the principle of necessity, and 'necessity must be assessed proportionately'. The instruction of Abū Bakr, the first Caliph, in preparing Usāmah's army, contained great and comprehensive matters in this topic.

3. Treaties between Islamic states and others are respected and binding like the contracts between individuals. They must also be fulfilled and executed in good faith. The Messenger (s.a.w.) and

his successors signed a number of treaties which were executed with utmost good faith from the Muslims' side, except when the other side breaches the terms therein.

4. It is not allowed to fight before warning. The incident of the Umayyad Caliph, 'Umar ibn 'Abd al-'Azīz with the delegation of Samarkand is well-known. In this incident, a delegation from Samarkand came to 'Umar to complain about a particular commander of a Muslim army. Thus, the Caliph appointed a judge to settle the issue between them and the commander. The judge finally resolved that the Muslim army should vacate Samarkand (see *Tārīkh al-Balādhurī* in the discussion on "the Conquest of Samarkand").

5. Retaliatary action is allowed except in matters that contradict the Islamic principles. Based on this principle, al-Imām al-Awzāʿī (one of the great *fiqh* scholars in the second century of Hijrah) gave the *fatwā* (verdict) of not allowing the killing of Roman men hostages as a guarantee to execnte the treaty between the Romans and the Muslims when the former betrayed and breached the pact. The basis of al-Awzāʿī's verdict is this Qur'ānic verse which prevents taking a person to task for another's crime, "*...and no bearer of burden shall bear the burden of another*" (al-Anʿām, 6:164).

   A detailed *fiqh* has emerged concerning the principles of external rights of the *Sharīʿah,* and is discussed at length in its respective chapters of *fiqh* books.

SECTION 2

THE MEANING OF *FIQH*, ITS DIVISIONS AND RULINGS

2/1 The Meaning of *Fiqh*

The *Fiqh* in Islamic law has two meanings:

a. The first meaning of *fiqh* is **the knowledge of the practical legal rulings with their proofs** meaning; the detailed knowledge of a person on these rulings that is extracted from their proofs. Thus, *fiqh* is a knowledge attribute by which a person is considered a *faqīh*.

"**Rulings**" *(al-aḥkām)* from the definition refers to everything that the legislator issues to people including commands and practical rules that organize people's social life and their interrelationships, and determine the outcomes of their deeds and actions. An example of this is a usurper who is held liable for the usurped property if it is destroyed, while an entrusted person, like a depositary; is not liable except if he abuses the trust or neglects its preservation.

"**Legal**" *(al-shar'iyyah)* from the definition means emanating from the command of the legislator, explicitly or implicitly. "**Practical**" *(al-'amaliyyah)* is an adjective which is meant to exclude the credence issues that include fundamentals of faith and its branches as this theme is discussed in a different discipline.

b. Whereas the first meaning of *fiqh* referred to the knowledge of the legal rulings, the term *fiqh* was then named after the rulings themselves. This is what is meant by saying: I have studied the Islamic *fiqh*, and this is the second meaning of *fiqh*.

Based on this, *fiqh* is defined as **a group of the practical rulings legalized in Islām.** The legality of these rulings is known either through the explicit texts of the *Qur'ān* or the Messenger's explanations and teachings or through the consensus of Muslim scholars or the extraction from the implicit texts of the *Qur'ān*,

the Prophetic teachings, or through the consensus of Muslim jurists, the legal maxims, derived from the *Qur'ān* and *Sunnah*, by previous and current jurists who are qualified for *ijtihād*.

2/2 Divisions of Jurisprudential (*Fiqh*) Rulings

The jurisprudential (*fiqh*) rulings are divided into seven categories:

1. Rulings pertaining to worshipping Allāh such as *ṣalāt* (prayers), fasting, and others; and this category is known as ***'ibādāt*** (acts of worship).

2. Rulings pertaining to family such as marriage, divorce, affinity, maintenance, bequests, inheritance, etc; and are presently termed as *al-ahwāl al-shakhṣiyyah* (personal statutes).

3. Rnlings pertaining to people's earning activities, their dealings in wealth and rights, their contractual relationships, and their use of judiciary to settle their disputes. This category is known as *muʿāmalāt* (transactions). The previous two categories (2 and 3) constitute what is known in the modern legal terms as Civil Law.

4. Rulings pertaining to the ruler and his snbjects, and the rights and obligations of each. Some *fuqahā'* term this category as rulings of the ruler *(al-aḥkām al-Ṣulṭāniyyah),* which falls under what is named *al-siyāsah al-sharʿiyyah* (legal policy). This category forms two distinguished groups of laws in the modern legal terminology: the administrative laws and the constitutional laws.

5. Rulings pertaining to penalizing criminals and controlling the internal order among people. This category is termed as *'uqūbāt* (penalties).

6. Rulings that organize the relations of an Islamic state with other states, and forms the protocol of peace and war. This category is known as *al-siyar* (expeditions), the plural of *sīrah*, an expedition. In legal terms, it is known as public international law.

7. Rulings pertaining to morals, values, virtues, and vices, and are known as *al-ādāb* (morals).

The civil law normally consists of the rulings in the second and third categories, but the *Majallah* (Civil Code) available to us contains only the third category, that is, the transactions part, and not the personal statutes.

2/3 From the preceding discussion, it becomes clear that the *fiqh* is a combined spiritual and civil system because the *Sharīʿah* systemises the religious and worldly affairs.

This is the centre of difference between the *fiqh*, including its civil part, which is transactions, and the positive laws (those that have no religious attribute, but made by nations themselves).

In the positive laws, there is no place for the notion of the lawful and the unlawful, nor is there consideration for essence and substance. Rather, consideration is given to forms and formalities. Thus, whatever the law shows mastery in, and passes judgment with, becomes right and acceptable, otherwise it does not.

As for the *fiqh*, religious consideration is at its core, and thus the notion of the lawful and the unlawful functions as an internal observer that accompanies a person and calls upon him in every action.

Consideration is given to rights related with the truth even though judgment by the court is imperatively based on what is apparent.

Thus, if a judgment is made in favour of a person based on an apparent reason but in reality he is not entitled for the right, as in cases where he produced false testimonies or relied on an act of sale for which he has received its amount or he discharges the debtor or it was ruled in his favour to dismiss his opponent's suit because of negative prescription while the right is still under his obligation, then the judgment under such situations does not permit the unlawful nor prohibit the lawful, even though it is considered executable from the civil law perspective based on the imperative implementation of the apparent. This is because the permissibility and prohibition in the eyes of the *Sharīʿah* and *fiqh* must be founded on a valid reason.

The basis of this rule is the saying of the Prophet (s.a.w.): *"I am only a human being, and you people have disputes. May be someone amongst you can present his case in a more eloquent and convincing manner than the other, and I give my judgment in his favor according to what I hear.*

Beware! If ever I give (by error) somebody something of his brother's right then he should not take it as I have only given him a piece of Fire".[9]

Thus, judgment in such a case, as long as it satisfies its conditions, and the judge has expended his maximum effort, is a right judgment. However, the result of the judgment is not, and its religious consequences befall on the one whose judgment was in his favour.

2/4 Judicial Judgment versus Religious Judgment

Stemming from this topic, the transactions in the *fiqh* involve two considerations: judicial and religious.

Judicial judgment passes its rulings on actions or rights according to what is apparent, whereas the religious judgment passes its rulings as per the truth and reality. Hence, a matter or action may have a different judicial judgment compared to the religious one.

For instance, a person who accidentally divorces his wife by pronouncing divorce without intending it, and instead intending a different term, is considered as having divorced his wife judicially. That is, the judge rules that the divorce has taken place based on what is apparent. However, from religious side, the divorce is not counted. Thus, a *muftī* [one who issues *fatwā*] would give the husband a verdict that he remains with his wife under condition that the husband takes full responsibility of claiming the accidental divorce.

Similarly, if a person discharges his debtor without informing him, then sues him for the debt, and the court rules in his favor; he will have the right to execute the court's order and demand his payment judicially but not religiously.

Based on this, the judicial task differs from the task of issuing *fatwā*, in terms of situations and legal arrangements whereas a judge looks at the judicial considerations of actions and rulings, and ignores the religious consideration.

A *muftī* on the other hand, examines the reality and looks at both considerations: if their directions differ, he would issue *fatwā* based on the religious consideration.

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[9] Reported by al-Bukhāri in *Kitāb al-Ḥiyal* (6967) and see also *ḥadīth* no. 2458 of al-Bukhāri, and reported by Muslim in *Kitāb al-Aqḍiyah,* 3:337 (41). It is stated in al-Nihāyah, 4/241 that *"al-ḥan bi-ḥujjatihi"* means "maybe some of you can present his case on a more eloquent and convincing manner with evidence than the other".

As a result, the *fuqahā'* mention that the judicial ruling in certain matters which they formulate is such and such while the religious ruling is the opposite. For instance, a debtor denies being in debt, and his creditor, who fails to prove the credit before the court, obtains the debtor's wealth: the religion in this case resolves that the creditor to take his rightful amount from the wealth without the debtor's permission or knowledge. However, if this case reaches the court, it would not approve the appropriation if the debtor fails to prove his right (see *Radd al-Muḥtār: Kitāb al-Qaḍā',* 4/315; *Kitāb al-Ḥijr,* 5/95; *Kitāb al-Ḥiẓr wal-Ibāḥah,* 5/271).

In this same line, we say: No matter how far the materialistic and socialistic nations today stay from the religious restraint of protecting rights, they have been forced to use the restraint in their legislation of positive laws, and have used it to develop certain aspects of their judiciary. They could not afford except resorting to the religious guarantee and spiritual conscience.

This is evident by the swearing of the defendant when the plaintiff has failed to prove the lawsuit, and when the defendant sticks to a short commercial prescription in order to place an impediment against a bond for which he has been sued.

CHAPTER TWO

SOURCES OF THE ISLAMIC JURISPRUDENCE
(AL-FIQH AL-ISLĀMĪ)

Chapter Outline

The Primary Sources

Section 3: The *Qur'ān*, *Sunnah*, *Ijmā*ʿ and *Qiyās*

The Secondary Sources

Section 4: *Istiḥsān* (Juristic Preference) and its Types
Section 5: *Istiṣlāḥ* (Consideration of Benefits) and *Al-Masāliḥ al-Mursalah* (Unrestricted Benefits)
Section 6: ʿ*Urf* (Custom)
Section 7: Historical and Consideration Sequence of the Sources of Islamic Jurisprudence
Section 8: The Difference between *Sharī*ʿ*ah* and *Fiqh*.

SECTION 3

THE PRIMARY SOURCES OF *FIQH*

*AL-QUR'ĀN, AL-SUNNAH, AL- IJMĀ*ʿ*, AL-QIYĀS*

3/1 We have noticed in the previous section (para 2/1) that the basis of the rulings in the *fiqh* issues is either explicit texts from the *Qur'ān* or the *Sunnah* or the consensus of Muslim scholars or the extraction of *ijtihād* from the inferences of the texts and principles of the *Sharīʿah*. From this, the scholars have regarded the following four as the sources of *fiqh*: the *Qur'ān, Sunnah, ijmāʿ*, and *qiyās*.

THE HOLY BOOK: *AL-QUR'ĀN*

3/2 The Holy *Qur'ān*, is the foundation of the Islamic legislation. The fundamentals of the *Sharīʿah* and its milestones have been clearly elaborated in the *Qur'ān*; in a detailed manner in matters of faith and in general for acts of worship and rights.

The *Qur'ān* performs the same role in the *Sharīʿah* as the constitution in the positive laws of nations. It is a model for the Prophet (s.a.w.) himself and those after him. For this reason, it is the main source of Islamic legislation.

However, owing to the Book's constitutional nature, it handles the elaboration of rulings with general texts, and does not elaborate minor aspects and the details of qualities, except in a few cases. This is because such a detailed explanation lengthens it and takes it away from its other Qur'ānic objectives such as the eloquence *(balāghah)* and so on.

For example, it contains the command of offering *ṣalāt* (mandatory prayers) and *zakāt* (alms) in general without elaborating the method or quantity. It is the *Sunnah* that has explained their details through the sayings and deeds of the Messenger (s.a.w.).

Similarly, the *Qur'ān* has commanded the fulfillment of contracts, and has declared the permissibility of trade and prohibition of usury (*ribā*) in general. It did not, however, explain the valid and permissible contracts that must be fulfilled, and the void contracts that are not supposed to be fulfilled. Thus, the *Sunnah* again took the

responsibility of elaborating the basis of distinguishing these contracts.

Nonetheless, the *Qur'ān* has also elaborated certain rulings of detailed issues as in the following topics: inheritance, invoking curse (*liʿān*) between spouses, some fixed criminal punishment, and the women/men are prohibited to marry.

The quality of generality of the *Qur'ān* has another distinct advantage with respect to the rulings of civil transactions as well as the political and social systems. They indeed help in understanding the general texts and applying them in various possible ways that do not contradict with the text. With this expansion, the generality attribute is able to deal with the periodic interests (*maṣlaḥah*) and the rulings pertaining to it without exceeding the foundations of the *Sharīʿah* and its objectives.

For instance, the *Qur'ān* has mentioned the political consultation (*shūrā*) but without ideutifying any specific structure for it. It therefore, encompasses every governmental system that avoids dictatorship and realizes consultation and correct respect for the opinion of the scholars in a nation. This is regardless of whether the system is republic or constitutional caliphate or any other system that is not monopolized by a person or group, according to the requirements of the common good.

The *Qur'ān* has also prescribed the establishment of justice and rights among people in many texts. But the tool for achieving this, which is the procedure of judgment, was not specified by the *Qur'ān*. Thns, quantitatively, it is possible to have individual or collective courts, and qualitatively; it is possible for the courts to be of single or several grades (see para 5/11).

In any case, these general texts of the *Qur'ān* need an elaboration by the *Sunnah* so that they can be implemented both qualitatively and quantitatively; their comprehensive and limited boundaries can be known; and partial events and deeds can be applied on them.

For this purpose, the *Qur'ān* has made a general reference to the *Sunnah* regarding the detailed issues. Allāh says: "*and whatever the Messenger gives you, accept it; and from whatever he forbids you, keep back*" (al-Ḥashr, 59:7). Hence, the *Sunnah* is considered the key to understand the *Qur'ān*.

AL-SUNNAH

3/3 The term *Sunnah* is used to refer to what is narrated from the Messenger's saying, action or approval (*taqrīr*).[10] In this sense, the *Sunnah* is synonymous to *ḥadīth*.

Sunnah may also be used to refer to the real practice of implementing the *Sharīʿah* during the reign of the Prophethood. This means the Islamic way of dealings that prevailed during the first generation of Islām.[11]

The result of the difference between the two meanings is that an oral *ḥadīth* may be reported from the Messenger (s.a.w.), but it is historically proven by the scholars that the conduct of people during the Prophet's era or the reign of the rightly guided caliphs is conflicting with the content of the reported *ḥadīth*. In this case, it would be said, 'such and such has been stated in a *ḥadīth*, but the *Sunnah* is such and such.

In this kind of situation, if both the *ḥadīth* and *Sunnah* are genuine, then the scholars would reconcile *(al-tawfīq)* them if possible, or else, one of them is given preference over *(tarjīḥ)* the other using certain preference factors. The same applies to two genuine narrations of the Prophet (s.a.w.) that contradict each other, one of them is considered the abrogator (*nāsikh*), and hence the abrogating and the abrogated (*mansūkh*) are determined.

As a legislative source, the *Sunnah* comes second after the *Qur'ān* based on its function of elaborating the generalities of the *Qur'ān*, clarifying its complex meanings, restricting its unrestricted (texts), and supplementing the laws not mentioned in the *Qur'ān*.

Therefore, from one dimension, the *Sunnah* is an independent source of legislation because it may include some rulings that are not

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10 *Taqrīr* refers to a saying or doing that was either done by someone in front of the Prophet (s.a.w.) or he is informed about it, and becomes aware of it, then, he approves the saying or the doing or the narrator of both. He also does not reprimand the doer or indicate that the saying and doing is against the ideal. See *al-Mūqiẓah* by al-Dhahabī; and *al-Tatimmah al-Ūlā fī Bayān al-Sunnah al-Nabawiyyah* by Shaykh 'Abd al-Fattāḥ Abū Ghuddah, pp. 98-102.

11 Based on this meaning, it is the statement of 'Abd al-Raḥmān ibn Mahdī when he was asked about Sufyān al-Thawrī, al-Awzāʿī, and Mālik. [He said]: "Sufyān is an Imām in *ḥadīth*, but not in *Sunnah*, al-Awzāʿī is an Imām in *Sunnah* but not in *ḥadīth*, and Mālik is an Imām in both". See *Sharḥ Muwaṭṭa' Mālik* by al-Zarqānī; the introduction of *Tanwīr al-Ḥawālik* (also a commentary on *al-Muwaṭṭa*) by al-Suyūṭī, and *Naẓarah 'Āmmah fī Tārīkh al-Fiqh al-Islāmī* by 'Alī Ḥasan 'Abd al-Qādir, p. 116.

contained in the *Qur'ān*. For instance, it is confirmed that the Prophet (s.a.w.) has allocated for the grandmother of a deceased, a sixth of his wealth as her proportion of inheritance. But from another dimension, it is noticed in the *Sunnah* the nature of following the *Qur'ān* because, in addition to its role as clarifier of the *Qur'ān*, it does not go against the Qur'ānic principles and general rules.

This applies even to the rulings that it establishes independently, and are not found in the *Qur'ān*. Thus, the main reference for the *Sunnah* is actually the texts of the *Qur'ān* and its general principles. The *Sunnah* in general is necessary and indispensable for the understanding of the Book although not all the *Sunnah* is like this.

With this note, and after the *Sunnah* became reported uarrations following the termination of revelation with the death of the Messenger (s.a.w.), nothing except geuuine and authentic *Sunnah* that is guided by stringent conditions is accepted as source of legislating the juristic rulings. Scholars of *Sunnah* have taken the responsibility of distinguishing the levels of authenticity of the Prophetic teachings.

AL-IJMĀ'

3/4 *Ijmā'* is the consensus of the Muslim jurists (*fuqahā'*) of a particular era regarding a particular ruling. It does not matter whether the consensus is by the *fuqaha'* among companions of the Prophet (s.a.w.) after his death or among the generations that came after them.

Ijmā' is a strong evidence for proving the jurisprudential rulings, and a source of legislation that follows the *Sunnah* in rank.

A set of Qur'ānic verses and teachings of the Prophet (s.a.w.) verify that the consensus of jurists is a source of legislation. These include the verse: "*And whoever acts hostilely to the Messenger after that guidance has become manifest to him, and follows other than the way of the believers, We will turn him to that to which he has (himself) turned and make him enter hell; and it is an evil resort*" (al-Nisā', 4:115), and Prophet's saying: "*My nation (Ummah) shall not agree upon error*".[12] From the

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[12] Reported by Abū Dāwūd from the *ḥadīth* of Abū Mālik al-Ash'arī (4253), al-Tirmidhī from the *ḥadīth* of Ibn 'Umar (2167) where he said: "This ḥadīth is strange from this direction". Ibn Mājah from the *ḥadīth* of Anas (3950) with a weak chain of transmitters (*sanad*). In general, the *ḥadīth* is as said by al-Ḥāfiẓ in *al-Talkhīṣ* (3/141): "Famous

many *ḥadīth* with this meaning and the verses of the *Qur'ān* that instruct togetherness, sufficient proof is formed to show evidence that *ijmāʿ* is a source of legislation.

When consensus about a certain ruliug is made, it must rest ou a proof, even if this proof is not meutioned with the consensus. This is because it is illogical that the reliable scholars of the *Ummah* unanimously agree by their desires without any legal proof.

For this reason, when searching for *ijmāʿ* of the former scholars, the present scholars only need to investigate its preseuce and authenticity, but not its proof, because if its proof was a requirement, then they would have considered the proof and not the *ijmāʿ*.

In a nutshell, auy *ijmāʿ* must rest on a proof, but for it [*ijmāʿ*] to be considered, its proof neither needs to be conveyed with it uor known.

An example of the establishmeut of a ruling by *ijmāʿ* is the case of a deceased who has left behind a grandfather and a sou. The agnatic grandfather, in the absence of the father, takes the father's place in inheritance, and thus inherits, in the preseuce of the agnatic son of the deceased, a sixth of the wealth like the father. This has beeu approved by the consensus of the *ṣaḥābah* (companions of the Prophet).

Similarly, by *ijmāʿ*, the brothers and sisters of the same mother and father (full brothers and sisters), and brothers and sisters of the same father (consanguine borthers and sisters) do not inherit in the presence of the deceased's father.[13] The contract of *istiṣnāʿ* has also been validated by *ijmāʿ*.[14]

3/5 There are two types of *Ijmāʿ*: Explicit *(qawlī)* and Implicit *(sukūtī)*

ḥadīth with many ways, each of them has a criticism". Al-Sakhāwī said: "In general, it is a *ḥadīth* with a famous text (matn), many chains, and numerous supporting texts including traceable (marfūʿ) and others" (*al-Maqāṣid al-Ḥasanah*, p. 460).

13 See *Uṣūl al-Fiqh* by al-Khuḍarī, p. 404, and *Sharḥ al-Sirājiyyah* by al-Sayyid al-Jurjānī, *"Bāb Muqāsamah al-Jadd"*.
Banū al-aʿyān: Brothers and sisters of the same mother and father.
Banū al-'Allāt: Brothers and sisters of the same father.
Banū al-akhyāf: Brothers and sisters of the same mother.

14 *Istiṣnāʿ* is the purchase of a manufactured product before being manufactured. The principles of Islamic law refute this type of contract as it involves the selling of non-existent, but it has been validated by the consensus of Muslim scholars owing to the need for it. See *Uṣūl Fakhr al-Islām al-Bazdawī,* the beginning of the chapter of *Istiḥsān*).

The explicit *ijmāʿ* is achieved by an overt agreement among scholars. The implicit *ijmāʿ* is achieved when one of the scholars issues *fatwā* that becomes knowu to the rest of the scholars and yet they do not object or approve it.

The first type of *ijmāʿ* is the one that is acceptable as a source of legislation, but the second type is highly debatable in terms of considering it as a source of legislation, the degree of this consideration, and its conditions.

Iu the first era of Islām, it was easy to achieve *ijmāʿ* because duriug time of Caliph ʻUmar (may Allāh be pleased with him), he prevented the Companions of the Prophet (s.a.w.) from leaving Madīnah so that he is able to consult them on kuowledge or political issues. However, during the last days of Caliph ʻUthmān, the Companions spread to different countries.[15] A number of jurists aud scholars from far regions including Hijaz, Yemeu, Egypt, Iraq, and Sham learned from them. From this time, henceforth, it was not possible to achieve *ijmāʿ* due to the difficulty in obtaiuing the cousultation *(shūrā)*, and the consensus of scholars from oue country about a particular ruling is not considered *ijmāʿ*.

Thus, all the issues that are solely based ou *ijmāʿ* trace their origin to the era of the righteous caliphs or the first period of the era.

AL-QIYĀS

3/6 *Qiyās* is to apply a juristic ruling of one issue to another, because of their common *ʻillah* (effective cause).

Qiyās, as a source of legislatiou, occupies the fourth position after the Book, the *Sunnah* aud *ijmāʿ*. Nonetheless, it has a greater impact on jurisprudential rulings than *ijmāʿ*, because of its wider applicatiou. *Ijmāʿ* issues are limited aud have no additions because of the spread of Muslim scholars to different regions, and the difficulty of achieving it after the first generation as mentioned before. *Qiyās* ou the other hand does not require the conseusus of the scholars, rather; every *mujtahid* uses his own analogy on every iucident that has no text from the *Qur'ān* or the *Sunnah*, and has not beeu agreed upon.

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[15] See *Tārīkh al-Tashrīʿ al-Islāmī* by al-Subkī, al-Sāyis, and al-Barbarī who are all the professors at the Faculty of Sharīʿah, al-Azhar University, pp. 96 & 137.

It is obvious that the texts of the *Qur'ān* and the *Sunnah* are limited and bounded whereas the occurring and anticipated incidents are unlimited. Thus, there is no way of assigning rulings to the new incidents and transactions in the *fiqh* except by using analogical *ijtihād* whose main element is *qiyās*.[16] Therefore, *qiyās* is the richest source of *fiqh* in legislating minor rulings of incidents.

In the letter of Caliph 'Umar ibn Khaṭṭāb to Abū Mūsā al-Ashʿārī (may Allāh be pleased with them) while guiding him to the principles of judgment and its ideal method, the Caliph wrote: *"Use your brain on matters that perplex you and to which neither the Qur'ān nor the Sunnah seem to apply. Know the similitude and weigh the issues accordingly. Follow that which is the closest to Allāh and most resembling to the truth"*.[17]

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[16] Al-Shahrastānī said in his book, *al-Milal wa'l-Niḥal*: 'There are uncountable new occasions of incidents in the areas of worships and transactions. It is certain that there are no specific rulings referring to each of them, and that cannot be anticipated as well. Since the rulings are specific and limited, whereas the new incidents are ever happening, it is certain that the limited ones cannot delimit what is never ending. Hence, *ijtihād* and *qiyās* are considered as essential, so there will be *ijtihād* on every newer incident (*al-Milal wal-Niḥal* of al-Shahrastānī, in the beginning of discussion on 'the difference on legal *ijtihād* rules'.

[17] This letter was sent by 'Umar to Abū Mūsā after appointing him (as judge of the Kufah, Iraq). The contents of the letter are viewed by scholars as a masterpiece of judiciary policy and its jurisprudence.

We have found it significant to mention the entire letter here as we may need it as reference in other places of this book. The letter reads: "In the Name of Allah, the Most Gracious the Most Merciful. From the servant of Allah, 'Umar ihn al-Khaṭṭāb, the leader of the believers, to 'Abd Allāh ibn Qays: Peace be upon you. The office of judge is a definite religious duty and a generally followed practice.

- Understand the depositions that are made before you, for it is useless to consider a plea that is not valid.
- Consider all people equal before you in your court and in your attention, so that the noble will not expect you to be partial and the humble will not despair of justice from you.
- The claimant must produce evidence; the defendant must pronounce an oath.
- Compromise *(al-ṣulh)* is permissible among Muslims, but not any agreement through which something forbidden *(ḥarām)* would be rendered permissible *(ḥalāl)*, or something permitted forbidden.
- If you gave judgment yesterday, and today upon reconsideration come to the correct opinion, you should not feel prevented by your first judgment from retracting; for justice is primeval and it is better to retract than to persist in error.
- Use your brain on matters that perplex you and to which neither the *Qur'ān* nor the Sunnah seem to apply.
- Know the similitude and resemblances. Weigh the issues with those which resemble them, depend upon those which are the most pleasant with Allah, the closest to the truth as per your observation and follow them.

The approach of the familiar texts of the *Qur'ān* and the *Sunnah* is to mention, in most cases, the *'illah* of the rulings and their general legal objectives so as to enable their application on similar issues in every occasion. Since most of the Qur'anic texts are general and broad as we have seen,[18] this paved the way to deduce undeclared rulings based on the declared ones when the *'illah* or reason is similar.

3/7 Examples of *Qiyās*

It is difficult to list all the incidents of *qiyās* in the *fiqh* of the *Sharī'ah* as they constitute a substantial part of the *fiqh*, and people are

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- If a person brings a claim, which he may or not be able to prove, set a time limit for him. If he adduces evidence within the time limit set, you should allow his claim; otherwise you are permitted to give judgment against him. This is the better way to forestall or clear up any possible doubt.
- All Muslims are acceptable as witnesses against each other, except such as have received a punishment provided by the religious law, such as are proved to have given false witness, and such are suspected of partiality on the ground of client status or relationship, for Allah, praised be He, forgives, because of oaths and postpones punishment in the face of evidence.
- Avoid anxiety and impatience and annoyance at the litigants. For establishing justice in the courts of justice, Allah will grant you a rich reward and give you a good reputation.

Whoever purifies his faith between him and Allah, He will be sufficient for him in all his needs, and whoever appears good to people in something that Allah knows he is otherwise, Allah will despise him. What do you think of the reward of Allah in His urgent provision and plentiful mercy? Peace and blessings of Allah be upon you".

See *Jamharah Rasā'il al-'Arab* by Professor Aḥmad Zakī Ṣafwah, v. 1, p. 252, article no. 214; *I'lām al-Muwaqqi'īn* by Ibn al-Qayyim, v. , p. 99; *al-Kāmil* by al-Mubarrad, v. 1, p. 9; *al-Bayān wa'l-Tabyīn bi-Sharḥ al-Sandūbī*, 2nd ed., v. 2, p. 37.

Ibn al-Qayyim has explained the contents of the letter in many places of his book, *I'lām al-Muwaqqi'īn*, in detail, v. 1, p. 100; v. 2, pp. 284-290.

Shaykh 'Abd Al-Fattāḥ Abū Ghuddah has also traced the letter from the books of *Sunnah, Fiqh, Adab, Tarikh*, and *Siyar*, with the title, *"Taḥqīq li-thubūt kitāb 'Umar ilā Abī Mūsā al-Ash'arī fī sha'n al-qaḍā', wa-fīhi al-'amal bi'l-qiyās"*, published in *al-Majallah Kulliyah Uṣūl al-Dīn*, v. 4, 1402 A.H, pp. 299-308.

Explanation of some words in the book of 'Umar:

If he adduced to you: He lead to proof, he gave evidence.

He fulfilled: From fulfilling, means he fulfilled judgment he materialized it means he fulfilled till right has been to his owner.

Ās: Heordered applying the principle of equality means he made every one equal without any difference.

He stammered: He hesitated

He repelled: Prevented as narrated in the *ḥadīth "repel sanction if there are doubts"*.

18 See *Tarikh al-Tashri' al-Islami* by al-Subkī, al-Sāyis, and al-Barbarī, p. 6.

continuously using it in every emerging case. However, the following examples will serve as clarification:

1. The *Qur'ān* (62:9) has forbidden trading when the call for *Jum'ah* (Friday) prayer is due. Based on this, the *fuqahā'* deduced analogically the prohibition of initiating other contracts like leasing when the call for *Jum'ah* prayer is made. This is because the *'illah* of prohibiting trade (during the prayer time) is that it distracts the traders from preparing for *Jumu'ah* prayer that is preceded by a general sermon and admonition by the imām. The same effective cause is also found in all other business activities and contracts besides buying and selling although it is the most dominant in the markets. As a result, the majority of the *fuqahā'* have ruled that buying and selling and all other contracts are invalid during the call for *Jumu'ah* prayer.

2. The *Sharī'ah* contains a number of provisions and rulings concerning the guardian of an orphan: his rights, responsibilities, and jurisdictions. Using these rulings, the *fuqahā'* deduced analogically the rulings on *waqf* (endowment) manager because of the close relationship between the two tasks. Several other rulings pertaining to endowment have also been derived by *qiyās* from the rulings on *waṣiyyah* (bequest). Based on this analogy, the *fuqahā'* resolved to restrain a person in his terminal illness from endowing more than one third of his wealth, unless validated by the heirs. This ruling was derived from the ruling on *waṣiyyah* by the use of *qiyās*, because both *waṣiyyah* and *waqf* are gratuitos. The two resemble each other to the extent that *fuqahā'* say, "most of the rulings on *waqf* are extracted from (the rulings on) *waṣiyyah*".

3. There are more provisions in the *Sharī'ah* regarding buying and selling than those regarding leasing. Hence, the scholars have deduced many rulings of leasing from the rulings of buying and selling by *qiyās* as leasing is also a form of selling that involves usufruct.

4. Certain provisions of the *Sharī'ah* permit the special agency with its specific rulings. From the rulings and permissibility of the special agency, the Ḥanafī scholars have deduced the general agency. They also did not see any harm if the delegated acts are

not identified when initiating the contract of general agency because the generality makes the unknown like known, and resolves disputes. But this is not the case when the subject matter of a special agency is unknown, like saying, I have delegated some of my work to you. The *fuqahā'* have agreed that such an agency is not permitted.

5. The *fuqahā'* have also deduced from the contract of agency that a person is permitted to deal with someone besides himself while dealing with some of those of his rights which in fact did originated from someone else (latter), and that too without prior agency from the latter. Thus, they put forth that 'the subsequent permission is like the antecedent agency'. This means that should an agent (executor) act on his own discretion without the permission of the principal, the act is considered executable[19] on the principal based on his former delegation of authority to the agent.

6. The *Sharīʿah* states that a worker is compelled to carry out what he has been hired for. The *fuqahā'* then deduced that a paid agent is also compelled to carry out what he has been delegated to do. This is because by taking a wage, he becomes like the worker even though initially the agency contract is not binding, that is, the agent is not forced to execute his principal's authority.

7. The provisions of *Sharīʿah* state that a usurper is forced to return the usurped property as long as it exists with him. In case it is damaged, he has to give a similar property to the owner or its value. The right of the property owner then shifts to this compensation as a substitute of his original property that is damaged. This is based on the saying of the Prophet (s.a.w.), *"The receiving hand is held liable for what it has taken until it returns it"*.[20]

   The Ḥanafī jurists deduced that if a usurper causes some changes to the usurped property such that it bears a new name,

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[19] See section 38/5 for more details on the meaning of *al-fuḍūlī*.

[20] See para 10/2 (B). The *ḥadīth* was reported by Aḥmad, al-Nasā'ī, Ibn Mājah and al-Ḥākim from the *ḥadīth* of al-Ḥasan from Samurrah. It was also reported by Abū Dāwūd and al-Tirmidhī, and their text ends with *"until it returns"*. The hearing of al-Ḥasan from Samurrah is, however, debatable. See *al-Talkhīṣ al-Ḥabīr*, 3/53.

like the manufacturing of swords from a usurped piece of steel or making flour from usurped wheat, then such a change is considered damage to usurped property. Hence, the right of the property owner then shifts to holding the usurper liable for the property similar to the previous case of damage.

8. In the Prophetic teachings concerning agency in a marriage contract, the Prophet (s.a.w.) said regarding a mature virgin girl, "Her silence implies her consent".[21] In other words, if her guardian seeks her permission to be married and she keeps silent, it is interpreted as her authorization to be married. This is customary evidence because a virgin is normally shy in such situations.

   Based on this, the *fuqaha'* deduced that if a guardian marries her to a person without her consent, and she keeps quiet upon hearing the same, then her silence after the marriage contract implies her permission by customary evidence.

9. The *Sunnah* has permitted a buyer to stipulate an option that entitles him to either terminate or endorse a contract within a specified time. This is known as *khiyār al-sharṭ* (stipulated option) which is aimed at giving the buyer an opportunity to assess the deal for fear of deception. A companion of the Prophet (s.a.w.) named Hibbān ibn Munqidh (may Allāh be pleased with him) once complained to the Prophet (s.a.w.) that many times he is deceived in trade. The Prophet (s.a.w.) thus guided him to stipulate an option. He said, "When endorsing a sale contract, say: No deception,[22] and I have an option for three days".[23]

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[21] Reported by Mālik in *al-Muwaṭṭa'*, 2/524-525; Muslim in his *Ṣaḥīḥ*, 2/1037 from Ibn 'Abbās who said: "The Prophet (s.a.w.) said: *"A woman without a husband has wore right to her person than her guardian, and a virgin's consent must be asked from her, and her silence implies her consent"*. See *Tuḥfat al-Muḥtāj ilā Adillat al-Minhāj* by Ibn al-Mulaqqin, 2/365.

[22] The meaning of *al-khilābah* according to *al-Kasr* is deception.

[23] The original text of the *ḥadīth* is agreed upon by al-Bukhārī and Muslim from Ibn 'Umar that a man was being deceived in trade, then, the Prophet (s.a.w.) told him: *"When endorsing a sale contract, say: No deception in Religion"*. The naming of the companion as Ḥibbān ibn Munqidh was mentioned in numerous narrations, but al-Nawawī preferred that the story belongs to Munqidh ibn 'Amrū, the father of Ḥibbān, as it appears in the narrations of Ibn Mājah, 2/79, al-Dāraquṭnī, 3/55, and al-Bayhaqī, 5/273. See *al-Talkhīṣ al-Ḥabīr* by Ibn Ḥajar, 3/21.

Based on this ruling, the *fuqahā'* have deduced that even the seller is also entitled to the stipulated option since his need for it is the same as the buyer.

They also deduced from the stipulated option another situation known as *khiyār al-naqd* (option of payment) where the seller stipulates that if the buyer, who has requested to defer his payment, does not settle the full amount within a specified period of time, their sale contract is dissolved. The option is aimed at preventing the buyer from disappearing for a long time thus delaying the seller from receiving his payment. This in turn affects the seller who has already transferred the ownership of the subject matter to the buyer, and therefore, cannot do anything with it. With this option, he is able to take precaution against the suffering.

The basis of this *qiyās* is that both options (stipulated option and payment option) involve dissolution of a sale contract after its endorsement for a legal purpose. (See *al-Durar Sharṭ al-Gharar*, 2/152).

These are but only few examples we have cited to illustrate the incidents and application of *qiyās* in the *fiqh*. Most of the jurisprudential rulings concerning novel events have been, and are proven by *qiyās*.

3/8 From the preceding discussion, we see the clear role of *qiyās* in establishing legal rulings and extracting them. *Qiyās* is an essential method of expanding the limited rulings so that they encompass the new incidents which are unlimited.

Qiyās cannot be displaced by the *'umūm* (generality) of some texts, because a general text covers only the components that fit in its meaning. *Qiyās* on the other hand, renders the texts, including the specific ones, inclusive of all what does not fit in its meaning through the method of resemblance of *'illah*. In so doing, it adds to the existing legal texts other juristic texts (rulings) emanating from the scholars who extract them. These texts are unlimited and are built on the principles and rules of the original texts.

Furthermore, the minor (*far'iyyah*- rulings for minor matters) rulings that are established via extraction and analogical deduction become the original cases from which other new cases with similar effective causes are deduced, and so on, to infinity. This is the secret

of the richness of the *fiqh* that comprises of contemporary and non-contemporary incidents.

However, there is a group of *fuqahā'* in certain jurisprudential schools who did not accept the way of analogical deductions, and instead relied solely on the explicit meanings of the texts. Because of this, they were termed *al-Ẓāhiriyyah* (Zahirites), but their school of thought *(madhhab)* did not prevail or have any strong impact since it defied the prerequisites of the legislative life.

A highly eloquent summary of the concept of *qiyās* and its legislative power comes from al-Muzani, the companion of Imām al-Shāfiʿī, who said:

"Jurists, since the time of the Messenger of Allāh (s.a.w.) to the present day, have used *qiyās* in all rulings of their religious affairs. They held a consensus that the equivalence of the truth is truth, and the equivalence of the falsehood is falsehood. Hence, it is not permissible for anyone to deuy *qiyās* because it is a comparison between matters, and their representation (see *Mālik* by Shaykh Muḥammad Abū Zahrah, Professor at the Faculty of Law in Cairo, part 2, section 160).

SECTION 4

THE SECONDARY SOURCES

4/1 Apart from the four primary sources of jurisprudential rulings mentioned previously, there are other legal sources that have been considered by the *Qur'ān* and the *Sunnah* as acceptable sources of legislation.

It is, however, noted that these sources are auxiliary which stem from the four primary sources, and thus most of the scholars do not consider them as extra sources, but related to the primary ones.

The most important of these secondary sources are three which we shall discuss them in this and the next two sections. They are: *istiḥsān*, *istiṣlāḥ* or the principle of *al-Maṣāliḥ al-Mursalah* and *ʿurf*.

ISTIḤSĀN (JURISTIC PREFERENCE)

4/2 ***Istiḥsān* is the departure of an issue from its equivalent ruling to another one because of a stronger reason requires that departure.**

This is the definition given by Imām Abū al-Ḥasan al-Karkhī, one of the leaders of the Ḥanafī school. This may be the best definition of *istiḥsān* and the most inclusive of all its types, which shall be explained hereinafter (see *Kashf al-Asrār Sharh Usūl al-Bazdawī*, 4/3; and *Abū Ḥanīfah* by Shaykh Muḥammad Abū Zahrah, part 2, section, 174).

The meaning of the above definition is that *istiḥsān* is the diversion from the ruling of *qiyās* to another ruling due to a reason which requires that departure. Therefore, *istiḥsān* is disconnecting an issue from those issues that are analogically similar to the first. Therefore, it is the the opposite of the apparent *qiyās*, which involves linking one issue with its equivalent under the same ruling.

Based on the type of *ʿillah* that distinguishes an issue of *istiḥsān* from the analogically similar issues, *istiḥsān* can be divided into two

types: *istiḥsān qiyāsi* (preferred analogy) and *istiḥsān al-ḍarūrah* (preferred necessity).[24]

Al-Istiḥsān al-Qiyāsi

4/3 This type of juristic preference (*Istiḥsān*) is to depart from the ruling of an issue deduced from the apparent analogical ruling to a different ruling of another analogy which is more obscure and insingnificant than the former; but it is more evident, rectified and more conclusive than the apparent analogy.

Owing to its popularity among the Ḥanafī jurists, some of them define *istiḥsān* as *qiyās khafī* (hidden analogy). This type of *istiḥsān,* in fact, is a way of prioritising one case of *qiyās,* when there are approaches of it, and when they conflict with each other in a certain case. Thus, *istiḥsān* is nothing other than the part and parcel of *qiyās*.

4/4 Examples of *al-Istiḥsān al-Qiyāsi*

1. A creditor in a joint debt,[25] who receives his share of payment, has no right to own the received payment, but his partner has a right to claim his share from the amount received. If the received amount perishes while in the hands of the receiving partner before the second partner take his share, the apparent *qiyās* dictates that both the partners share the loss, because when the received item was safe they were supposed to share it, thus they should also share its loss as well.

   However, by preferred *qiyās*, the received amount that perished while in the hands of the receiver is considered solely as his share; and the amount that has not been received becomes

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[24] The Ḥanafīs divide *istiḥsān* into four types. The two types had already mentioned and the two more are namely *istiḥsān al-sunnah* and *istiḥsān al-ijmā'*, which we shall criticize at the end of this discussion (para 4/8).

[25] A joint debt *(al-dayn al-mushtarik)* is an obligation to pay two or more creditors, and the reason for the credit is single i.e. a property owned by two people if sold on credit under one transaction or if the property is damaged by a third person. In these cases, the third party has an obligation to pay the two creditors who are joint partners in the debt.

If the reason of the debt is not one, it is not considered a joint debt. For instance, if a person borrows two loans from two persons and each loan is under a separate contract.

the share of the second partner. This is because the second partner is not obliged to share the received amount, rather; he may forgo the received share with the first and claim his share from the debtor.

2. It is among the established maxims that a person is accountable to his confession with regards to his right alone, not with the rights of others. If, for example, a person confirms that he and his brother are indebted with a certain amount, this confirmation does not bind his brother in case he denies. On the same note, if a person claims that he is a creditor's agent, and the debtor confirms his agency, he is then obliged to settle his debt with the agent as per the conferssion of the creditor.

   Based on the aforementioned, if someone deposits something with someone and disappears, then, another person claims to be an agent of the disappeared one to collect the deposited items, whereas the depository or trustee agreed to the same, according to apparent *qiyās*, he is forced to hand over the deposit to the agent.

   However, by *al-istiḥsān al-qiyāsi*, the trustee is not obliged to hand over the deposit to the agent even if he has confirmed his agency. This is because it is possible that the depositor himself might show up denying that he has delegated any authority to collect his deposit; and it is possible that the deposit might have expired that it cannot be recovered, whereas his right is linked to the thing itself. In safe-keeping, the depositor's right is related to the exact deposit, unlike in a debt where the right of the creditor is related to the debtor's obligation (to pay back) and not the exact amount that the debtor pays to the agency claimer. Hence, if the creditor appears and denies the agency, it shows that the former payment was not a valid settlement of the debt because of the false agency. In this case, the right of the creditor remains as an obligation to the debtor who is obliged to repay the debt to the creditor (himself). The debtor also has the right to recover his payment from the receiver who initially received the amount under the pretext of agency.

   To elaborate the preceding case, the mechanism of settling debts in real practice and from the perspectives of *fiqh* is such that a debtor pays his debt with an equivalent amount from his own wealth. Thus, his confirmation of the agency is his approval of the

obligation of conferring his wealth to the agent as fulfilment of the debt of the debtor. Hence, he is liable for his confession, that if the agency is proven untrue later, he is considered negligent in his own wealth, and therefore, obliged to pay again to the creditor who denied the agency.

As for safe deposit *(al-wadīʿah),* the right of the owner is related to the deposit item itself. Hence, the confirmation of the depository on the agency would be similar to the confession of his obligation to submit the wealth of another person to a third party, for which he is liable on his own, not on anybody else. If we were to implement, it would have been negligence to the right of the owner by mere confirmation of another party (see *al-Durr al-Mukhtār wa-Radd al-Muḥtār, "bāb al-wakālah bil-khuṣūmah wal-qabḍ"*, 4/413-414).

3. It is established in *fiqh* that the mortgage is guaranteed by the mortgagee creditor up to an amount equivalent to the debt. Thus, if the mortgaged which is equal to the value of the debt perishes while in the hands of creditor, the debt will be cancelled. So any payment that the mortgagee receives prior to the loss of the mortgage must be returned.

   Based on this rule, if the mortgagee creditor discharges the debtor's obligation to pay, but the mortgaged perishes before returning it to the debtor, then, the apparent *qiyās* (anology) implies that the creditor is still liable for its value, analogising the case of discharge with that of fulfilment of the debt, where even after the fulfilment the mortaged will remain as liable until he gives it back.

   However, the juristic preference implies that the mortgaged property is not guaranteed after discharge of the debt; and after he discharges the debtor, the mortgagee is considered as having cancelled the mortgage. For the mortgagee creditor is free to terminate the mortgage, since it is a security for his right, that if he terminates it, the mortgage will be turned into an *amānah* (trust) in his hands for which he is not liable if it perishes unless he misuses or neglects it (see *Radd al-Muḥtār*, 5/335 and 338).

Istiḥsān al-Ḍarūrah (Juristic Preference of Necessity)

4/5 The juristic preference of necessity is the departure from the ruling of an analogy *(qiyās),* considering an imperative necessity or required interest, in order to meet a particular need or to eliminate the problems. It is used when the flow of *qiyās* ruling leads to difficulties in certain issues, and thus, based on the juristic preference the ruling is abandoned in favor of another ruling that eliminates the difficulties. This is because the issues that involve analogical deductions - in spite of their unified genus and shared foundations- may have different outcomes in terms of justice and injustice, easiness and uneasiness, depending on their themes, contextual obstacles and complexities.

In this case, *istiḥsān* becomes the jurisprudential method of deriving welfare-oriented rulings that are congruent with the jurisprudential logic and the objectives of the *Sharīʿah,* whereas the flow of analogy *(qiyās)* leads to bad results.

This type of juristic preference in fact resembles the outlook of Unrestricted Public Interest *(al-maṣāliḥ al-mursalah),* which will be discussed later.

4/6 Examples of *Istiḥsān al-Ḍarūrah*

1. It is legally resolved that a trustee such as a depositary is not held liable for the loss of the deposit under his possession as long as there is no misuse or negligence. This *qiyās* applies to every type of trust such as the shared property in the hands of one partner, the leased property in the hands of a lessee, a loan in the hands of a borrower, etc... and among others, the property of the employer in the hands of the employee. In such a case, the employee is not held liable for any loss of the property unless he has misused or neglected in guarding it.

   However, based on *istiḥsān,* the *fuqahā'* have distinguished between a private worker who dedicates all his time and effort to the service of his employer, such that he would not have free time to service others, such as a servant and a stableman; and a common worker who performs a particular skill for anyone who wants, such as a painter, baker, carpenter, etc. The *fuqahā'* said that based on *istiḥsān,* in contrast to the analogy, any damage that happens to a client's property which is under a common worker

must be compensated unless the damage is caused by any reasons beyond the worker's control such as intense fire. The rationale for this *istiḥsān* is to discourage the common worker from accepting more than what he is capable at accomplishing from the clients in his desire for higher profits. In so doing, he may subject their properties to damage or loss due to overburden.

The Mālikī *ijtihād* has also accepted this ruling for the sake of the *maṣlaḥah*.[26]

2. Among the established principles of jurisprudence is that whoever offers something from his wealth on behalf of another party without his order, either for alimony or debt payment or settling any financial obligation; is considered a donor, whether he intends to donate or not. The payer has no right to claim a refund from the person on whose behalf he paid, unless he was compelled to pay.[27]

   Accordingly, if someone gave money to another ordering him to buy something for him or settle his debt on his behalf or spend it on his children, building, etc, but the instructed person held the money and paid from his own with the intention of refunding the same amount from the instructor; the apparent *qiyās* is that he

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26 Shaykh Muḥammad Abū Zahrah said in his discussion on *al-maṣāliḥ al-mursalah* in his book, *Mālik*, while quoting from al-Shāṭibī's *al-I'tiṣām*: "The rightly guided Caliphs had agreed to hold the manufacturers liable (for loss or damage) even though the original principle declares them as trustees. But it was found that if they had not been made liable, they would have heen careless in protecting the people's custodies and wealth, and people are in dire need of their service. Thus, the *maṣlaḥah* was to hold them liable so that they protect what they have been entrusted. This is why 'Alī (may Allah be pleased with him) said: "Nothing else will reform people except this (rule)".

I say: "This and other issues have been mentioned by the Mālikīs as examples of the principles of *al-maṣāliḥ al-mursalah* whereas the Ḥanafīs have mentioned them under *istiḥsān*". See, *Kitāb al-Ijārah min al-Durar Sharḥ al-Ghurar*, 2/237.

This supports what we shall later mention in our discussion of *al-maṣāliḥ al-mursalah* that the theory of *al-maṣāliḥ* among the Mālikī jurists is equivalent to the expanded version of *istiḥsān* among the Ḥanafī jurists.

27 An example of a case where it is necessary to pay on behalf of another party is when a person pledges his property as collateral to secure another person's debt. If the debtor does not clear his debt, and the property owner wants back his property, he will have to pay the debt on behalf of the other party, and then claim refund from the debtor, and in this case he is not considered a donor. See *al-Durr al-Mukhtār wa-Radd al-Muḥtār*, 5/331.

is a donor. He must therefore, return to the instructor the amount he was given.

However, based on juristic preference, the *fuqahā'* said the instructee will not be considered as a donor for facilitating the mutual assistance and removing any difficulties thereof. Hence, he will set off what he paid with what he holds from the wealth of the instructor (see *Radd al-Muḥtār, Bāb al-Wikālah*, 4/415).

3. Things that are ordinary sold by measure or weight are legally considered as *ribawi* (usurious) which involve *ribā al-faḍl*, that is, it is not permissible to loan any of these items and receive more than the loaned amount or exchange two items of the same genus but one of them in excess.

   However, based on juristic preference, the Ḥanafis have moved from the *qiyās* and permitted the borrowing of bread in numbers among neighbors, though the slices might normally vary in weight). They looked at the necessity and need of people away from the idea of *ribā* or making profits from such operations, because the difference in weight among the breads is customarily insignificant and ignorable[28] (see *Radd al-Muḥtār*, 4/172 and 187). This is also the view of the *ijtihād* of (the Mālikīs).

4/7 These are but a few of the numerous examples, in the Ḥanafī *fiqh*, of the issues that emanate from both types of jurisprudential preferences namely, analogical juristic preference analogy and juristic preference of necessity.

From here, it becomes clear that *istiḥsān* is given precedence over *qiyās* when the two contradict each other.

Concerning this matter, the *fuqahā'* say, "When it is mentioned in any issue that a ruling derived by *qiyās* is such and such, but by *istiḥsān* it is the opposite, then the ruling by *istiḥsān* is the one that prevails

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[28] The same opinion should be considered when exchanging silver coins and its likes with its smaller divisions when the weight of the smaller divisions is more or less than the weight of the piece exchanged with.

Today, some of them go to the extreme of making such an exchange sinful without justification, whereas this type of exchange is a dire need than the exchange of bread. This is because the exchangeable parts and the part with which they are exchanged are customarily equal in value, and do not qualify to being a means to *ribā* and making profits.

and that should be followed." This is because *istiḥsān* in actual sense is a remedy for the anticipated problems that arise from the use of *qiyās*.

4/8 Critique of the Traditional Classification of *Istiḥsān*

From the preceding discussion on the meaning of *istiḥsān* and its position among the legislative sources and their proofs, where it is actually an alternate way of remedying the ill and extreme outcomes of simply applying *qiyās* in some issues, we say:

The majority of the Ḥanafīs of *uṣūl al-fiqh* divide *istiḥsān* into four types: the two types discussed previously, and two more types, which are:

- *Istiḥsān al-Sunnah* which according to them is the departure from the analogical ruling *(qiyās)* to another ruling that is confirmed by the *Sunnah.*
- *Istiḥsān al-ijmāʿ*, which is also a departure from the analogical ruling *(qiyās)* to another ruling upon which the scholars have agreed by consensus. For example, the contract of *istiṣnāʿ* that was discussed under *ijmāʿ*.[29]

It is clear that indeed the generalization and categorisation of the technical meaning of *istiḥsān* is not appropriate; rather it is an inclusion of something that is not in its place.

From the preceding discussion, it is clear that the confirmed ruling of what they term as juristic preference by *Sunnah* or *ijmāʿ*, is indeed attributed to either the *Sunnah* or *ijmāʿ*, i.e. to the text of the legislator and to that of the same rulings and not to *qiyās* or *istiḥsān*.

The intended *istiḥsān* is the departure of a *faqīh*, who extracts the law, from the ruling of *qiyās* where *qiyās* is permissible due to the absence of a legislative text *(naṣṣ tashrīʿī)*. Since the *Qur'ān*, the *Sunnah*, and *ijmāʿ* are the three fundamental sources that precede *qiyās* in ranking, that there is no chance for *qiyās* or *istiḥsān* exept when no rules are found in the three sources.

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[29] See *Kashf al-Asrār* by Shaykh ʿAbd al-ʿAzīz al-Bukhārī; *Sharḥ al-Uṣūl* by Fakhr al-Islām al-Bazdawī, 4/3; and *Abū Ḥanīfah* by Shaykh Muḥammad Abū Zahrah, pt. 2, para 174.

Thus, using the term *istiḥsān* for the two extra types is a misclassification and an excessive amplification of the term *istiḥsān* that would lead to confusion in distinguishing facts.[30]

As a matter of fact, a departure from similar analogical situations due to a particular interest observed by the legislator is considered the legislator's preference, which is not the subject of discussion. The theme of the discussion is on juristic preference by a *faqīh* who extracts laws and implement the texts of the legislator and deduce from them, and make preference under the guidance of the objectives of the law.[31]

4/9 Abū Ḥanīfah and the followers of his school have been famous for the methodology of *istiḥsān,* and formulating laws on its basis. They were so skilled in the preferential extraction that they departed from plenty of extreme *qiyās* when such analogical deductions lead to a problem in implementing *maṣlaḥah*.[32]

The Mālikī School has also relied on the methodology of *istiḥsān* and in fact used it more than the Ḥanafīs, except that they do not term it hidden *qiyās* as the Ḥauafīs do. To the Mālikīs, *Istiḥsān* is to abandon the apparent analogy due to one of the following three factors: When the apparent analogy contradicts a domiuant custom,

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30 The reason of the amplification of the term *istiḥsān* by its proponents is to prove wrong their opponents who consider *istiḥsān* as a mere expression of an opinion and an inclination without any legal proof. Hence, the advocates of *istiḥsān* wanted to prove to their opponents that the original meaning of *istiḥsān* is to rely on the *Sunnah* or *ijmā'* or *qiyās*.

31 The difference between legislative preference *(istiḥsān al-shāri')* and juristic preference *(istiḥsān al-faqīh)* is close to the difference between what the scholars of the modern law term as legal presumption and judicial presumption.

Legal presumption *(al-qarā'in al-qānūniyyah)* is a rule of law which permits a court to assume that a fact is true, and a judge camot infer or draw any conclusion, i.e. the lapse of a certain right.

Judicial presumption *(al-qarā'in al-qaḍā'iyyah)* is an inference, which is a conclusion that a judge or jury may draw from the proof of certain facts if such facts would lead a reasonable person of average intelligence to reach the same conclusion.

The difference between the two is such that the former draws on the evidence of the legislator while the latter draws from the evidence of the judge.

32 It is reported that Abū Ḥanīfah was using *qiyās* unless it led to an extreme ruling then he would depart to *istiḥsān*.

His student, Muḥammad ihn Ḥasan al-Shaybānī said: "When Abū Ḥanīfah was using *qiyās*, his companions who use *qiyās* would argue with him. But when he said he is using *istiḥsān,* no one would argue with him". See *Abū Ḥanīfah* part 2, para 172; and *Mālik* part 2, para 172, both written by Abū Zahrah.

that is, a common habit or contradicts a paramount *maṣlaḥah* or leads to hardship and difficulty.

Thus, the preferential ruling *(al-ḥukm al-istiḥsānī)* to the Mālikīs is also a form of favoring partial interest in a particular ruling where the analogical principles require a different ruling. This is because the *Sharī'ah* is replete with texts that necessitate the consideration of *maṣlaḥah* and prevention of hardship. For instance, Allāh says, "*Allāh desires ease for you, He does not desire for you difficulty*" (Al-Baqarah, 2:185), and He also says, "*...and has not laid upon you any hardship in the religion*" (Al-Ḥajj, 22:78). The Prophet (s.a.w.) also said, "*Harm shall not be caused nor reciprocated*".[33] The Mālikī jurist, al-Qāḍī Ibn Rushd al-Ḥafīd said in his *Bidāyat al-Mujtahid* (2/154): "The meaning of *istiḥsān* in most situations is to turn to the *maṣlaḥah* and justice". This in actuality is the counterpart of *ijtihād* in the Ḥanafī.

4/10 Among the examples that clearly show the extreme nature of applying apparent *qiyās* with regard to their extrapolation by *istiḥsān*, and the differences in *ijtihād* is the famous issue in inheritance known as *al-mas'alah al-mushtarikah* (the joint issue). In this issue, a woman dies leaving behind her husband, mother, two uterine brothers, and two germane brothers. All of them except the full brothers are heirs of fixed shares. The full brothers are among the agnate relatives who, according to the law of inheritance, receive what is left after giving the heirs of fixed shares.

Thus, the import of the analogical principles in this case is that the two uterine brothers inherit while the germane brothers do not. This is because the allotted share of inheritance for the husband is half of the deceased's wealth, for the mother one-sixth, and for the uterine brother one-third. This way, nothing is left for the germane brothers who are agnates *('aṣabah)*.[34] This result is in a problem that

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[33] *Ḥadīth* no. 32 of *al-Arba'īn al-Nawawiyyah*. Al-Nawawī said: "This is a *ḥadīth ḥasan*, which is narranted by Ibn Mājah, al-Dārquṭnī and other as *Musnad*. Also it is narrated by Mālik in *al-Muwaṭṭa'* from Amr ibn Yaḥyā from his father from the prophet as *Mursal*, for he omitted Abū Sa'īd al-Khuḍrī. Nonetheless, it has multiple chains of transmission that they strengthen each other.

[34] *'Aṣabah* in the inheritance terminology is every male relative linked to the deceased via a pure male channel, that is, there is no female in his affinity to the deceased, eg. the father's brother and his son and brother and his son. They are unlike father's sister who is a female relative and mother's brother and his son who are linked to the deceased via a mother who is a female.

is really strange: the uterine brothers inherit while the germane brothers are deprived. Nonetheless, some companions of the Prophet (s.a.w.) and the two schools of *ijtihād* of Ḥanafī and Hanbali have adopted this opinion.

However, 'Umar ibn Khaṭṭāb and another group of companions, may Allāh be pleased with them, opined that the germane brothers share with the maternal brothers in their share of one-third, by juristic preference, considering that all are from the same mother. Hence the germane brothers share with the uterine brothers in the same cause of inheritance on the part of mother. In doing so, 'Umar (may Allāh be pleased with him) had initiated the way of *istiḥsān* that establishes justice and eliminates hardship. This opinion has been adopted by the schools of Mālikī and al-Shāfiʿī, and it is the most reasonable.

It is also reported that when this case was raised before 'Umar (may Allāh be pleased with him), he first opined that the uterine brothers should get a third and nothing remains for the full brothers. The latter then said: "Assume that our father was a donkey, are we not from the same mother?" Thus, 'Umar (may Allāh be pleased with him) withdrew his opinion and ruled that they should all share in the one-third (see *Iʿlām al-Muwaqqiʿīn* by Ibn al-Qayyim, 2/48; *Bidāyat al-Mujtahid* by Ibn Rushd, 2/290; *Sharḥ al-Manẓūmah al-Raḥbiyyah li'l-Sabt al-Marīdinī, "bāb al-mas'alah al-mushtarikah")*.[35]

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[35] The Egyptian government amended special law that was passed in 1365 = 1946 changing from the Ḥanafī School to make practice compulsory jointly according to the schools of the Mālikī and Shāfiʿī. And that was right. The Syria as well did it in its new Personal Laws in 1953.

SECTION 5

THE SECONDARY SOURCES (OF LEGISLATION)

5/1 *Istiṣlāḥ* is the establishment of the rules of *fiqh* on the basis of Unrestricted Public Interest (*al-Maṣāliḥ al-Mursalah*).[36]

***Al-Maṣāliḥ al-Mursalah* refers to every benefit that has not been considered in tbe texts of *Sharī'ah* by itself or its type.**

These benefits come under general benefits that are manifested in [the principle of] acquiring benefits and avoiding harm. Such benefits are those that the *Sharī'ah* has come for their realisation and its texts and principles have implied on its continual observation and consideration that all the aspects of life are organised, yet the legislator did not specify them. Because of this, they are called as *mursalah,* i.e. unregulated and unrestricted.

In situations where specifically the interest has been mentioned in a particular text like the benefit of writing the *Qur'ān* to preserve it, and the teaching the reading and the writing[37] or where the interest by its kind is mentioned in a general text signifying its import like the necessity of teaching knowledge in general, and enjoining all types of good and forbidding all types of evil, then it becomes among the benefits that is textually stated, in specific or in kind, but not among the Unrestricted Public Interest. Thus, its ruling is confirmed by the text, not by the principle of *istiṣlāḥ*.

5.2 Explanation of the Notion of Benefits and Harm

In a general elaboration of the notion of benefits and harm in Islām, we say: benefit is the opposite of harm, and each of them is discussed

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[36] *Istiṣlāḥ* is a new terminology that was coined by Imām al-Ghazālī in contrast to the word *istiḥsān*. It is better than the word *al-maṣāliḥ al-mursalah* as the former denotes the process of establishing rulings while the latter does not.

[37] It is firmly established that the Prophet (s.a.w.) had scribes who were tasked with transcribing the *Qur'ān* when it was revealed. It is also established that he set the ransom for prisoners on the Battle of Badr that each life rate idolator shall teach ten illetarate Muslims to read and write.

from two dimensions: (1) The subjective meaning of benefit and harm; (2) The Legislator's perspective of considering benefit and harm.

5/3 (A) The Subjective Meaning of *Maṣlaḥah* (Benefit) and *Mafsadah* (Harm)

Maṣlaḥah is defined subjectively as an absolute benefit while *mafsadah* as absolute harm regardless of whether the benefit and harm are individual or collective, dominant or minor, urgent or delayed, etc.

Thus, knowledge, profit, enjoyment, comfort, amusement, health and the like are all benefits in themselves, which are advantageous to those who are involved in them regardless of how they are achieved.

Conversely, ignorance, loss, pain, fatigue etc, are all detriments in themselves and harmful to those involved in them.

However, this subjective consideration in defining *maṣlaḥah* and *mafsadah* is limited. It is neither adequate nor appropriate for making it the basis of establishing legal rulings. This is because a temporary enjoyment like drinking wine may consequently lead to pains or detriments to the soul, family or wealth of the person involved and others. Similarly, comfort may lead to great loss and fatigue. Profit may also be, in some instances, a result of injustice to others or achieved in dishonorable ways that are more detrimental than the profit.

On the contrary, we may find that some pains may lead to better outcomes such as the pains of healing and treatment, and so are some troubles and difficulties. Thus, in spite of the detriments caused by *jihād* (holy war) to the souls and wealth, the survival of the present and future generations and their security are dependent on it.

Therefore, it is imperative that another criterion, other than the snbjective meaning, is adopted for the *maṣlaḥah* and *mafsadah* in which the general legislation is established. The criterion should take into consideration the benefit of an individual as well as society, and balance urgent needs with delayed outcomes. Hence, no benefit or harm is considered except that which has been considered by the Legislator in order to cut off the chaos and conflict of individual criteria. As a resnlt, the consideration in this case would only be the one made by the *Sharīʿah* legislation.

5/4 (B) The Legislative Consideration of *Maṣlaḥah* and *Mafsadah*

The benefits and harm that are regarded as criterion for enjoining good and forbidding evil in the Islamic legislation are the ones that are respectively congruent or in conflict with the objectives of the law. The foremost objective of the law is the protection of the five essential elements necessary for the human well-being, namely, religion, self, intellect, offspring and wealth. Thereafter, the protection of other elements that is needed for the human well-being but is below the five essential ones in their significance. All the divine legislations and even the positive ones have agreed upon the obligation of honoring and protecting the five essential elements. None of the religions has ever permitted breaching the five essentials as mentioned by al-Ghazāli in *al-Mustasfā*.

Based on this, we find that the scholars of *fiqh* have divided deeds and behaviours, which are considered among the benefits from the *Sharīʿah* perspectives, and according to the inferences of the legal texts and rulings, into three classes:

1. *Ḍarūriyyāt* (Necessities)

These are the deeds and behaviours on which the protection of the five essential elements is dependent. The legal perspective is that the five elements are inevitable for the well-being of human kind such that if some of them are absent, the human life would collapse or be disturbed and corrupted.

For this reason, the acts of worship were legitimized; and eating, drinking, and wearing of what covers the private parts was permitted, and in fact obligated. Similarly, the rulings of transactions were regulated in order to protect rights and wealth. In the same way, penalties and financial obligations were legitimized as restraint against hostility and compensation for (breached) rights.

Therefore, the deeds that are considered of necessary benefits are those that comply with the five essential aspects of human life.

2. *Ḥājiyyāt* (Needs)

Needs are the deeds and behaviours ou which the protection of the five essential elements is not dependent, yet they are needed

for convenience and avoiding hardship. For instance, the permissibility of hunting and enjoyment of good things, which a person may forego but with some hardships, the legitimization of lease contract, and many other types of transactions.

Opening the way to leasing in civil transactions is a response to the great need of people since each of them would be able to benefit from the possession of others in return for a little compensation with respect to the leased property. If the way to leasing was blocked, people's lives would not stop, and their situations would not deteriorate, but they would face great hardship because a person would be forced to own the essence of a property even though he would need it temporarily.

3. *Takmīliyyāt* (Supplements) or *Taḥsīniyyāt* (Emblellishment or Beautifying)

These are the deeds and behaviours which do not cause any hardship to life when absent but observing them is part of good morals or beautiful traditions. Thus, they fall under completing what befits the human well-being and abstaining from what does not befit it such as the manners of talking, eating, and drinking; tolerability in appearance; and prudence in expenditure such that there is neither extravagance nor parsimony.

As a result, the rulings that were legitimized for the protection of the essential elements are the most important rulings, and the most imperative to be observed. They are followed by the rulings which are legitimized to secure the needs, and finally the rulings legitimized for beautifying and supplementing.

A ruling of *taḥsīniyyāt* is however, not observed if its observance would lead to breach of a necessity or a need, because a branch is not maintained if its maintenance leads to breaching the root. Because of this, it is legally permitted to disclose the *ʿawrāt* when there is need to do so like in diagnosing a disease, treatment or surgical operation because hiding a private part is among the beautifying elements which promote morality, whereas treatment is a necessity meant to preserve life or intellect or offspring (see *Uṣūl al-Fiqh* by Shaykh ʻAbd al-Wahhāb al-Khallāf, p. 163; *al-Madkhal ilā ʻIlm Uṣūl al-Fiqh*, by fellow Professor Dr. Maʻrūf al-Dawālibi, p. 416-417).

These are the foundations which the Islamic legislation is considering when weighing the *maṣāliḥ al-mursalah* with all its types and levels. They reflect on the objectives of the law as evidenced by its texts' inferences in different topics, issues and rulings.

Therefore, everything that upholds the objectives of the *Sharīʿah* and helps in accomplishing them is a benefit which is demanded either strongly or lightly depending on its position in the inferences of the three classes. Conversely, everything that violates the objectives of the *Sharīʿah* is a detriment which is forbidden either strongly or weakly depending on the type of the objective of the *Sharīʿah* that it violates.[38]

From the preceding discussion, it becomes clear that some of the *taḥsīniyyāt* are a part of *mandūbāt*, meaning, they are demanded lightly in the form of priority such as the manners of eating; while others are among the *farā'id*, that is, they are legally demanded in the form of injunction and obligation such as covering the *ʿawrāt*. This is because the meaning of something being a beautifier is that people can forego it in their materialistic lives without any hardship, but it may be among the things which the moral and abstract considerations put obligations on people.

5/5 Everything has a duo direction of benefit and harm, but consideration is for the dominant

It is admissible that everything has a beneficial aspect as well as detrimental aspect, and both are either equal or different. If the beneficial aspect dominates, it is a benefit in the technical context even if it contains minor harm. On the other hand, if the harmful aspect dominates, it is a detriment in the technical context even if it contains a minor benefit. As such, any action that has a dual feature is affiliated to the dominant benefit or harm.

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[38] Imām al-Ghazālī in his *al-Mustasfā* has explained the foundations of unrestricted benefits and their three classes: *al-ḍarūriyyāt al-khams, al-ḥājiyyāt, al-taḥsīniyyāt*.

Later on, Imām Abū Isḥāq al-Shāṭibī explained them in an unprecedented detail with justification and analysis in his book, *al-Muwāfaqāt fī Uṣūl al-Sharīʿah*.

They were then discussed in our contemporary like Shaykh Muḥammad Abū Zahrah in his book, *Mālik*, with an interesting discussion and finally analyzed with useful additions by Shaykh Muḥammad al-Ṭāhir ibn ʿĀshūr, a Tunisian scholar, in his book, *Maqāṣid al-Sharīʿah al-Islāmiyyah* (Tunisia, 1366H).

On the basis of this rule, everything or action is either legitimized or forbidden depending on the dominance of either its benefit or harm, not because it is pure benefit or pure harm. All this is determined by the consideration of the Legislator.

In such a situation, it is resolved that the subordinate part of either benefit or harm is not intended by the Legislator in His orders of commanding and forbidding. Instead, it is ignored at the expense of the dominant side.

In those actions or things which are desired, the subordinate part of harm resembles thorns in a path that leads to achieving the goal. These thorns are not intended to be there by the traveller. Likewise, in those actions or things which are unpleasant, the subordinate part of the benefit resembles a materialistic profit from an indecent business that human kind denounces. Thus, the profit is not the main purpose of forbidding the indecent business, rather; the avoidance of the indecent business itself.

It is also resolved that the benefits which are considered and observed by the legislation have no consideration of whether they correspond to the desires of human kind and their lust or they do not. They are meant to serve the affairs of the world such that it becomes the bridge to the Hereafter. Hence, the establishment of good and honorable life that leads to helping each other in good and righteousness.

Imām al-Shāṭibī has elaborated this meaning with detailed evidences in his *al-Muwāfaqāt* (2/26-27) where he said, "And all these views are based on the fact that benefits are legitimized in order to establish this world, not to obtain lust or to respond to the call of desire".

5/6 Factors that call for *Istiṣlāḥ*

After the preceding discussion, we can divide the factors and motives that make a *Sharʿī* a legal *faqīh* or a commanding ruler to resort to the principle of *istiṣlāḥ* to create new rulings under the purview of the *Sharīʿah*, into four factors:

1. **Acquiring of Benefits** *(jalb al-maṣāliḥ)*: These are the things that a society needs to establish people's life on the strongest foundation such as imposing fair taxes when there is need for the purpose of financing public services and key useful projects.

2. **Averting Harm** *(dar' al-mafāsid):* These are the things that are detrimental to human kind; individual or collective, regardless of whether the harm is material or behavioral. The criterion for harm is the principles of *Sharīʿah* and its objectives that emanate from its permanent texts, and from which the Islamic system is formulated.

3. **Blocking the Means** *(sadd al-dharā'iʿ):* This means preventing all the ways that lead to neglecting the orders of the *Sharīʿah* or circumventing them, or that lead to falling into illegal dangers even without intention.

4. **Changing Time** *(taghayyur al-zamān):* i.e., the changing of people's situation and the general conditions of life from what they were before.

Each of the above four factors calls for adopting the method of Consideration of Public Interest *(istiṣlāḥ)* by creating new relevant rulings that accomplish the objectives of the *Sharīʿah* in establishing the social life on the best path, and subsequently producing the best outcomes.

The meaning and examples of the first two factors, namely acquisition of benefits and averting harm, have been discussed previously, and we shall see more of their examples in our discussion on the types of rulings which are based on the theory Unrestricted Public Interests. The other two factors namely blocking the means and change of time shall be discussed briefly below:

5/7 Blocking the Means (*Sadd Al-Dharā'iʿ*)[39]

Dharīʿah (pl. *Dharā'iʿ*) literally refers to the means to which a human resorts in any given matter.

From the perspective of the Legislator, most illegal actions and behaviours are not *ipso facto* forbidden, rather; they are prohibited contrary to their original rule because they are potential paths to

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[39] A thesis about this topic is written by Muḥammad Hishām al-Burhānī which was published by Maṭba'at al-Rayḥānī, Beirut, 1406H/1985, 880 pages.

illegal actions including non-deliberate ones or they are means of circumventing the law.

Thus, any means that leads to illegal things, with or without intention, is legally prohibited. This foundation, in the terminologies of *fuqahā'* and scholars of *uṣūl al-fiqh* is termed as the principle of blocking the means, which is a vast topic linked to legal policy. As such, it is considered part of *istiṣlāḥ*.

The principle of blocking the means is supported by numerous texts from the Holy Book and the *Sunnah*. Among the supporting texts in the Book is the prohibition of insulting the deities of the idolaters so as not to spur their rage and in turn they insult Allāh the Almighty out of ignorance and hostility. Allāh says: "*And do not abuse those whom they call upon besides Allāh, lest exceeding the limits they should abuse Allāh out of ignorance*" (al-Anʿām, 6:108).

Similarly, the *Qur'ān* has prohibited marrying a woman during her waiting period after divorce or the death of her husband until her waiting period (*'iddah*) ends. The purpose is to prevent the marriage from causing any breach of the serious duties of *'iddah* which are required for maintaining the family system and the previous marital rights. Because of this, engaging in a marriage contract with a woman during her waiting period, even without intercourse, is legally void.

Among the supporting evidence for the principle of blocking the means from the *Sunnah* is the Prophet's prohibition of constructing mosques on graves so that it does not lead to worshipping the dead who were once great people.

Likewise, the Prophet (s.a.w.) prohibited a *waṣiyyah* for an heir so that it is not used as means to favoring some heirs over others in a way of circumventing the laws of inheritance. This type of favoring is legally prohibited as we shall see (para 23/8).[40]

Similarly, the Prophet (s.a.w.) forbade the close proximity of a man with an *ajnabī* (woman whom he can marry) because such close proximity (*khulwah*) is tantamount to an evil temptation, which must to be averted.

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[40] This is the opinion of majority of the Muslim jurists. However, the Zaydiyyah, and the Imāmiyyah opine that a *waṣiyyah* for an heir is executable within a third of the deceased's wealth. Their proof is that the Prophet's saying: *"No waṣiyyah for an heir"* after the revelation of the verses of inheritance is an abrogation of the obligation to make a bequest for an heir, which was the case before the legislation of inheritance. Thus, after the abrogation, the ruling is permissibility.

From the preceding examples, the following observations are noted:

1. The *Sharī'ah* has adopted the principle of blocking the means in both religious matters such as prohibiting the construction of mosques in graves, and civil matters such as the *waṣiyyah* for an heir.

2. The focus point of blocking the means is not the ill intention of the pepetrator, but the mere fact that it leads to an outcome that is denied by the law, even if the pepetrator's intention is good. For this purpose, the *Qur'ān* forbade abusing the idols of the idolaters even though the abuser is abusing out of his faith in Allāh and defense for His religion.

Based on these and other similar texts that are connected to the wisdom and policy of legislation, which lead to the principle of blocking the means, the *mujtahid fuqahā'* have resolved several issues on the basis of this principle.

Among the issues resolved in more than one school of *ijtihād* is that a wife who is divorced under *talāq al-firār*[41] is entitled to inherit from the husband who divorced her. This is to prevent the husband from using his right to divorce as means to denying his wife her legal inheritance with the intention of harming her. This is a form of preventing abuse of exercising rights because allowing people to abuse them is not beneficial.

The *fuqahā'* have also resolved that when a seller stipulates in a sale contract that he is not responsible for hidden defects that may appear in a sold item, he is not held responsible towards the buyer as per the condition of the contract. However, if the seller knows about the defect and hides it from the buyer when initiating the contract, he will be held responsible for the defect even if he stipulates otherwise.

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[41] *Ṭalāq al-Firār* is a term used in the Ḥanafī school (known to our new personal statutes law as abusive divorce) is when a man issues an irrevocable divorce to his wife without her willingness in his terminal illness with the intention of depriving her of her share of inheritance. Thus, the *fuqahā'* have ruled that she inherits as long as she is in the *'iddah* even if the husband divorced her without the intention of disinheriting her, so as to block the means. See, the appendix of this section for more details.

The purpose is to prevent the use of the principle of respecting terms of contracts as a mean to cheating and ill intentions.

Based on this opinion, 'Uthmān ibn 'Affān (may Allāh be pleased with him) issued a verdict in an incidence that occurred during his time. It is also the opinion of the Mālikī (see my book *'Aqd al-Bay*ʿ, para 127, and *Bidāyat al-Mujtahid*, 2/153-154).[42]

5/8 Change of Time *(Taghayyur al-Zamān)*

Among the reasons for changing the rulings derived by *ijtihād* in the *fiqh* of the *Sharīʿah* is the change of time-dependent means from what they were before when the rulings were resolved. This is cansed by either a development in situations, administrative and organizational methods as well as changes in vital means such as the emergence of electrical instruments, laboratories and motor vehicles that have changed the direction of life in our contemporary time or an emerging corruption in the general morality of people. In this respect, the *fuqahā'* have resolved the famous maxim that reads, *"It cannot be denied that changes in ruling follows changes in time"*.

In this context, the eminent scholar, Ibn 'Ābidin says in his article, *Nashr al-'Arf:*

"Most of rulings are resolved by a *mujtahid* based on the situation during his time. The rulings then change with the change of time as a result of either the changing of people's custom or emergence of a necessity (*ḥudūth ḍarūrah*) or corruption of the people of that time (*fasād ahl al-zamān*) such that if the previous ruling prevailed, it would be detrimental to people and conflicting with the principles of the *Sharīʿah* that are founded on lightening, easing, and aversion of harm and corruption to ensure that the system remains in the best perfection. For this reason, you will notice that the Muslim jurists of each school have defied what has been mentioned by a *mujtahid* in

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[42] This ruling corresponds with what is mentioned in many places in the Syrian civil law. For example, the condition by the seller that he bears no guarantee for destuation or defective title or underestimation of guarantee is void if the seller's intention is ill i.e. he is hiding a defect in the commodity or other person's right in the commodity with full knowledge of the same (CL 413 & 421).

The *ijtihād* of the Ḥanafīs, however, permits the seller's stipulation of not guaranteeing the defects even if he has ill intention i.e. hiding a defect with knowledge, but there is no doubt that the *ijtihād* of the Mālikīs in this is more appropriate and relevant with the wisdom and objectives of the law.

many places which he based on the conditions of his time, because of their knowledge that if he was in their time he would have said what they have opined according to the principles of his school…".

The scholar, may Allāh have mercy on him, then, illustrated the aforementioned opinion with many examples, some of which are mentioned below:

- In the classic version of the Ḥanafī School, coercion was not considered an excuse for the coerced person except when the coercion is from the ruler himself or through his order. This is because the ruler's authority prevents people from coercing each other into an action or a contract, and if it happens, the coerced person can resort to the ruler (for help). However, if coercion comes from by the ruler himself, there is no other authority to resort to as all the power lies with him.

  The jurists who came after them however, noticed that time has made people change and overpower each other under the protection of the ruler, and that there was no restriction. Therefore, they issued a *fatwā* that coercion is considered an excuse that influences the responsibilities of the coerced person on actions and contracts that he undertook under coercion, even if it is not from the ruler.

- The classical jurists also permitted the leasing of *waqf* estates irrespective of the period of leasing.

  Nevertheless, contemporary jurists, after seeing the increase in usurpation of *waqf* properties by its executors in collusion with some of the *waqf* managers, issued a *fatwā* that prevented leasing of more than one year for constructed shops and houses; and more than three years for agricultural lands. This is for fear that the lessee may use the long duration of leasing as a proof to claim his ownership of the leased property at the end of the contract. Thus, renewing the contract within short durations prevents such fouls (see *Majmū'ah Rasā'il Ibn Ābidīn*, 2/125-126).

  Given this note, we shall revisit the topic on change of time and its impact on changing the rulings in a separate discussion where we shall cover it in much details and elaboration under the title, theory of *'urf*, in sections 76 to 78.

5/9 Compare and Contrast between Consideration of Public Interest (*Istiṣlāḥ*) and Juristic Preference (*Istiḥsān*)

Juristic preference *(Istiḥsān)* according to the Ḥanafīs, as we saw, is of two types:

The first type i.e., analogical juristic preference *(istiḥsān qiyāsī)*, is a form of analogy *(qiyās)* because it is the favoring of a *qiyās* that is vague in form and strong in substance over an obvious apparent *qiyās* when there are multiple methods of analogy which conflict with each other in a given matter.

The second type is the juristic preference of necessity, which is actually a form of consideration of public interest *(istiṣlāḥ)*, that is, a branch of the principle of unrestricted interests because it involves the departure from the import of ruling of *qiyās* to another ruling if the former leads to unusual inconvenience or major harm, that is, a harm which is greater than the anticipated benefit. The rationale for this is that the general Islamic methodology is based on the foundation of discarding inconvenience, and removing major harm from its rulings.

However, for the Mālikīs, *istiḥsān* is a branch of the theory of public interests *(masalih)* because to them *Istiḥsān* is one type, which is the departure from *qiyās* in a particular case observing a benefit that collides with it.

Therefore, they do not term the hidden *qiyās* as *istiḥsān* rather it is still a *qiyās* in its origimal terminology.

However, there is one point which is considered as the distinguishing element between juristic preference (*istiḥsān)* and the principle of unrestricted benefits (*al-maṣāliḥ al-mursalah*). It is that, a juristic preferential ruling in any case is what goes against the import of analogical principles in that case in the form of an exemption from those principles, that is for the purpose of either observing general benefit like in the case of holding general workers liable for their customer's goods (see para 4/6), and hastening the dissolution of marriage when a husband is declared missing (see para 5/12) or observing partial beneficial right.[43]

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[43] Among the examples cited by the Mālikīs for *istiḥsān* that is based on observing partial beneficial right is when a person buys a commodity with a condition that he reserves the right to conclude or rescind the contract within a stipulated time, which is known as stipulated option (*khiyār al-sharṭ*), but he dies before the expiry of the stipulated

On the other hand, in *al-maṣlaḥah al-mursalah* on which the consideration of public interest *(istiṣlāḥ)* is built, it is not necessary that it goes against a conflicting *qiyās*. It is possible that a ruling established by unrestricted interest is under the general affairs which the *Sharīʿah* has no opposing evidence. Instead, the benefit found in it is the sole evidence. For example, imposing taxes where there is need; and determining criminal penalties to avoid chaos in rulings caused by differences in ruler's views; government's order that people should be judged using a particular school of *fiqh* or codification of civil rulings selected from numerous reliable schools of *fiqh* so that people are aware of the outcome of their transactions and contracts, and the direction of the court's ruling in advance and clear manner.

All the above and similar matters which emerge as needs and are infinite, but in the *Sharīʿah,* there are no analogical indicators that imply otherwise, indeed, they are pure *istiṣlāḥ*.

In his book, *al-Iʿtiṣām,* after mentioning issues under the forms of *istiḥsān* according to Imām Mālik, Imām Abū Isḥāq al-Shāṭibī says:

"If it is said, "These issues are under unrestricted interests, not under juristic preference", we reply, "Yes, but the jurists have formulated juristic preference as an exemption from *fiqh* maxims, and this is not the case with *al-maṣāliḥ al-mursalah*" (*al-Istiḥsān*, 2/324).[44]

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time. In this case, his heirs diffesee some of them are willing to conclude the contract while others oppose, and the seller has refused to divide the sale. According to *qiyās*, the sale contract becomes void altogether. But the Mālikīs, however, preferred that the seller executes the contract if the heirs, who agreed to conclude the contract, also agree to take the share of those who refused. This is in order to observe the benefit of the heirs without causing detriment to the seller who refused to divide the sale.

But the *Istiḥsān* applied in this issue does not apply in the Ḥanafī school because it is resolved in their school that a stipulated option is not inheritable. Thus, with the death of the owner of option within the stipulated time, the contract is concluded and the buyer's full ownership of the commodity is completely established if he owns the option, otherwise, if the option is for the seller and he dies, the ownership is confirmed to his heirs. See *al-Majallah,* 306.

44 In his book, *Mālik,* Shaykh Muḥammad Abū Zahrah comments on the above statement of al-Shāṭibī by saying: "The meaning of this statement is that *istiḥsān* is a partial exemption in contrast to general evidence that has some exemptions. But unregulated benefits are found where there is no other evidence except it".

We, however, find that preferring partial benefits, that is, *istiḥsān* is no doubt an adoption of the principle of unregulated benefits. For this reason, the Mālikīs say: "*Istiḥsān* is to prefer unregulated evidence, that is, the evidence of unregulated benefit to the evidence by *qiyās*. This leads to the conclusion that *maṣlaḥah* applies on two situations:

5/10 Types of Rulings which are established by the Theory of *al-Maṣāliḥ al-Mursalah*

The rulings that are established through the principle of *al-maṣāliḥ al-mursalah* may be categorized into two classes:

1. Rulings related to the affairs of general management that organized the welfare of the society, i.e, those types of planning related to the organizing of the public affairs and welfare, such as levies on capable people when there is a need for public services such as funding the armed forces, constructing bridges, urban planning, population census, constructing roads, establishing hospitals and elderly houses, and all other social amenities that eliminate misery, provide employment, and eusure relevant standard of living for people and the necessary facilities for their lives.

   For all those and other similar benefits which are vital, familiar and required for public sustenance, members of the society must cooperate and finance them according to their individual capabilities as per the law of the *Qur'ān* which states, "*...and help one another in goodness and piety, and do not help one another in sin and aggression...*" (al-Mā'idah, 5/2).

   Thus, the establishment of necessary institutions for every project of such nature and financing them through fair levy collections as per the need, are rulings of *istiṣlāḥ*.

   Another example of this type of *al-maṣāliḥ al-mursalah* is the fixing of commodity prices so that vendors do not charge excessive profits, and manipulate people's needs.

First: When there is no *qiyās* that is based on a text. In this case, *maṣlaḥah* becomes the sole evidence, which according to Mālik, is an independent source.

Second: When there is *qiyās* whose application leads to difficulty and inconvenience, or contradicts with an apparent *maṣlaḥah*, in this case it is permitted to abandon *qiyās* because of the achievable benefit and preventable harm. This type that contrasts *qiyās* has been termed as *istiḥsān*" (Excerpted from *Mālik*, part 2, para 179, with minor modifications)".

I say: "It is clear from the preceding comment that the relationship between *istiḥsān* and *istiṣlāḥ* is a form of generality and absolute specification.

Istiṣlāḥ is thus general while *istiḥsān* is specific. Hence, every *istiḥsān* is a kind of *istiṣlāḥ* where *qiyās* has been opposed, but not every *istiṣlāḥ* is *istiḥsān*, because the latter is a method that involves going against the rules of *qiyās*".

Also, the establishment of a state council by the second Caliph, 'Umar ibn al-Khaṭṭāb (may Allāh be pleased with him) for the purpose of managing soldiers wages, their duration of services, etc. After that, the councils were extended to other welfare issues.

Under this category also, is the management of traffic in our modern times in both internal and external routes through specialized systems in order to prevent road carnage and collisions, and to protect people's lives.

All the above examples are the requirements of the general jurisdiction of the supreme authority in a state, be he a Caliph or any other title. Such a supreme leader is entitled to organize the situations, establish institutions, initiate the necessary systems for establishing these tasks and finance and manage them, and impose penalties on the violators in accordance with the emerging trends. All this is in compliance with the principle of the *Sharīʿah* and its objectives.

2. Rulings which are related to the judicial system and special rights. Hereunder are realistic examples of both the two themes:

5/11 First: The Judicial System (*al-Niẓām al-Qaḍā'ī*)

Some examples that fall under this type are the following procedures and rulings:

1. Allocation of judiciaries according to the themes such that for every type of lawsuit there is a specific court that looks into it, and is restricted from looking into other lawsuits. For instance, criminal courts for prosecuting criminals, law courts for looking into financial complaints, and other specialized courts according to the necessities of time, the huge number of lawsuits and systems, and the specialization in the distribution of work.

2. Dividing the judiciary and the courts into levels (two or three) such that a convicted person can appeal before a higher court which can repeal or modify the ruling if it contains any injustice or fault.

3. Preventing judges from hearing lawsuits neglected by the parties for a specified long time without excuse. This is to avoid suspicion

in the origin of the right and its proof after prescription, to clear the judiciary of the chaos of searching old facts, and to compel people to pursue their rights and not to neglect them. This judicial procedure is known as *taqādum* or *murūr al-zamān* (prescription) that has been approved by contemporary jurists, and upon which the royal orders were issued during the Ottoman period (see para 15/6).

5/12 Second: Special Rights (*al-Ḥuqūq al-Khaṣṣah*)

Examples of this type are the following issues:

1. The ruling of dissolution of marriage between a missing husband[45] and his wife upon her request even if his death is not proven. This ruling applies after the lapse of four years under difficult circumstances such as war or one year under normal conditions. In such a case, the wife is allowed to marry another man after the dissolution of the marriage by a judge and completion of her waiting period. This is to avoid harming the wife by leaving her in suspense throughout her life, even if the missing husband has left enough wealth for her sustenance.

   This was the ruling of 'Umar ibn al-Khaṭṭāb (may Allāh be pleased with him), and on its basis, the *ijtihād* of the Mālikī School was adopted.[46] Also, the Family Law of the Ottoman era, which

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[45] A missing person is the one whose whereabouts are not known, and it cannot be determined whether he is dead or alive. If his life can be determined, he is considered absent and not missing.

[46] The schools of Ḥanafī and Shāfiʿī did not adopt this ruling; instead they adopted the principle of *istiṣḥāb* (presumption of continuity) for both the missing husband and his wealth, although the Shāfiʿī permits the wife of the missing husband to request for separation if he husband did not leave anything for her sustenance.

The principle of *istiṣḥāb* rules that a situation existing previously is presumed to be continuing at present until the contrary is proven. For example, a person who has a debt continues to be a debtor until it is proven that his debt is settled. Conversely, the one who has no debt is presumed the same until ir is proven that he has an obligation of debt payment or any other, and so on.

Thus, the missing husband was alive and is therefore, presumed to be alive until his death is proven. He can also be pronounced dead by overwhelming conjecture if his coevals in his place of living die. The same way his wealth is not distributed among the heirs, his wife also remains under his marriage.

It is clear that this *ijtihād*, although it complies theoretically with analogical principles, leads to great inconvenience for the wife. The rights of a wife are

was applicable to us[47] and the Personal Statutes law together with the Alimony Law of Egypt issued by the Egyptian government in 1920, no. 25, have all adopted the same ruling.

2. The *fatwā* of contemporary jurists of the Ḥanbali School, and later the Ḥanafi School that the financial dispositions of a debtor whose debts equal to his wealth are not executable, even if he is not restricted legally by a court, except in what remains from his wealth after paying his debts. This is to prevent him from using such dispositions like *hibah* (gift) or *waqf* as a pretext to avoid paying his creditors. Thus, anything he disposes from his wealth will be dependent on the permission of the creditors, as will be discussed later (see para 38/5 & 77/2).

3. Legal rulings in our present time, which declare that real estate contracts do not grant the contractor any ownership rights on the property if it not registered with the land or property register. This is for the many organizational and reformatory objectives such as preventing the property owner from manipulating people and defrauding them. For example, he may sell his property to several people sequentially or place his property to the buyers as mortgage while receiving amounts or loans from all of them without their knowledge.[48]

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distinguishable from financial obligations. Thus, if there is no harm or damage in holding the property (of the missing husband) for a long time, there is indeed a great harm in a wife staying for a long period without a husband. Such harm is not approved by the objectives of the *Sharīʿah,* and may consequently lead to evils. Therefore, deriving the *qiyās* of a wife from wealth is a *qiyās* with disparity. Hence, such types of problems are solved in *uṣūl al-sharīʿah* through the method of *istiḥsān* and *istiṣlāḥ,* in order to avoid the outcomes of extreme analogies.

[47] This law was applicable to us until 1953 A.D when Syria introduced the new Personal Statutes Law, which hence repealed the mentioned Family Law of the Ottoman era.

This new law, which was modeled on different schools of jurisprudence, has resolved in the article 109 that a wife is entitled to request for separation from her husband, if he disappears from her without reason, one year after his disappearance even if he leaves for her wealth to sustain her. Thus, this new ruling encompassed the missing as well as the absent whose life is known.

[48] The current Real Estate Laws in many countries have different opinions for real estate contracts that are made informally outside the property register. Some laws regard such contracts void, and do not have any impact neither on the contractors nor outsiders. Thus, if one party denies to register his contract, the other party has no

4. Under this category also, the court does not entertain any confession that is alleged to have been made outside the court setting except with written evidence. Thus, personal evidence or testimony of witnesses is not accepted because of the many forgery cases of confessions and the simplicity of this forgery. The legal ruling for this prevention has been in place since the Ottoman era in this country.[49]

5/13 All the preceding discussion is part of establishing rulings on the basis of *al-maṣāliḥ al-mursalah* under private rights. It is noted here that most of the examples under this type are also considered under *istiḥsān* because they also oppose the principles of *qiyās* which require different rulings from the ones mentioned.

According to the principles of *qiyās*, the real estate contracts and their resulting effects are supposed to be valid even if they are made secretly between the contracting parties. Likewise, a wife of a missing husband was supposed to remain married until his death is proven or his coequal die, and also, the court should hear a lawsuit no matter how old it is.

The rulings and procedures resolved in these and other similar examples are *istiṣlāḥ* from the dimension of the *maṣlaḥah* that necessitated them, and they are *istiḥsān* from the dimension that they have contradicted the principles of *qiyās*, based on the aforementioned discussion on the comparison and contrast between *istiḥsān* and *istiṣlāḥ*.

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power to compel him to do so, since the contract is itself void. This is the provision of the Jordanian law.

Other laws regard the unregistered contract valid and binding, but the contract has no implications on parties other than the contractors. Thus, if one party denies registration, the other party has a right to sue him and so that he is ordered by court to register. For example, in a sale contract before registration, the lessor in relation to the lessee is the seller, and therefore, the lessee pays rentals to the seller and not the buyer, and this is the provision of our new Civil Law.

49 It is noted here that the new Evidence Law in Syria issued on 1366 A.H / 1946 A.D permits confessions made outside court settings through a testimony in absolute non-contracting obligations, and in contracting obligations with a value not exceeding 100 Syrian Pounds, as per the general principles of evidence established in the law, found in articles 52-58, 95, and 102.

5/14 *Istiḥsān* and *Istiṣlāḥ* in the Schools of *Ijtihād*

The views of the scholars of *ijtihād* have differed concerning *istiḥsān* and *istiṣlāḥ*.

The Ḥanafi School has opened the way for *istiḥsān* under the same terminology. They established it on a well-defined system when they found that there was need to solve the problems of extreme cases of *qiyās*. They relied on the methodologies of the law itself in solving problems and emergencies, and on the general objectives of the *Sharīʿah* in promoting justice and reformation.

As we have seen in our previous discussion of *istiḥsān*, the Ḥanafis divide it into two types: *al-istiḥsān al-qiyāsī* (preferred analogy) and *al-istiḥsān al-ḍarūrah* (preferred necessity). *Al-Istiḥsān al-qiyāsī* is not the one intended in this comparison as it is a form of *qiyās* as explained before. The intended type is the preferred necessity because it is the counterpart of *istiṣlāḥ*.

We have also seen that *istiḥsān al-ḍarūrah* to the Ḥanafis relies on observing benefits as a way of departure from *qiyās* when it leads to inconveniences, because elimination of hardships is one of the principles of *Sharīʿah*. Thus, *istiḥsān* to the Ḥanafis is the departure to the general objectives of the law in search for the most beneficial. This departure was previously known as *al-ra'y* (the opinion) in the first generation, and then was named as *istiṣlāḥ* or *al-maṣaliḥ al-mursalah*.

Apparently, the Ḥanafis theory of *istiḥsān* and their jurists statements suggest that they do not consider it as an independent source [of *fiqh*] in addition to the four primary sources. Rather, they see it as a sub-branch of the legal *qiyās* but moves in its opposite direction, and aimed at solving the evils consequences of *qiyās* on the basis of the principle of necessity and elimination of hardship.

5/15 Then, came the Mālikī *ijtihād* and presented the theory of *al-maṣāliḥ al-mursalah* in a more holistic picture such that it made *istiḥsān* a branch of *al-maṣāliḥ al-mursalah* specified by a situation where it is not appropriate to apply the general principles of *qiyās* as aforementioned. This is contrary to the *ijtihād* of the Ḥanafis which treated the theory of *al-maṣāliḥ al-mursalah* as branch of *istiḥsān*, because they took the preferred necessity that opposes principles of *qiyās* as their starting point, and this automatically leads to the

endorsement of *al-maṣāliḥ al-mursalah* which do not contradict any of such principles.

It is known of the Mālikī *ijtihād* that it considers the *al-maṣāliḥ al-mursalah* an independent source [of *fiqh*] verified by legal texts which have also verified *qiyās*. Therefore, it establishes on its basis the legal rulings of an incident or its equivalent in the absence of legislative texts. The *al-maṣāliḥ al-mursalah* thus become the evidence when there is no any other evidence in as much as it is made to oppose the text-based *qiyās* when it leads to unwanted consequences. This last situation presents the focus on *al-maṣāliḥ al-mursalah* in the form of *istiḥsān* that opposes the outcome of *qiyās* (see para 5/9).

From this point, the similarity between the two schools of the Ḥanafi and Mālikī with respect to the theory of *istiḥsān* becomes clear. The idea in both the schools is same, but due to the advantage of chronological delay of the Mālikī School, the technical structure of the principle of *al-maṣāliḥ al-mursalah* became more focused, and thus the school gained more popularity in it.

5/16 Then, came the Shāfiʿī School which refuted both the theories of *istiḥsān* and *al-maṣaliḥ al-mursalah* on the grounds that the *Sharīʿah* has taken the responsibility of elaborating all what the human kind needs to know of the rulings, either by explicit texts or indication or by way of legal *qiyās*. They also argued that *istiḥsān* has no standard or scale to measure the truth and the falsehood. Thus, if it is allowed for every *muftī*, ruler or *mujtahid* to prefer, then things would go out of hands.

In his *al-Umm*, Imām al-Shāfiʿī has devoted a special discussion in *Kitāb Ibṭāl al-Istiḥsān*.[50]

He also said in what is reported from him, "A *mujtahid* is not entitled to legislate, and whoever prefers [in the religion], he has legislated. This means the job of a *mujtahid* is to resolve the *Sharīʿah* rulings, not to establish rulings from himself. If he resorts to *istiḥsān*, he will then have assnmed the task of legislation.

This opinion from Imām al-Shāfiʿī, in our view, is too harsh, because those who resorted to *istiḥsān* and al-maṣāliḥ al-mursalah

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50 It is noted that *istiḥsān* in the expression of the Shāfiʿī encompasses what is technically known in the *fiqh* of the Ḥanafīs and Mālikīs as *istiḥsān* and *al-maṣāliḥ al-mursalah*. See the footnote in *Mālik* by Shaykh Muḥammad Abū Zahrah, part 2, para 188; and *al-Shāfiʿī* by the same author, p. 121.

among the *mujtahidūn*, had indeed followed a path that was opened to them by the *Sharīʿah*, and were guided by its implicit texts, principles, and objectives.

Similarly, the Shāfiʿī scholar, al-Ghazāli, regarded *istiḥsān* and *istiṣlāḥ* in his *al-Mustaṣfā*, among the evidences of erroneous conjectures, and considered them as a form of issuance of ruling on the basis of desire and whims without any legal proof (1/137-144, al-Maṭbaʿah al-Tijāriyyah, 1356 A.H).

Nonetheless, he did not mean by this the preferred analogy of Ḥanafis and the rulings of necessities, instead; he approved them because they are free from doubts, although he attributed them to *qiyās*.[51]

5/17 Then, came the Ḥanbali *ijtihād* which followed the footsteps of the Mālikī s in considering *al-maṣāliḥ* a basis for establishing rulings. In this type of *ijtihād*, a *faqīh* can judge that every action that contains overwhelming *maṣlaḥah* is legally required by the *Sharīʿah'ah* without the need for a particular text as evidence to support it. Conversely, everything that has greater harm than benefit is forbidden without the need for a particular text stating the same.

The Ḥanbalis however, do not consider the *al-maṣāliḥ al-mursalah* as independent source of *fiqh* as the Māikis do, rather; they view the *al-maṣāliḥ al-mursalah* as a type of *qiyās* that branches out from *qiyās* and has the same ranking with it (see *Ibn Ḥanbal* by Abū Zahrah, p. 303).

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[51] In response to al-Shāfiʿī's opinion that *istiḥsān* has no criterion, and that it is based on desire without legal proof, Shaykh Muḥammad Abū Zahrah said in his book, *Mālik*, while quoting from al-Shāṭibī's *al-Muwāfaqāt*: "The scholars who have studied the Mālikī school, and acquainted themselves with the school's methodologies of extraction, have noted that the use of unregulated benefits by Imām Mālik was guided by certain restrictions which prevented the influence of desire and lust on the determination of benefits. These restrictions are:

1. Compatibility of the noted benefit with the objectives of law such that the benefit does not violate any of its principles or definite evidences. Rather, the benefit is under one general henefits, which the law has intended to achieve, even though there is no specific evidence to consider it.
2. The benefit is rational in itself such that if presented before rational minds they will accept it.
3. The benefit should entail removal of hardship in the religion such that if the benefit is not taken into account people would suffer. Allah says that which is translated as: "...and (He) has not laid upon you any hardship in the religion..." (Summarized with minor changes).

5/18 Sulaymān al-Ṭūfi, on the other hand, had exaggerated the consideration of *maṣlaḥah* by giving them precedence over the definite texts if the latter contradicts them.[52] This opinion is very dangerous as it leads to the negation of the legislative texts by pure views of *ijtihād*. In fact, if it is possible for a nation to acknowledge the absoluteness of this opinion in its legislation, the implementation of the *Sharīʿah* and laws would have been dominated by chaos. As a result, whoever perceives a benefit from [the application of] laws will apply it, and whoever perceives harm will discard it, and this is a serious confusion and blunder.[53]

Because of this, the great jurists of the *Sharīʿah* have consensually refuted this extreme opinion. We also saw that the proponents of the principle of *istiṣlāḥ* have established criteria that are sufficient for distinguishing between *maṣlaḥah* and *mafsadah* and limiting their boundaries extracted from the general objectives of the legislation which are today known as *gharḍ al-shāriʿ* (the Objective of the Legislator). The purpose is to prevent chaos in understanding and determining, because *maṣlaḥah* and *mafsadah* have to be determined in accordance with the view of the Legislator and his consideration, not with the personal or individual view, as explained before (see para 5/3-4).

Moreover, we also saw that at the peak of these criteria that were established to avoid any confusion in the path of *istiṣlāḥ* is [the rule that] the *maṣlaḥah* on which a ruling is established must be unrestricted that is, there is no particular or general text in the *Sharīʿah* regarding its permissibility or prohibition. The *maṣlaḥah*

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52 This was related by Shaykh Muḥammad Abū Zahrah in his book, *Mālik*, which he published in 1365H, in which he counted al-Ṭūfi as a Ḥanbalī scholar.

After that, Shaykh Abū Zahrah published his book, *Ibn Ḥanbal* where he confirmed in it that al-Ṭūfi is a Shi'ite who says regarding benefits what the al-Shīʿah al-Imāmiyyah say.

However, Sayyid ʿAbd al-Ḥusayn Sharaf al-Dīn who is one of the Shīʿah Imāmiyyah scholars at Jabal ʿĀmil, wrote an article in *Majallah al-ʿIrfān* (issued in Rajab, 1373H.) clearing the Shīʿah Imāmiyyah of al-Ṭūfi's opinion, and counts him as one of the extremists. See, *al-Madkhal ilā ʿIlm Uṣūl al-Fiqh* by the fellow professor and researcher, Maʿrūf al-Dawālibī, 2nd ed., pp. 216-217.

After that, Dr. Muṣṭafā Zayd of Dār al-ʿUlūm published his valuable thesis on *al-maṣāliḥ al-mursalah*, where he confirmed precisely with historical and narrative evidences that al-Ṭūfi was not a Shi'ite, rather, he was accused so by his opponents out of jealousy. He is a Ḥanbalī scholar but free in his thinking.

53 See *al-Madkhal ilā ʿIlm Uṣūl al-Fiqh*, pp. 216-219.

must also support one of the three categories which organize the social life which are *ḍarūriyyāt*, *ḥājiyyāt*, and *taḥsīniyyāt*.

Thus, when a benefit contradicts a legal text, the scholars then do not absolutely favor it over the text (as asserted by al-Tūfi), rather; they have a detailed standpoint towards it as we shall see soon (see para 5/20-25).

This is the stance of the four schools of *ijtihād*[54] towards *istiṣlāḥ* and *istiḥsān*, aud there is no doubt that adopting the approach of the Ḥanafis, Mālikīs, and Ḥanbalis renders the *Sharīʿah* fertile, prosperous, and productive, and satisfies people's needs iu every time and place[55] (see *Mālik* by Abū Zahrah part 2, para 187-188).

5/19 A Remark

Shaykh Muḥammad Abū Zahrah says in his book, *Ibn Ḥanbal* that the Ḥanafis, like the Shāfiʿīs, do not endorse *al-maṣlaḥah al-mursalah*, and

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54 It is noted here that Imām al-Shāfiʿī is the student of Imām Mālik, while Imām Aḥmad ibn Ḥanbal is the student of al-Shāfiʿī.

55 Al-Qarāfī al-Mālikī says in his *Tanqīḥ al-Fuṣūl*, p. 200: "Others overtly deny the *maṣāliḥ al-mursalah*, but when it comes to sub-issues you will find them using absolute benefit in analogical reasoning. They do not require themselves to produce supporting evidence for their consideration in the differences and similarities, rather; they rely on mere relevance - that is, something being more relevant and accurate – and this is the *maṣāliḥ al-mursalah*". See *Mālik* by Abū Zahrah, part 2, para 174 and 209.

Imām al-Shāṭibī has elaborated in his *al-Muwāfaqāt* and *al-Iʿtiṣām*, and likewise, other adept jurists of fundamentals of jurisprudents; that the rulings of the *Sharīʿah* are two classes:

First: Those that are related to the affairs of the Hereafter, that is, the acts of worship.

Second: Those that are related to organizing the worldly affairs and they comprise all what are excluded from the acts of worship such as the normal and transactional issues.

For the first part, it is not permissible to search for the effective causes and benefits in order to link them with the acts. Rather, the command in them is based on religious obedience. As for the second part, from which the transactional systems are formed, it is analogically reasoned by the benefits of the servants (of Allah), and is linked with beneficial connotations in this life, as denoted by the very texts of the *Sharīʿah*. Imām Mālik has expanded the view on the analogical reasoning and beneficial connotations of this class, to the extent of pronouncing the principle of unregulated benefits and *Istiḥsān*. It is confirmed from him that he said: "*Istiḥsān* is nine tenths of a scholar". See *al-Muwāfaqat*, 2/307).

Al-Muwāfaqāt of Imām al-Shāṭibī Ibrāhim Abī Ishāq al-Gharnāṭī (d. 790 A.H.) is the noblest book known in *uṣūl al-fiqh* and *maqāṣid al-sharīʿah*. In this book of four volumes, the author came up with wonders of accurate thought, jurisprudential vision, and an invented approach (of writing).

it has no consideration as an inferential reason to them even though the Ḥanafis' *istiḥsān* opens a slight door to it (p. 303). Nonetheless, al-Āmidi has preceded him in saying this, in his book *Uṣūl al-Aḥkām*.

However, we do not think that this judgment is correct as the truth with regard to the Ḥanafis is the opposite of this ruling. The Ḥanafis agree with the Mālikīs as we have explained when we categorized the *ijtihād* in terms of *istiḥsān* and *istiṣlāḥ*.

We have seen that the Ḥanafi *ijtihād* has established the theory of *ijtihād*, which, as we saw, is the departure from the equivalents and principles of general *qiyās* for a stronger view or necessity that requires acquisition of *maṣlaḥah* or prevention of *mafsadah*.

Thus, if the Ḥanafis agree with the cousideration of *maṣlaḥah*, and they depart from the principles of *qiyās* when they collide with the *maṣlaḥah* as a way of *istiḥsān*, then it is obvious that they would obligate the consideration of *al-maṣāliḥ al-mursalah* and the establishment of rulings on its basis when it does not contradict with the principles of *qiyās*. This is the meaning of *istiṣlāḥ* like we have mentioned before in the difference between *istiḥsān* and *istiṣlāḥ*.

Therefore, it is not sensible that the one who agrees with *istiḥsān* does not agree with *istiṣlāḥ* because *istiḥsān* is the final destination; the one who reaches it must have passed through its previous destination (see *al-Madkhal ilā 'Ilm Uṣūl al-Fiqh* by Dr. Maʿrūf al-Dawālibī, p. 214, and pp. 287-288).

Probably the cause of this confusion is that the term *al-maṣāliḥ al-mursalah* (the unregulated benefits) has appeared and spread in the terminology of the Mālikī School after the appearauce and spread of the term *istiḥsān* in the terminology of Ḥanafi School. Hence, the difference in the technical terms led to this confusion and conjecture.

In our opinion therefore, the difference between the Mālikīs and the Ḥanafis in this topic is terminological and uot difference in *istiṣlāḥ*.[56]

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56 The correct similitude, in our view, between the Ḥanafis and the Mālikīs in this topic is that considering the benefits in establishing the legal rulings is equivalent to a path where one of its end is *istiḥsān* and the other end is *istiṣlāḥ*, according to the meaning explained in each of the two schools. Whereas the Ḥanafis entered *istiṣlāḥ* through *istiḥsān*, the Mālikīs are *vice versa* and each school became famous from the door which it entered.

5/20 Contradiction of *al-maṣāliḥ al-mursalah* with the texts of *Sharīʿah*

We have seen in the previous definition of *al-maṣlaḥah al-mursalah* that it is the benefit that complies with the general objectives of the *Sharīʿah*, without having a legal text or its equivalent such that an analogical deduction can be made.

It is therefore, supposed that the issues and rulings which are established by the jurisprudential *ijtihād* on the basis of the principle of benefits, are not commanded by a legal text or a command that combines with it an effective cause such that it can be deduced from them; because if such a text in the topic was available, the required ruling would have been related to it or to the *qiyās* on which the ruling is established, but not to the mere observanced *maṣlaḥah* that the Islamic legislation has required in general (see para 5/1).

Nonetheless, it is possible for the opposite to happen and can be conceptualized, that is, the path of a *maṣlaḥah* that coincides with the objectives of the *Sharīʿah* is intercepted by a prohibitive legal text. In such a case, should the text be implemented instead of the *maṣlaḥah*, or the *maṣlaḥah* instead of the text, what is the jurisprudeutial stance on that? Indeed the legal texts are two kinds:

- Special texts that come from the Legislator in limited things and particular situations thus it commands them or forbids them based on their specificity.[57]
- General texts of comprehensiveness and vastness under which many homogeneous issues, situations, and elements fall.[58]

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57 An example is the Prophet's prohibition of a Muslim from betrothing on top of his fellow brother's betrothal or bargaining on top of his bargaining [reported by al-Bukhārī (5144) and Muslim 2:1029 (38)]. This means that it is not allowed for anyone, when he sees his fellow Muslim betrothing a woman for marriage or bargaining with a buyer to buy something, to come and squeeze him in the betrothal or the sale. Rather, he has to wait; if there is no mutual agreement between the parties then he may proceed.

58 An example is the Prophet's prohibition of sale at uncertainty (*bayʿ al-gharar*). Ibn al-Athīr said in *Jāmiʿ al-Uṣūl* (1/527): "*Gharar* is that which has a visible that you would prefer, and an invisible (part) that you would hate; the visible part allures the buyer, while the invisible one is unknown". Thus, the sale of speculative items that cannot be confirmed by existence or parameters is forbidden because of the gambling and aleatoric elements that makes it resemble gambling. For instance, the sale of fish

In addition, the legal text may be definitive in the meaning intended and in the verification of its transmission from the Legislator. It may also be non-definitive in either of these two dimensions, that is, inference and verification.[59]

5/21 (a) *Maṣlaḥah* in Relation to a Definitive Text (*Naṣṣ Qaṭʿī*)

If the (divine) text is definitive in its inference and verification, it is not possible that a *maṣlaḥah* that requires the opposite (of the text) would go against it because the measure of *maṣlaḥah* is from the viewpoint at the *Sharīʿah*.

Thus, what we may perceive to be a *maṣlaḥah* in our specific opinion while it contradicts a definitive text is actually a detriment in the sight of the Legislator from other preferable dimensions. In this case, therefore, there is no doubt in implementing the text instead of the uncertain *maṣlaḥah*. This is agreed upon among the leading Muslim jurists, except some anomalous individual opinions from people like Sulaymān al-Ṭūfī.

An example of the above is that the *Qur'ān* has obliged a married woman, when her marriage is dissolved by divorce, to wait (without getting married) for a period of three menses, if she is a menstrual state, or three months if she is not. And if the marriage is dissolved by death of a husband, the *Qur'ān* has obliged her to also wait four months and ten days. If the woman is pregnant, her waiting period extends until she delivers. All this is for the purpose of legal considerations the most important of which is the protection of the lineage from getting lost or mixed up, because when a woman marries after the dissolution of her previous marriage, and later a pregnancy appears, it will not be known to which of the two husbands the pregnancy belongs. As a result, this text is definitive, in terms of meaning and transmission *(qaṭʿiyyāt al-thubūt wal-dilālah),* in obliging the waiting period and the duration.

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caught by a fish net or diamond obtained from a diver's dive. Thus, this is a general text that encompasses all types of uncertainty (*gharar*).

59 Among this type (of texts), that is, the non-definitive text, is all the general texts of the *Qur'an* or the *Sunnah* in the view of majority of leading scholars of *fiqh* except the Ḥanafīs. The general text (from the *Qur'an*) as well as the singular narrated *ḥadīth* even if they are reported via authentic narrations, are all non-definitive in general to the majority (of the scholars), eventhough they are definitive in their inference on the meaning intended.

Therefore, whatever *maṣlaḥah* that one would perceive in neglecting the duration (of waiting) or reducing it, it would not be supportive of defying this definitive text. It is also not valid to marry a woman before the expiry of her waiting period, because the aim of the Legislator is crystal clear from the text. He did not ignore the consideration of the *maṣlaḥah* that we envisage except that He is seeing, in the contrary, a greater harm than the *maṣlaḥah*. And we have mentioned that everything contains a duo direction of benefit and harm, but consideration is given to the preferable dimension (see para 5/5).

5/22 (b) *Maṣlaḥah* in Relation to a Non-definitive Text (*Naṣṣ Ghayr Qaṭʿī*)

In the case where the text is non-definitive in its meaning *(al-dilālah)* or transmission *(al-thābit),* there is a difference of *ijtihād* opinions in terms of restricting or specifying it using the *maṣlaḥah* when there is a conflict:

1. The opinions that disapprove and refute the theories of *istiḥsān* and *istiṣlāh,* such as the opinion of al-Shāfiʿī, do not agree with the specification *(takhṣīṣ al-naṣṣ)* of a text, even the non-definitive one, by a *maṣlaḥah,* because the one who denies that unregulated *maṣlaḥah* should be the basis of judgment in the absence of a text, would definitely deny the unregulated *maṣlaḥah* when it contradicts the text.

   However, if the application of the text is hindered by an emergent necessity, the principle of necessity and choosing the lesser evil is applied because necessities render the prohibited things permissible.

   Imām al-Ghazālī opined in this context that if there are emergent circumstances that require that a *maṣlaḥah* be contradicted with a legal text, and that complying with the text results into a general harm, then in this case, observance of the *maṣlaḥah* that contradicts with the requirement of the text is compulsory, and cannot be disputed.

   An example of this is, if rebellious enemies use our people who have fallen as prisoners of war in their hands as human shields, and it is feared that if the enemies are spared they would attack us. It is allowed and in fact compulsory, to attack them with

weapons even if such an attack would result into killing the Muslim prisoners who have been used as human shield and whose blood have been protected by the clear-cut text of the *Qur'ān* (see *al-Mustasfā* of al-Ghazālī, discussion on *istiṣlāh*).

This example is agreed upon and has been mentioned by the Ḥanafis, and they justified it by (saying), if we do not attack [the enemies] for fear of killing the Muslim prisoners take as shield, the enemy would then be able to overpower us, and ultimately killing all of us. Thus, sacrificing the prisoners in order to topple the enemy and protect people is the lesser evil. However, from the intention perspective, the archers must aim in their attack to kill the enemy not the people taken as shield (see *al-Durr al-Mukhtār wa-Radd al-Muḥtār*, 3/223).

It is, therefore, clear that in order for the Shāfiʿīs to implement the *maṣlaḥah* that contradicts a text connotation, they require that the *maṣlaḥah* reaches the level of a necessity as a way of applying the principle of lesser evil in emergent and exceptional circumstances. This, as we said, is an agreed point even for the definitive texts. However, in normal general situations which are the focus of our discussion, there is no opportunity for determining *istiṣlāh* on them.

2. As for the opinions which agree with the concept of *istiṣlāh,* there are two approaches:

   i. Specifying a text by the connotation of unregulated *maṣlaḥah* even if the text is not definitive is not accepted. This is the Ḥanbali approach. Thus, in the school of Aḥmad ibn Ḥanbal, the inference of a text and its generality are given precedence over the *maṣlaḥah* because it is considered only when there is no text. With the availability of a text, there is no chance of considering it (see *Ibn Ḥanbal* by Shaykh Muḥammad Abū Zahrah, p. 303; and *al-Madkhal ilā 'Ilm Uṣūl al-Fiqh* by Dr. Maʿrūf al-Dawālībī, p. 315).

   ii. The proponents of this approach opine that the *maṣlaḥah* specifies a text when both of them contradict each other. In other words, they agree with applying the text in situations that do not contradict with the benefit, because they see that the benefit which is determined by legal criteria is a proof

that the Legislator wants his texts to be implemented where the *maṣlaḥah* does not connote the contrary.[60]

This position of specification of a non-definitive text by a connotation of a *maṣlaḥah* unfolds when there is a conflict in the two *ijtihād* of the Ḥanafis and Mālikīs in particular, as we shall see in the following discussion:

5/23 In the Māliki School

The opinion of the Mālikīs, which is famous for endorsing the unrestricted *maṣāliḥ* more than any other school, approves that, when there is a contradiction, *maṣlaḥah* restricts non-definitive texts, including the general texts.

An example of this according to the Mālikīs is when a person claims from another party a sum of money, which he is unable to prove, and asks the defendant to swear an exculpatory oath; Mālik [in this case] does not oblige the defendant to swear unless there has been some mingling between the claimant and the defendant. This is in order to preserve the *maṣlaḥah* and eliminate wrongful exploitation so that the imbeciles do not dare to make false claims on noble people and drag them to courts. Their aim would be to take advantage of the fact that noble people dislike swearing and thus the imbeciles would extort wealth from them that comes as a substitute for the oath.

This opinion according to the Mālikīs is a specification, by mere *maṣlaḥah*, of the *ḥadith* that says, "[Producing] evidence is the obligation of the plaintiff, and the oath is the obligation of the defendant"[61] (see *Risālat al-'Urf wal-'Ādah* by Shaykh Aḥmad Fahmī Abū Sinnah, p. 97).

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60 It is imperative to be noted here that specifying a legal text does not entail changing its established ruling because changing (a rule) is an abrogation which no one is entitled to except the legislator. Rather, specification, according to scholars of *Uṣūl al-Fiqh*, is to limit a text to some of the contents captured by its words as a way of interpreting and elaborating the intent of the legislator, not as a way of changing (the rulings).

61 Reported by al-Tirmidhī (1341) in *al-Aḥkām* from the *ḥadīth* of 'Abd Allāh ibn 'Amrū (may Allah be pleased with them). Al-Tirmidhī said: "This chain of narrators (*sanad*) has criticism where Muḥammad ibn 'Ubaydillāh al-'Arzamī is weak in his memory (*ḥifẓ*). He has been weakened by Ibn al-Mubārak and others.

Al-Tirmidhī then mentioned the *ḥadīth* of Ibn 'Abbās (1342) that the Prophet (s.a.w.) ruled that the oath is the obligation of the defendant. Then, al-Tirmidhī said:

There are other examples, in the Mālikī School, of specifying the texts of the *Qur'ān* and the *Sunnah* by *maṣlaḥah,* which need not to be mentioned here, [but] some of them shall be mentioned in the theory of custom *(ʿurf)* at the end of *al-Madkhal* (see para 72/5).

What is well-known among researchers is that the Mālikī School is the one that perceives the specification of the texts by *maṣlaḥah* when there is a conflict, not the Ḥanafi School. This is also the opinion of Shaykh Muḥammad Abū Zahrah in his books, *Mālik* and *Ibn Ḥanbal*.

However, in our opinion, this is contrary to the reality; the branches of the school of Ḥanafi, and the rulings that they have resolved in it, testify that they have preceded the Mālikī School in specifying the texts with unrestricted *maṣlaḥah*, as evident from the following:

5/24 In the Ḥanafi School

1. It is mentioned in the *Sunnah* that the Prophet (s.a.w.) was asked about testimony, and replied to the enquirer, *"Do you see the sun? He replied, "Yes", the Prophet (s.a.w.) said, "You either testify [to the truth that is] as clear as the sun or do not testify at all".*[62]

   This *ḥadith* apparently obliges eye-witnessing in undertaking a testimony in generally all matters, and prohibits a person from testifying before a court to a matter he did not witness but rather heard from other persons.

   Consequently, the *fuqahā'* have resolved not to accept the testimony of an ear-witness when proving rights. The Ḥanafis however, found that there are certain issues which *maṣlaḥah* requires the acceptance of an ear-witness, because stipulating eye-witnesses in such issues is impossible or not easily achievable. Such a condition places significant neglect of rights that the legislation does not permit, and as a result, they resolved to accept ear-witness in many issues including proof of the root *(aṣl*

"This ḥadīth is good and sound, and this is the basis of implementation by the scholars among the Prophet's companions and others, that [producing] evidence is the obligation of the one who asserts, and the oath is the obligation of the one who denies". See the footnote of para 10/2.

62 Sourced by al-Bayhaqī in his *Sunan* and al-Ḥākim in his *al-Mustadrak* and he authenticated it. But the *ḥadīth* has been weakened by al-Dhahabī and al-Nasā'ī. See *Naṣb al-Rāyah li-Aḥadīth al-Hidāyah* by al-Ḥāfiẓ al-Zaylaʿī on *"Kitāb al-Shahādāt"*.

al-waqt) of endowment, that is, proving that a particular estate is endowed and not a property owned by the beneficiary of the endowment when there is dispute regarding ownership and endowment of the property.

They have justified [this opinion] by arguing that *maṣlaḥah* in this case requires the acceptance of an ear-witness on the basis of *istiḥsān* contrary to the *qiyās* for the necessity of protecting ancient endowments from getting lost. This is because when an endowment becomes old and its properties are not registered with the court registry or the register goes missing, it is no longer possible to prove the endowment status as a result of the demise of the witnesses who witnessed the statement of the donor when he donated the endowment. Therefore, if we stipulate eye-witnessing, every person would have the opportunity to usurp the ancient endowments and claim their ownership without the possibility of proving the endowment status. Therefore, the ear-witness is accepted in this type of evidence, and that is by having someone attesting that [a particular [property] is an endowment based on what he hears from reliable people even though they have also heard and not seen from other people like them.[63]

Among the issues in which the Ḥanafis have also accepted ear-witnesses are proofs of lineage, death, and marriage consummation, up to ten situations that are explained in their books.[64] By this, they have specified the text of the *ḥadīth* which stipulates eye-witness in bearing a testimony so that its delivery is correct. The Ḥanafis have no other evidence or reasoning for this specification except the unregulated *maṣlaḥah*.

2. It is also mentioned in the authentic *ḥadith* that the Prophet (s.a.w.) forbade a person from selling what he does not possess,[65]

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[63] It is noted in this point that after the real estate registry was initiated in our country, its provisions became the reliable source of proving the ownership or endowment status, and other in real rights in properties that are registered with it.

[64] I have mentioned all the situations in which Ḥanafis accept ear-witness in my book, *Aḥkām al-Awqāf* (para 134), in the commentaries of article 1688 of *al-Majallah*, and in *Radd al-Muḥtār* by Ibn 'Ābidīn, 4/375.

[65] Narrated by Ḥakīm ibn Hizām (may Allah be pleased with him) that the Prophet (s.a.w.) said to him: *"Do not sale what you do not possess"* reported by Abū Dāwūd (3503), al-Tirmidhī (1232) who said: "[The *ḥadīth*] is good and sound"; and al-Nasā'ī (4613).

which is the issue of sale of a non-existent [item]. He also forbade the *gharar* (uncertainty) sale[66] that was explained before (see footnote in para 5/20).

The Ḥanafīs, however, specified these two *ḥadīth*. They permitted the sale of seasonal fruits in grapes and other trees that have continuous fruits, whenever they just blossom and become ripe.[67] This is because the *maṣlaḥah* dictates the permissibility of this sale as people are in need of it.

This permissibility is a specification of the two aforementioned traditions since the fruits that would be available are non-existing during the sale, and this leads to the sale of non-existent. Similarly, its quantity is probable; it is not possible to determine it during the sale, thus it involves an element of *gharar*.

3. The Ḥanafis have resolved the acceptance of the testimony of women only in matters that no one sees except women only such as the crimes that occur in their baths, the testimony of a midwife on conceiving and determining a child when conflict arises. By so doing, they have specified the texts of the *Qur'ān* and *Sunnah* which stipulate in a testimony the element of masculinity such that the witnesses are either all men only or men combined with women.

   This specification is also by connotation of *maṣlaḥah* for without it these rights will be lost. We have seen that the protection of rights is a legal *maṣlaḥah* among the five necessities that have been mentioned (see para 5/4).

5/25 It becomes clear from the supporting evidences we have mentioned that the Ḥanafīs adopt the specification of legal texts by the unrestricted *maṣlaḥah*, contrary to the view of Shaykh Muḥammad Abū Zahrah in his book *Ibn Ḥanbal* that the Ḥanafīs differ from the Mālikīs in this point.

Ibn Daqīq al-'Īd said at the end of *al-Iqtirāḥ*, p. 303: "It is on the condition of the two Shaykhs [al-Bukhārī and Muslim]". See para 72/3.

66 Reported by Muslim (1513) in *al-Buyū'*; al-Tirmidhī (1230); Abū Dāwūd (3376); and al-Nasā'ī (4518).

67 Successive here means fruit that does not exist on trees at once, but whenever it is harvested it succeeds again and again, for example grasp and artichoke that are known nowadays as (anknar) and (shoke) in Syrian countries.

With this note, we have lengthened and expanded the discussion on *istiḥsān* and *al-masalih al-mursalah* because I have seen that the timely need calls for researching into these two sources of great concern in the Islamic law in a comprehension manner, congruent with the present time. The purpose is to make known what is contained in the Islamic law regarding pillars, fundamentals, and grounded theories which are lenient, productive, and accommodate the extraction and deduction in different aspects of legislative needs.[68]

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[68] We have cited in the fourth edition and commented on some books which appeared after the third edition of this introduction such as *Ibn Ḥanbal* by Shaykh Muḥammad Abū Zahrah, and *al-Madkhal ilā 'Ilm Uṣūl al-Fiqh* by Dr. Ma'rūf al-Dawālibī. We have benefitted from them some new remarks on *al-maṣāliḥ al-mursalah* that we have incorporated in the fourth edition. We have expanded the discussion on *istiṣlāḥ*, and made it more abundant with supportive and jurisprudential examples.

APPENDIX TO SECTION 5

AL-ISTIṢLĀḤ AND *AL-SIYĀSAH AL-SHARʿIYYAH*

5/26 *Al-Siyāsah al-Sharʿiyyah* is the ruler's disposition that brings people closer to righteousness and makes them far from evil, even if [the disposition] was neither done by the Prophet (s.a.w.) nor revealed to him...as long as it does not contravene what the Legislation has stated,[69] that is, it is permissible. One of the most famous examples of *al-siyāsah al-sharʿiyyah* that is cited by jurists is discretional punishment (*taʿzīr*) which the *Sharīʿah* has left the issue of determining it to the [discretion] of the ruler.

It is prevalent among the jurists the use of the term *al-siyāsah al-sharʿiyyah* to refer to such kinds of measures that restrain people from the misuse of rulings and permissions.

It is also easy to note that *al-siyāsah al-sharʿiyyah* is a form of *istiṣlāḥ*. This is emphasized by the fact that the procedural restraints that may comprise of *al-siyāsah al-sharʿiyyah* are not limited to corporal punishments, rather; they could be civil corroborations that invalidate a contract or disposition, thus depriving the violator of the ruling of realizing his purpose. This becomes clear from the following two examples:

5/27 Marrying a woman during her waiting period (*'iddah*)

The Holy *Qur'ān* forbade marrying a woman during her waiting period.[70] It has occurred during the caliphate of 'Umar (may Allāh be pleased with him) that a man married a woman while she was in her waiting period. 'Umar separated the couple and forbade the man from marrying the woman forever (that is, even after her waiting period ends). The two Imāms, Mālik and Aḥmad have adopted this opinion and said that whoever marries a woman in her waiting

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69 This is the definition of the Ḥanbalī jurist, Ibn 'Aqīl. See *Sharīʿat al-Islām* by Yūsuf al-Qaraḍāwī, p. 25, and *al-Ṭuruq al-Ḥukmiyyah fī al-Siyāsah al-Sharʿiyyah* by Ibn al-Qayyim (may Allah have mercy on him), pp. 15-17

70 The two verses 234 and 235 of *Sūrat al-Baqarah*.

period shall be prohibited from marrying her forever.[71] Thus, this life ban, that is, the invalidation of the marriage contract is a punishment for the violation [of Qur'anic Law]. It is a punishment that has been determined by *ijtihād* on the basis of *al-siyāsah al-shar'iyyah* since the Holy *Qur'ān* did not state a particular punishment for those who violate this ruling.

5/28 Deprival Divorce (*Ṭalāq al-Firār*)

This title was used by the Ḥanafis to denote the man's irrevocable divorce of his wife without her willingness, while he is in his terminal illness. This is considered as oppressor from the husband in exercising the right to divorce because it involves a departure from the purpose for which divorce was legitimized, which is to get rid of poor companionship, as the Ḥanafi jurists say. And when a person is in his terminal illness or in a similar situation (like the one who is involved in a bear fatal accident or the one who is led to the execution chamber to be killed by way of retaliation *(qiṣāṣ)*, for, as he claims, he is then about to completely get rid of the bad companionship that he suffers. Therefore, while in this situation, there is only one interpretation of the divorce that he pronounces: that he wants to harm [his wife] in order to deprive her wife from inheritance. It is not about getting rid of bad companionship, and this is a plain oppression.

Our master 'Uthmān (may Allāh be pleased with him) had ruled in favor of allocating inheritance to a widow in this case,[72] contrary to the normal situation where a couple separated irrevocably do not inherit from each other. Therefore, assigning a wife the inheritance of her husband after divorcing her is an annulment of one of the consequences of divorce as it is most likely that the husband has used

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[71] The two opinions of Ḥanafi and al-Shāfi' are contrary to this opinion. See *Aḥkām al-Qurān* by Abū Bakr al-Jaṣṣaṣ, in his commentary of the two glories verses aforemenetioned.

[72] It appears that this is also the opinion of Imām 'Alī (may Allah be pleased with him). The three schools of *fiqh* have also adopted the same opinion but they restricted it with additional conditions. The Shāfi'īs disagreed [with the opinion]; they do not allocate inheritance to a woman deprived of inheritance by divorce. For details, see *Mālik* by Abū Zahrah, p. 19; and *Bidāyat al-Mujtahid* by Ibn Rushd (2/68) (Ṭab'at al-Khānjī, 1329 A.H).

the divorce for what is not legitimized. Hence, as a *al-siyāsah al-sharᶜiyyah*, his bad intention is rejected.

Owing to the strong relation between *istiṣlāḥ* and *al-siyāsah al-sharᶜiyyah*, the examples of either of them is appropriate for the other in most cases. We shall mention, in our discussion on the sixth phase of the stages of *fiqh* (in the forthcoming appendix of section 15) examples of *istiṣlāḥ* rulings promulgated by the ruler's orders at that time, either invalidating some dispositions or restricting some rulings that were based on opinions. Similarly, we shall quote in the appendix of section twenty two valuable remarks by Ibn al-Qayyim about the types of *istiṣlāḥ* policies and orders based an *istiṣlāḥ* which he termed as "political laws" (*al-qawānin al-siyāsiyyah*) (see footnote at para 22/9).

SECTION 6

THE SECONDARY SOURCES: CUSTOM (*'URF*)

6/1 The Literal and Technical Meaning of *'Urf*

The original meaning of *'urf* in Arabic language is knowledge (*ma'rifah*). The term was then used literally to mean something that is known. Afterwards, it was used to mean something that is known, familiar, preferred, and accepted by people of sound nature. Based on this meaning, Allāh says, "*Take to forgiveness*[73] *and enjoin good and turn aside from the ignorant*" (Al-A'rāf, 7:199).

In technical terms, *'urf* is defined as "*a tradition, comprising the saying or practicing, of a large number of people in a community*".[74] From this sense, *'urf* is also known as a recurrent practice (*'ādah*) and dealing (*ta'āmul*).

It is understood from this definition that *'urf* cannot be realized in any matter except when it becomes recurrent among people in the place where it occurs, or [it becomes] dominant such that the majority of the people practice the tradition, observe it and comply by it. For example, it is known today among the Syrians that two thirds of the dowry (*mahr*) that is allocated for a woman in the marriage contract is paid in advance while the remaining is deferred until after death or divorce. Thus, it is necessary, for *'urf* to be considered, that majority of the society used to it, and this does not occur except when it is

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73 The original meaning of forgiveness (*al-'afwū*) is the intention of obtaining something. It is said, so and so *afā* and *i'itafāhu* meaning that he intended to take what he has. Then this meaning spread out as a result of its usage, and among the other meanings is to forgive a sin because [this *'afwū*] contains the intention to eliminate the sin from the sinner. And the meaning of "take to forgiveness" in the verse is: accept from people what is easily intended and ohtained, without affection or hardship. Similar to this meaning is Allah's saying: "*And they ask you what they ought to spend. Say: "That which is beyond your needs*" (al-Baqarah, 2:219), meaning, tell them they spend that which they spare of their ordinary wealth. See *Mufradāt al-Qur'ān* by al-Rāghib al-Aṣfahānī.

74 We deduced this definition from the definitions of Muslim jurists like Ibn 'Ābidīn in his work, *Nashr al-'Urf fi Binā' Ba'ḍ al-Aḥkām 'alā al-'Urf*, published in the second volumes of his collected works from pages 114-147. And we do not find in those definitions that are clearer nor satisfied.

recurrent or at least dominant, otherwise it is an individual disposition, not *ʿurf*. For this, the *fuqahā'* established the maxim that states, *a custom is considered only when it is recurrent or dominant (al-Majallah*, 41)

6/2 Significance of *ʿUrf* in the Sources of Legislation

In the social life of men who have no laws, the customs and tradition become the constitution which they appeal to. From here, we recognize what *ʿurf* is to the ancient governance on human kind.

Owing to the fact that some customs may be good and just or unpleasant and permissible, it was among the goals of the legislations that they promote the good *ʿurf* and discourage the unpleasant one.[75]

The custom and recurrent practices are considered until today in the eyes of legal experts as one of the most important sources of positive laws. The formulators of these laws acquire from the custom and recurrent practices plenty of customary laws, which they present in the form of statutory provisions thus eliminating the ambiguity and obscurity that emanate from custom.

The *Sharīʿah* also came and approved plenty of the dispositions and customary rights that are congruent with the Arabs and Islām, rectified a lot of them and prohibited many others. Likewise, the *Sharīʿah* came with new rulings which encompassed the organization of rights and obligations among people in their social lives on the basis of fulfilling the needs and benefit, and guiding [them] to the best resolutions and systems. This is because the Divine laws aim, through their civil rulings, at organizing the benefits of human kind and their rights. Thus, the Laws approve from the traditions of

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[75] The law scholars consider the sources of positive laws, that is, the laws that are made by nations themselves, five, namely; (1) *al-ʿurf* (2) *al-dīn* (3) Opinions of scholars and commentators of laws (4) Judicial *ijtihād* (5) Principles of justice and fairness.

Extracted from these five sources are the positive laws which are formulated as binding laws to which people appeal for their legal decisions. The judiciary also refers to it when the laws are not included by text. In addition, the rulings which rely on *ʿurf* have two distinct features: **First**: People normally have prior knowledge in their dealings, and they thus have less conflict, because people's ignorance of the laws is part of what creates problems among them. **Second**: Such types of rulings are normally customary and palatable to people because they are used to them before they become laws.

people that which it deems potential for realizing its objective, and congruent with the principles and approaches of the Laws.

6/3 The *Sharīʿah* Proof for Consideration of *ʿUrf*

Among the legal proofs in Islām, which some scholars mention for the consideration of *ʿurf* as a legal source of *fiqh*, is the aforementioned verse in which Allāh says, *"Take to forgiveness and enjoin good and turn aside from the ignorant"* (al-Aʿrāf, 7:199).

It is evident that *ʿurf* in this verse corresponds to its literal meaning, which is a good customary matter [habit], but not to its technical jurisprudential meaning. However, this inference can be directed [by saying] that *ʿurf* in the verse, although it is not intended by the technical meaning, may be casually used to support the consideration of *ʿurf* by its technical meaning. This is because people's customs in their doings and dealings is part of what they have deemed good and accustomed by their intellect. In most cases, the custom of a society is proof of their need for a customary matter, and hence considering it is among the recommended issues.

The majority of the scholars seek proof for the jurisprudential position of *ʿurf* in establishing the rulings from an a discontinued narration (*athar mawqūf*)[76] of 'Abd Allāh ibn Masʿūd, who is among the senior jurists of the Prophet's companions, that states, *"What the Muslims deem good, then it is also good in the sight of Allāh"*.

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[76] A discontinued narration (*al-āthar al-mawqūf*) is that which a companion says without relating it to the Prophet (s.a.w.). It is among the resolved issues that if a discontinued narration contains a legislative issue, it is considered like narration from the Prophet because a companion is not in a position to say it from his mind.

Some jurisprudents elevate this text to the Prophet (s.a.w.) but [its] examination verifies that it is a discontinued narration of Ibn Masʿūd, as has been reported by Aḥmad ibn Ḥanbal in his *Musnad* (1/379). See the beginning of *Nashr al-'Arf fī Binā' Baʿḍ al-Aḥkām'ala al-'Urf* by Ibn 'Ābidīn.

Al-Sakhāwī in his *al-Maqāṣid al-Ḥasanah* (p. 367) said: "[The *ḥadīth*] was reported by Aḥmad in *Kitāb al-Sunnah* from Ibn Masʿūd, and it is a good discontinued [narration]. This is also the way it was sourced by al-Bazzār, al-Ṭayālisī, al-Ṭabrānī, Abū Nuʿaym in his biography of Ibn Masʿūd in *al-Ḥilyah*, but to al-Bayhaqī in his *al-Iʿitiqād*, it is reported from Ibn Masʿūd from a different chain.

6/4 General Discussion on the Authority of *'Urf* in General *Fiqh*

'Urf has a legal consideration in establishing numerous types of rulings which we shall explain in our discussion on the theory of *'urf* in *fiqh*, the end of second part of *al-Madkhal al-Fiqhī*.

The Islamic jurisprudence also agrees on this consideration of *'urf* although with some differences regarding its boundaries and extent.

The *fuqahā'* have given substantial weight to *'urf* in accepting or rejecting rights among people in different aspects of transactions and dispositions. They considered *'urf* and tradition an important principle and a great and vast source for confirming rights among people as a basis in all matters that do not conflict with a specific legal text that prohibits [*'urf*].

Thus, *'urf* in the *fuqahā's* perspective is a legal proof that is sufficient for the confirmation of binding rulings and detailed obligations among people, wherever there is no other evidence. In fact, *qiyās* is abandoned in favor of *'urf* because a *qiyās* that contradicts the outcome of a prevailing *'urf* leads to inconvenience, thus, abandoning the ruling by *qiyās* and applying *'urf* is a form of *istiḥsān* which is given precedence over *qiyās*.

Nonetheless, if *'urf* contradicts a legislative text that commands the opposite of what is accustomed, consideration and non-consideration of *'urf* together with the focus of consideration and its level, demands a detailed analysis that is beyond this context, and we shall discuss it at its place in the theory of *'urf* where we shall see the types of *'urf* and its division into verbal and practical aspects.

6/5 The Most Important Maxims Concerning *'urf* and its Authority

In addition to the aforementioned, the *fuqahā'* have endorsed maxims on *'urf* and *'ādah* which became fundamentals and a criteria for numerous minor rulings that rest on *'urf*. The *Majallah* has mentioned a collection of these maxims in the articles 36-37, 39, and 40-45. Among the most important maxims that are related to *'urf* are the following:

1. Custom (*al-ʿādah*) has the force of law (*muḥakkamah*)[77] (*al-Majallah*, 40).
2. The real meaning [of a term] is abandoned by the inference of the custom[78] (*al-Majallah*, 40).
3. The affair of people is proof that is compulsory to be implemented (*al-Majallah*, 37).
4. What is known through custom is like what is stipulated by law (*al-Majallah*, 43)
5. Identifying by custom is like identifying by text (*al-Majallah*, 45)
6. The changing of rulings should not be censured by the change of time (*al-Majallah*, 39).

The explanation of these maxims together with the rest of the collective maxims will come in the final part of this *Madkhal*. For elaboration of the last maxim mentioned, see the aforementioned discussion on *istiṣlāḥ* (section 5) and the coming discussion under the theory of *ʿurf* (para 76/1 - 78/3).

On the basis of these maxims, the *fuqahā'* branched out and resolved an unlimited number of rulings in different chapters of *fiqh* and transactions:

a. Dividing the woman's dowry for instance into advance and deferred, and the amounts of each payment if not mentioned in the marriage contract is referred to the *ʿurf*.
b. Dividing the price of a commodity and the wage of a worker if not disclosed by the contracting parties, and there is a prevailing *ʿurf* in the place where the contract was made, the two parties are bounded by the law of *ʿurf*.
c. What is considered as a defect in a commodity that allows termination of a contract or not a defect is based on *ʿurf*.

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[77] *Muḥakkamah*: with the emphasis on *kāf* with *fatḥah*, passive participle from the word "*al-taḥkīm*" means the custom (*al-ʿurf*) is authoritative as a legal proof in establishing *sharīʿah* rules and obligations among people to achieve harmony and they are legally bound by it.

[78] This legal maxim is related to the verbal *ʿurf*, more on that will be elaborated while dealing with the theory of *ʿurf*. Here, by reality (*ḥaqīqah*), its real, not the symbolic, meaning of the word is implied. This means that word useds by people in their sayings and dealings refer to their customary meanings, not upon the real meaning [of the word] in the original language.

d. A lessee exceeding the limits of usufruct of a commodity such that he is deemed negligent and liable for paying the value of the leased item if it is destroyed is judged by *ʿurf*.
e. The manner of preserving a deposit such that the depositary is deemed negligent in preserving it, and thus, is held liable for its refund if lost or not negligent and thus, not liable, is also based on *ʿurf*.
f. The differences that occur between a teacher and a student who works in a profession as to who deserves to be paid by the other is determined by the *ʿurf* of the place (*al-Majallah*, 569).
g. Similarly, in an employment [contract], all that is ancillary to the job yet not made obligated on the employee or worker, is considered according to the *ʿurf* of the place (*al-Majallah*, 574).

Several unending issues, which are abundantly found in different branches of fiqh, with regards to their rules, are given an absolute prominence to *ʿurf*.

It is needless to explain that any ruling that was established on *ʿurf* will change with the change of *ʿurf*. Because of this, the former legal maxim (the changing of rulings should not be censured by the change of time) was established. Similarly, *ʿurf* is not authoritative on any matter unless the *ʿurf* exists and prevails at the time of disposition of the actor. Thus, *ʿurf* that emerges after an action is done has no authority.

With this note, and since we we shall set for a separate discussion on the theory of *ʿurf*, and related principles and subsidiaries, that is in the second part of this volume which are specifically on general jurisprudencial theories, here, we shorten the discussion with this overall idea on *ʿurf*, and its position among the sources of *fiqh*, while referring the details of the discussion to the aforementioned places.

6/6 These are the primary sources of *fiqh* and its most important secondary source. We have presented in this introduction what is imperative for a student to know.

Thus, every jurisprudential ruling that the *fuqahā'* have recorded in different schools has to have a relation with one of the sources mentioned.

In spite of this, there are some scholars who relate that all the sources, in fact refer to the *Qur'ān* and the *Sunnah* on the grounds that *ijmāʿ*, in actual sense, has to be reliant on either of them while

qiyās is related to the effective cause in the text that is deduced from, and thus falls under the inference of that text.

In fact, there are other scholars who relate all the sources to the Book [*Qur'ān*] only as it is the one which orders the acceptance of the Sunnah, which in turn does not go out of the principles of the Book.

Although this opinion is correct, it does not satisfy the issue in our context. It does not look at the type of the direct restrictive evidence that is the basis of establishing rulings. Rather, it looks at the origin of considering this evidence, and there is no doubt that the origin of considering all these sources is the *Qur'ān*. But even with this, it is not correct to say, for instance, allocating a grandfather or grandmother a sixth of inheritance is established by the text of *Qur'ān*. Rather, the portion [of a sixth] is established for the grandfather when he is with the deceased's son in the absence of the [deceased's] father by *ijmā*ʿ, and a sixth for grandmother was established by the *Sunnah*, because the *Qur'ān* does not contain anything of this as aforementioned (para 3/3 and 3/4).

SECTION 7

THE HISTORICAL AND CONSIDERATION SEQUENCE OF THE SOURCES OF ISLAMIC JURISPRUDENCE

7/1 (a) Historical Sequence

The four fundamental sources of *fiqh* did not emerge together at one time.

In the period of the divine revelation, the reference of all the rulings were the Book and the *Sunnah,* represented by the elaboration and judgments of the Prophet (s.a.w.), and all differences were referred to him. As such, there was no consensus *(ijmāʿ)* that had taken place.

As for *qiyās,* some of the companions were resorting to it in matters which they faced while they were far from the Prophet (s.a.w.) in their journeys, tribes or work, and they were terming it understanding, opinion or *ijtihād*[79] as termed by Imām al-Shāfiʿī in *Risālat al-Uṣūl.* But as soon as the companions returned to the Prophet (s.a.w.), they presented to him their understanding and *ijihād* opinions. He thus approved or disapproved with rectification.

As for the period after the demise the Prophet (s.a.w.), the two companions, Abū Bakr and 'Umar (may Allāh be pleased with them)

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[79] When the Prophet sent Muʿādh to Yemen, he asked him: *"How will you give a judgment or settle a dispute?".* Muʿādh answered: *"I will refer to the Qur'ān".* The Prophet then asked: *"What will you do if you do not find the decree you are looking for in the Qur'ān?".* Muʿādh answered: *"I will refer to the Prophet's Sunnah".* The Prophet asked: *"But what will you do if you do not find a decree even in the Sunnah?".* Muʿādh readily answered: *"I will judge between mankind by resorting to juristic reasoning (ijtihād) to the best of my power".* The Prophet (s.a.w.) was pleased with this reply and said: *"Praise be to God Who has guided the messenger of the Prophet to that which pleases the Prophet".* The *ḥadīth* is reported by Aḥmad in his *Musnad* (5:242), Abū Dāwūd (3593), al-Tirmidhī (1327 and 1328), and he said: "Its chain (sanad) to me is not connected". Also reported by al-Bayhaqī in *al-Kubrā* (10:114), and was verified as sound by al-Baghdādī in *al-Faqīh wal-Mutafaqqih* (1:189). Abū Bakr ibn al-'Arabī indicated in *Aḥkām al-Qur'ān* that the *ḥadīth* is sound (5751), and he elaborated it in details in *'Āriḍat al-Aḥwadhī* (6:72-73). Al-Ḥāfiẓ Ibn Kathīr deemed the *ḥadīth* good in his commentary (1:6), while Ibn al-Qayyim in his *Iʿlām al-Muwaqqiʿīn* rendered in sound (*ṣaḥīḥ*) (1:202).

gathered the companions to seek their opinion in events that were taking place. If none of them knew any text or judgment from the Prophet (s.a.w.) regarding the event, and they agreed upon a ruling that it is congruent with the principles of *Sharīʿah,* the two caliphs implemented what they have agreed upon.

In case there was no agreement on the ruling of the event, the two caliphs would exercise their own effort to arrive at the most suitable and closest ruling to the judgments of the Prophet (s.a.w.), as an implementation of the inference of *qiyās* or *maṣāliḥ.*

In the following eras, there arose a need to know what the jurists among the companions agreed upon so that it is made a foundation in the Islamic jurisprudence.

Then, the consensus of the *mujtahidīn* from the followers (*tabīʿiyyīn*)[80] of the companions associated with the agreement of the companions, because they were conversant in the knowledge of *Sharīʿah*, and the reference for understanding it. Thus, *ijmāʿ*, after the period of the Divine Revelation, became the one of the sources of rulings (*aḥkām*).

If the consensus is not attained or its conveyance and narration is not confirmed in a particular issue, there would be no other option for a *faqīh* except to resort to the same approach that was resorted to by the companions themselves when they were deficient of a text. This is the approach of *ijtihād* and opinion which was later named as *qiyās* or *istiḥsān.*

It is can be summarized from the above that during the time of the Prophet (s.a.w.), there was no other source of legislation except the Book and the Sunnah, and that *qiyās* was timely followed by clarification and correction, and that *ijmāʿ* existed after *qiyās* although it is given precedence over *qiyās* both in sequence and consideration as we shall see.

7/2 (b) Consideration Sequence

The preceding was [a discussion on] the historical sequence of the emergence of the sources of *fiqh*.

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80 The *Tābiʿūn* and *Tābiʿiyyūn* (the Followers): They are those who did not meet the Prophet (s.a.w.) but rather some of his Companions (*Ṣaḥābah*). *Tābiʿ al-tābiʿīn* are those that did not meet the Companions but they do meet some of the Followers.

As for the consideration sequence, the leading scholars of Islām and the scholars of *uṣūl al-fiqh* have agreed that the texts of the *Qur'ān* should be given precedence in consideration over all other texts, followed by the texts of the Sunnah, then *ijmā*ʿ and finally *qiyās*.

And when the ruling of *qiyās* conflicts with the ruling of some of the secondary sources, that is, *istiḥsān* or *istiṣlāḥ* or ʿ*urf*, then the ruling of all these sources should be given precedence in consideration over the ruling of *qiyās* as has been explained before with examples.

SECTION 8

THE DIFFERENCES BETWEEN *SHARĪʿAH* AND *FIQH*

8/1 It is extremely important to distinguish between *Sharīʿah* and *fiqh*. *Sharīʿah* is the Qur'anic texts revealed by Allāh the Almighty unto His Messenger Muḥammad (s.a.w.), and the *Sunnah* which are the Messenger's sayings and doings that explain and elaborate what is general in the *Qur'ān*, and a practical application of the Qur'anic commands, prohibitions and permissibility. This is based on the consideration that all that emanate from the Prophet (s.a.w.) related to explaining the *Sharīʿah* and implementing it is not from the Prophet's own self or personal opinions, rather; it is a revelation sent to him by Allāh the Almighty, according to Allāh's saying: "*Nor does he say of (his own) desire. It is no less than inspiration sent down to him*" (Al-Najm, 53:3-4); and His saying, "*...So take what the Messenger assigns to you, and deny youselves that which he withholds from you...*" (Al-Ḥashr, 59:7).

8/2 *Fiqh*, on the other hand, is what the scholars comprehend from the texts of the *Sharīʿah*, and what they extract, resolve, and establish from the texts, and also what they formulate of the legal maxims that are obtained from the inferences of the texts.

It is not permissible to mix up and not distinguish between the implied meaning of *Sharīʿah* and *fiqh*, because *Sharīʿah* is infallible (*maʿṣūm*), and in the Islamic creed, accurate and good; all of it guides the mankind to the safe and straight path.

Fiqh is the work of the *fuqahā'* in the way of understanding the *Sharīʿah* and implementing it in accordance with the aim of the legislator and based on the fundamental principles (*qawāʿid uṣūliyyah*) in extracting the rulings from it. In this aspect, the understanding of one *faqīh* differs from the understanding of the other. Each of their understandings, no matter how high the status is, has a possibility of error and accuracy, because he is not infallible. But this does not mean that [the opinion] has no value, in fact, it has a great value and honor. Rather, it means that it has no sanctity that is found in the *Sharīʿah* itself represented in its texts from the Book and the

immutable *Sunnah*. Thus, *Fiqh*, which is the *faqīh*'s understanding and opinion, even if it is based on a legal text, is subject to analysis, correction and error. The error however, is in the understanding of the *faqīh* and not in the legal text. From this context, the opinions of the *fuqahā'* differed, and they criticised and corrected each other.

8/3 Nonetheless, there is an important point which is often confused that has to be clarified and cautioned against. It is that *fiqh* contains two types of rulings which are different in their nature:

1. The First Type: Rulings resolved by texts that are definitive in authenticity and inference which represent the clear will of the Islamic legislation in what it compels on the responsible people as an order in Islām and obligation to them. These rulings were not left to the interpretation, understanding or deductions of the *fuqahā'*. For instance, the basis of the mandatory prayers, alms, fasting in Ramaḍān, fulfilling pledges, struggling in the cause of Allāh (*jihād*) as per the need and ability, and similar [duties] that have been [ordained] in the texts of the *Qur'ān* and the successive *Sunnah* (*mutawātir*).

2. The Second Type: Rulings over which the *Qur'ān* and the *Sunnah* have kept silent and were left to the *ijtihād* and deductions of the scholars of the *Sharīʿah* or came with texts which are non-definitive in authenticity and inference, thus subject to the differences of scholars' opinions in their authenticity or inference. Such rulings are subject to the *ijtihād* of the scholars in understanding them and deducing their rulings.

The *fiqh* and its collection [of texts] encompass both these two types. What we said about the difference between the *Sharīʿah* and *fiqh* applies to the second type of jurisprudential rulings, that is, the deductions of the jurists and their *ijtihād* in interpreting the texts which are probable and not definitive in authenticity, or from their *qiyās* or what they have resolved through *istiḥsān* where they find a justification to depart from the ruling of *qiyās* or what they have resolved through *istiṣlāḥ* and *al-maṣāliḥ al-mursalah* when there is no text on the issue, but they resolved the ruling in it as a result of weighing the benefit against the harm, and similar other types of

rulings derived by *ijtihād,* which are more than what is contained in the *fiqh* of the schools of Islamic law.

Therefore, this type is the one associated with the work of the *fuqahā'* and their deductions, and does not enjoy the sacredness *(al-qudsiyyah)* that is found in the legislative texts *(al-nuṣūṣ al-shar'iyyah).* This is the type [of rulings] that we shall study its phases of development in the coming third chapter. As for the first type, it bears by itself the sanctity *(al-qudsiyyah)* and authenticity of legislative texts.

CHAPTER THREE

THE PHASES OF DEVELOPMENT OF ISLAMIC JURISPRUDENCE *(AL-FIQH AL-ISLĀMĪ)* AND ITS FEATURES IN EACH PHASE

This chapter covers a preliminary section (nine) which will provide a general look at the whole chapter. It is followed by a separate section for each of the eight phases of *fiqh*, starting from the first phase which is the period of Prophethood, and ending with the current eighth phase.

SECTION 9

ABOUT THE EXPANSION OF *FIQH*, ITS DEVELOPMENT AND HISTORICAL ROLES

9/1 The Prophet (s.a.w.) did not depart this life except after completing the establishment of the *Sharīʿah* by explicit text on the basis of foundations and collective principles, restricting the absolute verses, explaining the general [texts], specifying the general ones, abrogating the ones needed to be abrogated, etc.

Thus, the *ijtihād* of the companions and those after them was not legislation, rather; it was a ramification and implementation (see *Tārīkh al-Tashrīʿ al-Islāmī* by al-Subkī, p. 7).

The Prophet (s.a.w.) did not leave for his companions a documented *fiqh*, rather; he left a set of principles and collective maxims, minor rulings and judgments, spread in the *Qur'ān* and the *Sunnah*.

This was almost sufficient for them had the Islamic authority not spread outside the Arabian Peninsula where they encountered issues, events and traditions that were alien to them. Thus, they needed to organize them, establish principles for them and place them in their appropriate position in the rulings of the *Sharīʿah* and its objectives.

This is the principle of the development of *fiqh*. And those foundations that they [companious] needed were principles that are subject to expanding their implied meanings and developing their understanding following the expansion of the ideological sphere, and the emergence of great events that are linked with Islām through other situations and cultures (see *Naẓrah ʿĀmmah fi Tārīkh al-Fiqh al-Islāmī*, pp. 52-53).

In view of this, the Muslim scholars opened the door to contemplating the [jurisprudential] issues, and they started codifying the matters pertaining to practical life in the light of the Religion. Moreover, the systematic development [of the issues] was the by-

product of the rightly guided caliphs and their successors, according to what the situation dictated.[81]

In the countries conquered [by Muslims] following the massive embrace of their people to Islām, there was a dire need for teaching them what was not clear to them as much as the need to regulate the legal practical rulings and coordinate them for the purpose of organizing transactions and knowing the rights.

Similarly, these consecutive wars called for the organization and ramification of the rights of war and the rebels, and of the civil and political rights of the nations in the conquered countries in the light of Islamic foundations.[82]

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[81] Refer to the advice of 'Umar ibn al-Khaṭṭāb to Abū Mūsā al-Ash'arī with report to issuing judgment when he appointed him, which has been mentioned in our previous discussion on *qiyās* (see footnote in para 3/6).

[82] An example of this in civil rights is permitting the people of patronage or protection (*ahl al-dhimmah*) [that is, non-Muslims living in a Muslim run state] to deal with wine and pork while it is strictly prohibited for Muslims to deal with them. Also, approving the *ahl al-dhimmah*'s personal laws and family rights, such as permitting the marriage of widows without allowing them to wait [for *'iddah*] if the same is acceptable in their religion.

An example of war rights is the *fatwā* of Imām al-Awzā'ī of not permitting the killing of political hostages if their host nations betray their truce with the Muslims and break their terms, on the basis of Allah's saying: "*And no bearer of burden shall bear the burden of another*", and the practice of the nations was to kill them (see the introduction of Emir Shakib Arsalān to the thesis entitled *Maḥāsin al-Masā'ī fī Tarjamat al-Imām al-Awzā'ī*, p. 14, cited in *Tārikh al-Balādhurī*.

Political Security *(al-Rahā'in al-Siyāsiyyah):* Whereby certain people of status in the community do reserve [certain amount] under the holding of another community as a surety to the fulfilment of the contracts among them.

An example of political rights is what was related by *al-Balādhuri* in his book *Futūḥ al-Buldān* that, "When 'Umar ibn 'Abd al-'Azīz took over the caliphate, a delegation of people from Samarkand came to him. They complained to him that the commander of the Muslim army Qutaybah ibn Muslim had entered their town abruptly. 'Umar wrote to his deputy to assign for them a judge. If the judge rules that the Muslims should leave, they should be deported. Jumay' ibn Ḥāḍir al-Bājī was appointed as judge who ruled that the Muslim army should be deported, and that the Muslim commander must first warn them [the Samarkands], throw back [their covenant] to them so that they are in equal terms, then he should fight them if they still deny [to submit to Islam]. Consequently, the Samarkands disliked war and they approved the stay of the Muslim army" (p. 428).

With this, as you can see, 'Umar resolved the principle of subjecting the military and politics to regular judiciary based on the principles of legislation and plenty of its texts. This is because the religious notion of *ḥalāl* and *ḥarām*, and considering the truth with respect to the reality and not to what is apparent is the original colour in the Islamic legislation and its jurisprudence as mentioned before, which is considered within the limits of private and public laws (see para 2/1-3).

To summarize, after the necessary needs that appeared respectively in a gradual manner, the *fiqh* that concerns the internal and external life of an Islamic state started to develop and expand its horizons. In this manner, the *fiqh* developed in the forthcoming ages, and the consecutive generations took the task of enhancing it until it became huge, organizing all types of transactions and human relationships in a very precise approach.

This is a general description of the development of *fiqh*, the expansion of its foundation, and the widening of its horizons and settings. In the following sections we shall discuss the divisions and details of the historical phases of the *fiqh*.

The Phases of Development of *Fiqh*

9/2 A historical follow-up of the movement of *fiqh* reveals that the developmental phases through which the *fiqh* underwent is divided into eight phases:

Phase 1: The era of revelation, that is, in the lifetime of the Prophet (s.a.w.).

Phase 2: The era of the rightly guided caliphs after the Prophet (s.a.w.) until the middle of the 1st century Ḥijrī when the authority rested on the Umayyad, and most [of their rulers] ran their internal affairs according to their desire; and not according to the Islamic commandments.

These two phases are the preliminary phase of the *fiqh*.

Phase 3: From the middle of the 1st century to the beginning of the 2nd century when the science of *fiqh* became independent and a specialization that people turned to. In this phase, the schools of Islamic law were formed. This phase is the foundation stage of the *fiqh*.

Phase 4: From early 2nd century to mid 4th century where the *fiqh* reached the peak of *ijtihād*, documentation, and scholastic ramification. In this stage, the science of *uṣūl al-fiqh* was formed and completed. This is the final phase of the *fiqh*.

Phase 5: From middle of the 4th century to the fall of Baghdad in the hands of the Tatars in the middle of the 7th century. In this phase, the process of verification (*taḥrīr*), extrapolation (*takhrīj*), and preference (*tarjīḥ*) in the schools became dynamic.

Phase 6: From the mid 7th century to the emergence of the *Majallah al-Aḥkām al-ʿAdliyyah* that was formulated by a committee of

fuqahā', and was enacted on 26th Sha'bān 1293 A.H by the Royal Sunni administration. This is the declining phase of the *fiqh*.

Phase 7: From the emergence of the *Majallah* to immediately after the Second World War, that is, after the middle of the 14th century (around the middle of the 20th century A.D.), when the implementation of the *Majallah* was confined to only certain countries.

Phase 8: The current era starting from the independence of most of the Islamic countries from the colonial power after the Second World War until today where the Islamic awakening has appeared openly in different aspects, especially in *fiqh*.

In the following sections, we shall elaborate each of these sections in general, while indicating the approaches, attributes and features that have penetrated the jurisprudential movement.

SECTION 10

PHASE 1: THE PROPHETIC ERA

10/1 The authority of legislation, judiciary, and *fatāwa* in this phase was in the hands of the Prophet (s.a.w.) only who was the sole reference in all aspects. In his era also, the foundation of the *Sharīʿah* became complete in terms of satisfying its fundamental texts as aforementioned. Meanwhile, the term *fiqh* was used during the Prophetic period to refer to all that is implied from the texts of the *Qur'ān* and the *Sunnah*, whether it was regarding matters of faith or the practical legislative issues *(al-tashrīʿ al-ʿamalī)* or the morals *(al-ādāb)*.

The Religion of Islām in Makkah was directed towards reforming the *'aqīdah* and combating idolatry. However, its approach towards the practical legislation was in Madina after the migration. In this period, the terms "*fiqh*" and "*ilm*" were synonymous in the Islamic custom as evident from numerous Prophetic traditions.

The *fuqahā'* or the scholars among the companions of the Prophet (s.a.w.) were known as reciters (*qurrā'*, sing. *qāri'*), who were memorizers of the *Qur'ān*, because it is the original source of the knowledge of *Sharīʿah* and they were memorizing its verses with its rulings,[83] thus, the reciters were the scholars and *fuqahā'* of *Sharīʿah*.

During this time, there was no idea of specializing by turning to the knowledge issues emanating from the *Qurān* and the *Sunnah*. Rather, there were general efforts which were directed towards *jihād* and deeds. Knowledge comes from them [the *Qurān* and *Sunnah*] through reciting the *Qur'ān* and listening to the traditions of the Prophet (s.a.w.) and comprehending the *fatāwā* and judgments of events. In this period, *fiqh* was real and not theoretical. People were

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[83] Narrated al-Aʿmash from Abū Wā'il who narrated from Ibn Masʿūd that he said: "When one of us learned ten verses [of the *Qur'ān*], he did not exceed them until he knew their meanings and acts upon them".

Abū 'Abd al-Rahmān al-Sulamī said: "Those who were teaching us recitation narrated to us that they were learning from the Prophet, and that when they learn ten verses, they would not go to pass them until they implement them. They said: Thus, we learned both the *Qur'ān* and implementation". See Introduction of *Tafsīr Ibn Kathīr*, 1/3).

searching for rulings on events and enquiring about them after they happen or they seek judicial ruling on them according to the *Sharīʿah*, and the events were not hypothetical.

We just mentioned that the Prophet (s.a.w.) did not leave behind any documented *fiqh* for his companions, rather it was a set of principles, maxims and minor rulings spread over the *Qur'ān* and *Sunnah*. They are best conceived to be as flexible, general and inclusive of various great concepts that are backed by sound intellect and supported by rational interests. They are attributed to adjustability to partial applications during particular events, to transferability of one concept to another, although they are different, still both of them remain as valid that it begets a jurisprudence of amazing vastness beyond limitations and depletion.

10/2 Examples of this Adjustment in the Texts of the *Qur'ān* and the *Sunnah*

If you want an explanation by examples, take a look at the following texts from the *Qur'ān* and the *Sunnah*:

a. From the Qur'anic verses

"*And no bearer of burden shall bear the burden of another...*" (al-Isrā', 17:15).

"*And that man shall have nothing but what he strives for*" (al-Najm, 53:39).

"*O you who believe! Fulfill the obligations...*" (al-Mā'idah, 5:1).

"*And do not swallow up property among yourselves by false means, neither seek to gain access thereby to the judges, so that you may swallow up a part of the property of men wrongfully while you know*" (al-Baqarah, 2:188).

"*O you who believe! Do not devour your property among yourselves falsely, except that it be trading by your mutual consent...*" (al-Nisā', 4:29).

"*Surely Allāh commands you to make over trusts to their owners and that when you judge between people you judge with justice...*" (al-Nisā', 4:58).

"*And draw not near the property of the orphan except in a goodly way till he attains his maturity and fulfill the promise; surely [every] promise shall be questioned about*" (al-Isrā', 17:34).

"*Divorce may be [pronounced] twice, then keep [them] in good fellowship or let [them] go with kindness...*" (al-Baqarah, 2:229).

"*...and the maintenance and clothing [of the children] must be borne by the father according to the usage; no soul shall have imposed upon it a duty but to the extent of its capacity; neither shall a mother be made to suffer harm on account of her child, nor a father on account of his child...*" (al-Baqarah, 2:233).

"*And the recompense of evil is punishment like it...*" (al-Shūrā, 42:40).

"*...and call to witness two men of justice from among you...*" (al-Ṭalāq, 65:2).

"*...and do not conceal testimony; and whoever conceals it, his heart is surely sinful...*" (al-Baqarah, 2:283).

"*And if [the debtor] is in straitness, then let there be a postponement until [he is] in ease...* (al-Baqarah, 2:280).

"*...Allāh desires ease for you, and he does not desire for you difficulty...*(al-Baqarah, 2:185).

"*...and [He] has not laid upon you any hardship in the religion...*" (al-Ḥajj, 22:78).

"*...but whoever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him...*" (al-Baqarah, 2:173).

And many other verses that came in the context of different legislatives objectives and occasions.

b. From the *Sunnah* of the Prophet (s.a.w.)

"Harm should not be inflicted nor reciprocated"[84]

"Deeds are [judged] by the intentions"[85]

"The receiving hand is held liable for what it has taken until it returns it"[86]

"Verily, Allāh has forgiven my nation (Ummah) for their [unintentional] mistakes, their forgetfulness and that which they do under duress."[87]

"A commodate must be returned, a debt must be settled, and a guarantor is liable [for what he guarantees].[88]

"The child is reckoned to the bed [on which he is born]"[89]

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84 A *ḥasan ḥadīth* according to its channel and evidence. Related by Mālik in *al-Muwaṭṭa'*, 2/745 as a *mursal ḥadīth*. It is also related jointly from the *ḥadīth* of Abī Sa'īd al-Khudrī: al-Dāraquṭnī, 3/77 and 4/228; al-Bayhaqī, 6/69; al-Ḥākim, 2/57-58; and in the chapter from Ibn 'Abbās, and from 'Ubādah ibn al-Ṣāmit, and from Abū Hurayrah, and from Jābir ibn 'Abdullāh, and from 'Ā'ishah, where Ibn al-Ṣalāḥ said: "The total channels strengthen the *ḥadīth* and it is accepted by the majority of the knowledgeable people and they advance it as an argument". Abū Dāwūd said: "Indeed, it is among the *ḥadīth* that the *fiqh* revolves around" (see *Jāmi' al-'Ulūm wal-Ḥukm*, 2/205-211).

85 Reported by al-Bukhārī in seven places [of his *Ṣaḥīḥ*]; Muslim (1907); al-Tirmidhī (1647) in the *Kitāb al-Jihād*; Abu Dāwūd (2201); al-Nasā'ī (75) in *Kitāb al-Ṭahārah*; and others from 'Umar ibn al-Khaṭṭāb, may Allah be pleased with him.

86 Sourced by the compilers of the Four *Sunan:* Abū Dāwūd (3561), al-Tirmidhī (1266) where he said: "[The ḥadīth is] good and sound". Al-Nasā'ī in *al-Kubrā*, and Ibn Mājah. Also sourced by al-Ḥākim in *al-Mustadrak* (2/47), and was [its soundness] was approved by al-Dhahabī, all the above from the *ḥadīth* of al-Ḥasan from Samurrah, although the hearing of al-Ḥasan from Samurrah is debatable (see *al-Talkhīṣ al-Ḥabīr*, 3:53).

87 Reported by Ibn Mājah (2045) with a good chain of narrators (*sanad*) from the *ḥadīth* of Ibn 'Abbās. Also reported by Ibn Ḥibbān (7219) and al-Ḥākim who authenticated it (2/198), and [the authentication] approved by al-Dhahabī. This is the 39th *ḥadīth* of the 40 *Ḥadīth* of Imām al-Nawawī who said after it, "This *ḥadīth* is good, reported by Ibn Mājah and al-Bayhaqī (7/356) and others. Al-Ḥāfiẓ Ibn Rajab has verified its source in much detail (see *Jāmi' al-'Ulūm wal-Ḥikam* 2/361-365; *Tuḥfat al-Ṭālib Bi-Ma'rifat Aḥādīth Ibn al-Ḥājib* by Ibn Kathīr, 271-274).

88 Reported by Aḥmad in his *Musnad* (5/267, 293) from Abū Umāmah, and [reported] in length by Abū Dāwūd in *Kitāb al-Bay'* (3565), and by al-Tirmidhī also in *Kitāb al-Buyu'* (1265) who said: "[The *ḥadīth*] is good and odd"; and Ibn Mājah in *al-Ṣadaqāt* (2398). The *ḥadīth* by virtue of all its directions is sound (*ṣaḥīḥ*) (see *al-Talkhīṣ al-Ḥabīr*, 3:47; *al-Rawḍ al-Bassām fī Tartīb Fawā'id Tamām*, 2:311).

"No bequest may be made to a [legal] heir"[90]

"Muslims are bound by their conditions"[91]

"Whoever stipulates a condition that is not in the Book of Allāh, it is considered void"[92]

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89 Reported by al-Bukhārī in ten places [of his *Ṣaḥīḥ*]; Muslim (2/1080) from 'Ā'ishah, and the *ḥadīth* is massively narrated (*mutawātir*); more than twenty companions reported it from the Prophet (s.a.w.) (see *Fatḥ al-Bāri* 12:39; and *al-Azhār al-Mutanāthirah* by al-Suyūṭī, p. 219).

The meaning of the *ḥadīth* is that a child is attributed to a man (whether husband or a master) who has a legal relationship between him and a woman.

Al-Firāsh is a metaphor for a legitimate sexual intercourse between the man and the woman. This relationship is enough to link the lineal connection to the man without further investigations.

90 Reported by Aḥmad (5:267), Abū Dāwūd in *al-Buyu'* (2870), al-Tirmidhī in *al-Waṣāyā* (2120), Ibn Mājah in *al-Waṣāyā* (2713) from the *ḥadīth* of Abū Umāmah, may Allah be pleased with him, said: *"I heard the Messenger of Allah saying: "Verily Allah has given everyone who has a right his due right. Therefore, no bequeathal may be made to a [legal] heir."* This *ḥadīth* was narrated by a number of Companions such as 'Alī, Abū Umāmah, Ibn 'Amrū, Ibn 'Umar, Jābir, Zayd ibn al-Arqam, al-Barrā', Ma'qal ibn Yasār, and Khārijah ibn 'Amrū.

Al-Ḥāfiẓ said in *al-Fatḥ* after mentioning the manner of the *ḥadīth*: None of the chain of transmissions is free of critique, but collectively they denote that the *ḥadīth* has its origin. In fact, al-Shāfi'ī in his *al-Umm* contended that the text is massively reported (*mutawātir*). He said: "We found the people of *fatwā* and those from whom we have taken the knowledge of battles from among the Quraysh and others, do not differ in the fact that the Prophet (s.a.w.) said in the year of conquest [of Makkah]: *"No bequest may be made to a [legal] heir"* which they narrate from those who have met the from among the scholars, thus, it became a narration of majority from a majority, which is stronger than an individual narration" (5/272) (see *al-Talkhīṣ al-Ḥabīr*, 3/92; *al-Rawḍ al-Bassām fī Tartīb Fawā'id Tamām*, 2/341-345).

91 Reported by al-Tirmidhī in *al-Aqḍiyah* (1352), and he said: *"It is a good and sound ḥadīth"*, reported also by Abū Dāwūd (3594) in *al-Aḥkām*. Al-Bukhārī mentioned it in his *Ṣaḥīḥ* without chain of narrators (*ta'līq*) in an affirmative form where he said in *al-Ijārah*: *"And the Prophet said: Muslims are bound by their conditions"*. Thus it is a sound *ḥadīth* based on what has been resolved in the science of *ḥadīth* (see para 42/17).

92 Reported by al-Bukhārī (5/326 in *Fatḥ al-Bāri*; Muslim (1504); al-Tirmidhī (2124); Abū Dāwūd (3929); al-Nasā'ī (4655); and refer to the narrations of the *ḥadīth* in *Jāmi' al-Uṣūl* (8:/4-98). The meaning of *"not in the Book of Allah"* is what contravenes the foundations of *Shariah* that have been resolved by the *Qur'ān*. Thus initiating a contract and stipulating it [what is against the *Sharī'ah*] is void the same way the modern legal theories consider all that breach the public order and morals or violate the texts of the law, void. Similar to this is the aforementioned saying of 'Umar in his legal advice to Abū Mūsā al-Ash'arī, "Compromise is permissible among Muslims, but not any agreement through which something forbidden (*ḥarām*) would be rendered permissible (*ḥalāl*), or something permitted forbidden" (see footnote in para 3/6).

"The [right of] preemption is like untying a rope [of a camel]"[93]

"No divorce [is valid] under [the influence] of ighlāq"[94]

"[Producing] evidence is the obligation of the one who asserts, and the oath is the obligation of the one who denies"[95]

And other abundant and sublime Prophetic traditions related to the [Islamic] injunctions.

Kitābul-Lāh here does not refer to the *Qur'ān* but what is dictated and ordained by Allāh. It means the *Sharīʿah* commandments that He has legislated. The word *'kitāb'* here is a verbal noun in the sense of a passive participle which is *'maktūb'* means obligatory as stated in the *Qur'ān*, *"Indeed, the prayer is a timed prescription for the believers"*.

93 Pre-emption *(al-shafaʿah)* is the right to buy an adjourning property by virtue of the fact that the neighbor has priority, over any third party, to ownership of that property.
The meaning of the *ḥadīth* is that it is compulsory upon the preemptive neighbor to immediately claim his right upon his knowledge that a sale [contract] has been made [on the adjourning property] the way how a person rushes to untie the rope of a camel by pulling the head of its knot. See *Bidāyat al-Mujtahid* by Ibn Rushd [2/220], the end of the second issue in the fourth pillar of preemptive right).
The chain of the *ḥadīth* has not reached the level of soundness. It was reported by Ibn Mājah (2500) and al-Bayhaqī (6/108), from the *ḥadīth* of Ibn 'Umar. Al-Ḥāfiẓ Ibn Ḥajar said in *al-Talkhīṣ*, after relating it to Ibn Mājah and al-Bazzār. Its chain of narrators is very weak, and Ibn Ḥibbān said, "It has no origin, while al-Bayhaqī said, "It is not authentic" (3/56). At the same time, the jurists have used it as evidence for the necessity of identifying a short period of time for claiming the preemptive right so that the buyer is not affected by prolonged waiting from the second partner.

94 The scholars have differed in the meaning of *ighlāq*. Some of them have interpreted it as duress while others, as rage that makes a person lose his conscience. Others have interpreted it in a more general way as to include all that inhibits a person's will and conscience such as duress or rage or their likes that affects a person's nature of conception or choice, and this is the most reasonable interpretation.
The *ḥadīth* is reported by Aḥmad in his *Musnad* (6/276) Abū Dāwūd (2193) in *al-Ṭalāq*, Ibn Mājah (2046), al-Ḥākim in *al-Mustadrak* (2/198), Abū Yaʿlā and al-Bayhaqī (7/357) from the *ḥadīth* of ʿĀ'ishah. But the [scholars] have differed in its soundness and weakness. See al-Talkhīṣ al-Ḥabīr, 3/210).

95 Reported by al-Bayhaqī in the *Sunan* (10:252) from the *ḥadīth* of Ibn 'Abbās who related to the Prophet (s.a.w.) with the words, *"Producing evidence is the obligation of the defendant"*. Also reported by al-Tirmidhī (1341) from the *ḥadīth* of 'Abd Allāh ibn ʿAmrū (may Allah be pleased with them) and al-Dāraquṭnī but its chain of narrators is weak as said by al-Ḥāfiẓ in *al-Talkhīṣ* (4/208), and it has not attained the level of soundness, but it is evidenced by the practical reality of the judgments made by the Prophet (s.a.w.) and his Companions (may Allah be pleased with them). And he [Ibn Ḥajar] said in *al-Fatḥ* in *al-Shahādāt*: This addition (i.e. [Producing] evidence is the obligation of tbe one who asserts, and the oath is the obligation of the one who denies, is not in the two *Saḥiḥ* but its *sanad* is good (5:282).

10/3 Thus, a keen observer of such kind of texts which are of constitutional thoughts and abundent fruits[96] would be able to realize the extent to which the texts could be applied in minor applications and branches of jurisprudence with regard to different rulings and perceptions within the limits of correct and rational thought.

For instance, the *ḥadīth* "The [right of] preemption is like untying a rope [of a camel]", is basically suitable for the notion of prescription; determining the period for claiming some of the rights; using some of the contractual options such as the option of vision and defect; revising some of the judicial levels for objecting the initial rulings when the hierarchy of courts are established hierarchy like it is today as *maṣlaḥah* requires the determination of a period that would render the right to judicial complaint dropped if it is neglected [within the specified period].

We have previously elaborated that the Qur'anic approach of explaining the legislative rulings is by laying the foundations and principles, and generalizing the commands, but does not deal with minor rulings and detailed subsections except in some few issues.

These general foundations and accurate principles on which the body of justice in the social life stands are in most cases always on top of the theoretical differences which are minor in all settings. This is because they are connected to pure intuitive state and human conscience. The *Qur'ān* came to disclose their constant issues, thus, it became suitable for every place and time. Since the *Qur'ān* does not delve into details, its prescriptive verses, although few, are constitutional in their nature and are comprehensive such that all the injunctions and the details of the *Sharīʿah* go back to them.

For this reason, the Holy *Qur'ān* is considered by the scholars of *Sharīʿah* as the great proof and the first reference. In fact, some *fuqahā'* considered it the sole source of *Sharīʿah* injunctions while other sources are explanations of its generalities, elaboration or extrapolation based on its principles or extraction of what it contains of wisdom, and connected and supportive meanings as mentioned before (see para 3/2, 3/6, and the introduction of *al-Milkiyyah wa-Naẓariyyāt al-'Aqd fī al-Sharīʿah al-Islāmiyyah* by Shaykh Muḥammad Abū Zahrah, pp. 8-9).

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[96] *Al-Shajar al-mawāqir* (the tree with abundant fruit): It is where the fruits are produced in overwhelming abundance which is overbearing in weight.

SECTION 11

PHASE 2: THE ERA OF THE RIGHTLY GUIDED CALIPHS UNTIL THE MIDDLE OF THE FIRST CENTURY

11/1 In this phase, the condition of the scholars among the Companions changed from stage to stage. In the lifetime of the Messenger (s.a.w.), their task was to receive from him and contemplate what he delivers to them. Thus, there was no need for them to work out their minds in understanding the rulings that require deep sight and analysis; an effort which is known as *ijtihād*. This is because undertaking this responsibility with the possibility of correctness or mistake has no meaning when there is a reference for all matters pertaining to the *Sharīʿah* and its rulings.

Therefore, the situation of the Companions in the lifetime of the Messenger (s.a.w.) was to listen, follow and seek guidance (*fatwā*) from him for anything that was doubtful to them. In other words, they were relying on the Messenger (s.a.w.) for their understanding and guidance in everything.

However, after the death of the Prophet (s.a.w.) they shifted abruptly from the reliance stage to the *ijtihād* stage because of the disappearance of the reference and having his constitutional legacy of the *Qur'ān* and the Sunnah taking the place of his verbal explanations. At this time, there arose the necessity for *ijtihād* that was inevitable towards the emerging cases, and had neither boundaries nor limits.

Therefore, the Muslims after the death of the Prophet (s.a.w.), went on with the victorious conquests of the [kingdom of] Khusrau (*Kisrā*) and Ceaser (*Qayṣar*), hence breaking the obstacles that were set by the monarchs in the face of the propagation and the reformative message of Islām. Several nations of firmly established cultures of Egypt, Persia, Syria and then North Africa came under the authority of the Muslims, and the Islamic cities surged with mingled nations made of different races. It was inevitable to have new events which called for analysis of the jurisprudential solutions that are suitable for the social and political affairs [of the people]. It was also inevitable

that the Muslims would need systems and rulings emanating from the spirit of Islām, which, during the time of the Messenger (s.a.w.), they were neither compelled to nor made to reflect on. For this reason, it was necessary for the Companions to exercise *ijtihād* in solving such complicated issues that were facing them.

Their approach in this type of *ijtihād* was to resort to the Book of Allāh; if they found therein the ruling that they needed, they would take it; and if they did not, they moved to the narrations of the Messenger (s.a.w.). They thus spurred the memories of the Companions regarding what they memorized in a particular case. If they did not find anyone among them who memorized a *ḥadīth* of the Prophet (s.a.w.) in the topic, they resorted to using the legal opinion *al-ra'y*. Thus, they expended their efforts and worked out their understandings in what they perceived as closer to good *(maʿrūf)* objectives of the *Sharīʿah* and its principles of establishing justice, and in the *maṣāliḥ* whose path has been made clear.

Their example in this is as example of a judge (*qāḍi*) who is tied by the texts of the law; if he does not find in the text what he can rule for a particular case before him, he implements what he perceives as justice and fairness which is closer to the objective of the law.

11/2 The Meaning of *Ra'y*

Ibn al-Qayyim has elaborated in his book *Iʿlām al-Muwaqqiʿīn*, the meaning of (*ra'y*) in the context jurisprudence as understood by the Companions. He stated that *ra'y* is "what the heart recognizes after conception, scrutiny and search for the knowledge of the correctness contained in the contradicting evidences" (1/76). With this meaning, *ra'y* is broader than the implied meaning of special jurisprudential *qiyās*, which is "to attach a matter that has no prescribed ruling with another matter that has a prescribed ruling because of an effective cause that is common between them", because *qiyās* based on this meaning includes the said *qiyās* as well as *istiḥsān* and *istiṣlāḥ*, which have been discussed before under the secondary sources. Ibn al-Qayyim then divided the *ra'y* into sound (*ṣaḥīḥ*), void (*bāṭil*) and doubtful (*musthabbih*). He distinguished among the three divisions and applied on them what has been narrated by the Companions about dispraising *ra'y* at times, and implementing it at other times.

Nonetheless, the jurisprudential approach in this second era did not differ substantially to its previous era, since jurisprudence

remained, as it was in the period of revelation, real and practical while handling the events by searching for their rulings after their occurrence in line with the guidance of the texts of the Book and the *Sunnah*. It also reveals through its understanding, the Islamic benefits that the Legislator observed them.

11/3 The remarkable thing that distinguishes this era is related to the sources of *fiqh* more than its relation to the *fiqh* itself, which is two fold:

First: Use of thought and analogy in a very obvious way to derive laws for new incidents based on (*ijtihād*) discretion. The companions of Prophet did not use *ijtihād* and *ra'y* in the period of the Prophet (s.a.w.), if they did, it was very rare and temporary.

Second: The origin of *ijmā*ʿ as the approach of the first two caliphs, Abū Bakr and ʻUmar (may Allāh be pleased with them), was to gather the Companions when events emerged, and seek their legal opinion, and implement what they agreed upon as mentioned before.

11/4 The Approach of the Salient Independent Reasoning (*Ijtihādāt*) of ʻUmar ibn al-Khaṭṭāb in this Period

This age was also distinguished by salient *ijtihād* of ʻUmar ibn al-Khaṭṭāb, the second Caliph, in particular incidents in which a great jurisprudential intelligence, suitable for being the foundation of practical jurisprudential approach, emanated from the Caliph. Among these are the following:

1. He denied the people whose hearts have been reconciled [to faith] (*al-mu'allafah qulūbuhum)* their portion of tithes from the treasury *(bayt al-māl)* even though their portion is confirmed by the *Qur'ān,* and they were receiving the tithes under this title during the time of the Prophet (s.a.w.).

   Despite of the portion being declared in the *Qur'ān*, ʻUmar looked at the effective cause (ʻ*illah*) of the text and not the apparent meaning of it. The cause of giving the ones whose hearts have been reconciled was to win over their hearts so as to avoid their mischief when Islām was still weak, but when Islām gained strength and power, the need to placate them has eroded,

and the *Qur'ān* does not oblige giving particular people or names from this portion.[97]

2. His *ijtihād* of suspending the execution of the prescribed punishment of theft (*ḥadd al-sariqah*) on thieves in the Year of Draught (*Ām al-Ramādah*), and applying only the discretionary punishment (*ta'zīr*) on a thief instead of cutting the hand. This

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[97] This does not mean that 'Umar (may Allah be pleased with him) annulled any prescriptive verse of the *Qur'ān* but he thought that those people who were counted as people whose hearts have been reconciled [to faith], and who the Prophet (s.a.w.) used to give tbe tithes from the treasury because the Islamic propagation was in need of encouraging and supporting them and reconciling their hearts [to faith], the Religion now is not in need of placating them with wealth after it has become strong, and they have become the ones who are in need of strength through Islam. Thus, he only held the provision from this particular group, otherwise the Qur'ānic ruling on portion of reconciling the hearts and supporting [the newly reverted] is still standing, and has not heen stopped.

Therefore, whenever the *Ummah* falls in need of reconciling people's hearts to faith, at any time or place or to trigger the forces in order to ward off an enemy or to entice the one who is not enticed except by wealth, such people are given from this portion which has been kept for this purpose. Such is the way how the modern states allocate the expenditures in their [national] budgets for the purpose of propaganda. When the need for the propaganda is over in a certain place or for a certain group [of people] it is then not permissible to spend on the one who does not need the propaganda, instead the wealth is preserved in the state treasury until the need arises. The need may also change from time to time such those people who were previously given, or the news paper agencies or establishing advertisement magazines, or wireless radio stations like in our modern times because of their status and influence.

Imām Abū 'Ubayd al-Qāsim ibn Sallām said in his book, *al-Amwāl* regarding what the Prophet has stipulated for Banū Thaqīf the people of Ṭā'if when they embraced Islam: That the Prophet (s.a.w.) stipulated conditions on them upon their embracing of Islam which were special for them, not applicable for other people such as declaring their valley sacred, that no one should enter it to overpower them, and no one should lead them except from among themselves.

This part is what I have mentioned to you that the ruler is the overseer of Islam and its followers: When he fears that an enemy can overpower him and has no other way of warding them off except by provision, he should do like it was done by the Prophet (s.a.w.) with the confederates (*al-aḥzāb*) on the Day of the Trench (*Khandaq*).

Similarly, if the enemies deny to embrace Islam, unless something is given to them, and Islam would gain strength by their embracement, while Muslims are safe from their hate and fight, the ruler would then provide them [wealth] in order to reconcile their hearts with it. It was done by the Prophet (s.a.w.) to those whose hearts have been reconciled until they inclined to Islam and their intentions were purified. All this is permissible only when it does not contradict [the injunctions] of the Book or the *Sunnah*. This is elaborated by the fact that the Prophet (s.a.w.) did not permit them *ribā*, as evidenced from his condition that they deserve only their capital (*Al-Amwāl*, 1:193-194).

does not mean that he subsumed the prescribed punishment of theft, rather; it is a wise *ijtihād* from him to implement the conditions of this punishment as one of its legal conditions is that the thief should not have been forced to steal out of necessity. 'Umar had thus considered this to be a general doubt that the thieves were stealing out of necessity, and the Prophet (s.a.w.) has said, *"Drop the prescribed punishments in all cases of doubt"*.[98]

3. His dissolution of the marriage contract (*nikāḥ*) of the wife of a missing person after four years of his absent without waiting for the confirmation of his death or the death of his coevals as mentioned previously in the discussion on unregulated *maṣāliḥ* (see para 5/12).

4. His *ijtihād* in preventing the distribution of the dark [green and fertile] lands of Iraq and Egyptian lands among the fighters (*mujāhidīn*) who conquered them, and who demanded that the lands are distributed among them as how the war booty (*ghanā'im*, sing. *ghanīmah*) are distributed after dividing them into five parts. They argued using the apparent meanings of the texts of the *Qur'ān* and the *Sunnah* to justify the rights of the fighters who win war plunders in battles, and thus considered the lands as part of the booty.

'Umar, however, had a different opinion in that he considered the lands as State Lands (*fay'*) which has connection with the rights of all the Muslims, the present and the forthcoming, as a way of observing the interest of the future generations and their rights in

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98 Reported from the *ḥadīth* of 'Ā'ishah, 'Alī and Abū Hurayrah. As for the *ḥadīth* of 'Ā'ishah, it was sourced by al-Tirmidhī in *al-Ḥudūd* (1424), with the text, "Keep the Muslims away from punishments wherever possible. If there is any way out for an offender to escape punishment, acquit him. It is better for a judge to err in acquittal than in conviction", and he weakened its transmission to the Prophet (s.a.w.). It was also sourced by al-Ḥākim in *al-Mustadrak* (3:384) and he said, "Its chain (*sanad*) is sound, and he was refuted by al-Dhahabī.

As for *ḥadīth* of 'Alī, *it was sourced by al-Dāraquṭnī (3:84)*, and the *ḥadīth* of Abū Hurayrah was sourced by Ibn Mājah (2545) using the words, "Suspend the prescribed punishments as long as you can find anything to suspend them".

It was also sourced by Ibn 'Adī in a portion of his *ḥadīth* from Ibn 'Abbās raised to the Prophet (s.a.w.) with the words, *"Drop the prescribed punishments in cases of doubt, and forgive the sins of the noble people except in a punishment prescribed by Allah"* (see para 49/4).

the treasury in accordance with what the texts of the *Qur'ān* imply when considered collectively and not partially. Thus, he left the two lands with their natives and imposed on them land tax (*kharāj*) because this was more beneficial in reviving the lands, and more general and long lasting for its benefit and produce.[99]

Besides this, 'Umar is the first person to introduce the judiciary post independent from other duties while before that it was under the governorship of the emirs and their deputies, and part of their tasks.

'Umar's jurisprudential approach was an everlasting evidence for the school of the partisans of opinion (*ahl al-ra'y*) in Iraq among the subsequent generations that will be mentioned next. These people have been influenced by the *fiqh* of Ibn Mas'ūd in Kūfah, who was following the same approach of 'Umar, may Allāh be pleased with them.

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[99] We shall explain in details the *ijtihād* of 'Umar regarding the conquered lands in this section's appendix.

APPENDIX TO SECTION 11

'UMAR'S *IJTIHĀD* ON THE CONQUERED LANDS

11/5 We have explained in section 11 that the *ijtihād* of 'Umar was against the distribution of great land masses of Iraq and the Egyptian lands among the conquerors like how the war-booty is distributed. The following is an explanation of this:

The verse of war-booty appears in *Sūrat al-Anfāl* and reads, "*And know that whatever of war-booty that you may gain, a fifth share is assigned to Allāh, and to the Messenger, and to the near relatives, orphans, the needy and the wayfarer*" (8/41).

The verse identified the expenditure of the fifth share of the war-booty for public categories while the *Sunnah*, through the deeds of the Prophet (s.a.w.), elaborated the method of distribution of the remainder among the soldiers.

Then, came the verse of *fay'* in *Sūrat al-Ḥashr* saying, "*Whatever Allāh has restored to His Messenger from the people of the towns, it is for Allāh and for the Messenger, and for the near of kin and the orphans and the needy and the wayfarer, so that it may not be a thing taken by turns among the rich of you, and whatever the Messenger gives you, accept it, and from whatever he forbids you, keep back, and be careful of (your duty to) Allāh; surely Allāh is severe in retributing (evil). (It is) for the poor who fled their homes... and those who made their abode in the city and in the faith before them... And those who come after them....*".

Thus, this verse denotes that *fay'* benefits all the Muslims, the present and the coming, and is not limited to the conquering fighters, rather; it is kept in the treasury. The difference between *ghanīmah* and *fay'* in the legal context is that *ghanīmah* is that which has been extracted from the rebellious enemy by force, while *fay'* refers to what is left behind by the enemies out of fear, or they give it by force or being overpowered, but without involving a battle. Thus, *fay'* includes the taxes that are imposed on them [non-Muslims] such as poll tax (*jizyah*) and tax on lands (*kharāj*).

It is has been reported in the *Sunnah* that when the Prophet (s.a.w.) conquered Khaybar – through the military force and not through a treaty, and its rebellious people surrendered to the ruling of the exile – its lands were considered as *fay'* and the Prophet (s.a.w.) put aside half of it (it is also said fifth of it), and left it for anticipated catastrophes and disasters, and distributed the rest among the conquerors.

When the dark lands of Iraq were conquered during the caliphate of 'Umar, the conquerors demanded that the lands be distributed among them like the fighters while the opinion of 'Umar was not to permit the distribution. He thus gathered the people and consulted them, and the majority of them were in favour of distribution except 'Alī, 'Uthmān, Ṭalḥah, and Muʿādh ibn Jabal whose opinion was like that of 'Umar. Muʿādh said: "If you distribute [the lands], the greatest revenue would be in the hands of these people, then they will pass away; and its revenue would then be in the hands of one man or woman. Then a generation would come after them which would be of great benefit to Islām, but they will not have anything left for them. Therefore, decide on something that would benefit the present and the future".

Despite the conquerors' plea to distribute the land, 'Umar saw that the neighbouring lands have been conquered, and that the lands are *fay'* thus the conquerors are not entitled to own their tangibles. Instead, it is up to the ruler (Imām) to decide on what is more beneficial to revive it and what is more long lasting in benefiting the multitude of Muslims. What the Prophet (s.a.w.) had distributed from the lands of Khaybar was a result of *maṣlaḥah* following their need for lands at that time.

They continued discussing for days until 'Umar said: "I have found a proof against them in the last verse of [*Sūrat*] *al Ḥashr* where it says regarding those who deserve *fay'*, *"And those who come after them...."* 'Umar said: "I do not see this verse except that it has included all the mankind even the shepherded in Kadā (a mountain in Makkah)." Then, he told them: "Do you want the last [generation of] people to come and they don't have anything, then what would be there for those after you? Had it not been for the last [generation], I would have distributed [the war-booty of] every village that I conquer like how the Prophet (s.a.w.) distributed Khaybar". Thus, 'Umar resolved that the lands and rivers remain with their inhabitants and workers, and a land tax be imposed on them.

He then ordered the same to be done with the lands of Egypt because of a similar difference (of opinion) that occurred between Zubayr ibn 'Awwām and 'Amr ibn al-'Āṣ (see *Kitāb al-Amwāl* by Abū 'Ubayd al-Qāsim ibn Sallām, the paragraphs 141 to 153, *Kitāb al-Kharāj* by Abū Yūsuf, *Fatḥ al-Bāri,* 6:138, and *Aḥkām al-Qur'ān* by Abū Bakr al-Jaṣṣāṣ in *Sūrat al-Ḥashr*).

It is clear that this wise approach from 'Umar in distinguishing between the movable war booty and the lands was a result of holding to the implications of the texts and reconciling them, while implementing each of them by relating it to the appropriate situation led by correct analysis. Contrary to what is deluded by some people today that 'Umar in this case breached the texts of *Sharī'ah,* and they consider this breaching, in their claim, an intelligent *ijtihād*! Nonetheless, you have seen from what we have cited that 'Umar's evidence was the text of the *Qur'ān* itself with which he confounded his opponents, and he proved the predilection of his understanding of the text, and several senior jurists among the Companions like 'Alī and Mu'ādh shared his opinion.

Based on this, there have been three juristic opinions regarding the lands that have been conquered through force of arms:

An opinion which sees that the lands are to be distributed among the conquering army like the movable plunders, after subtracting a fifth share, and this is the opinion of al-Shāfi'ī.

Another opinion views that the lands become *waqf* for all the Muslims. Thus, their revenue is kept in the treasury *(bayt-al-māl)* and spent on the public welfare and benefits, and this is the opinion of the Mālikīs.

Another opinion views that the issue about lands goes back to the discretion of the ruler and his estimation according to what he sees in terms of need and interest. If he wishes he can subtract a fifth share or more of the lands to the treasury, and distributes the rest among the conquerors like what the Prophet (s.a.w.) did with the land of Khaybar. Alternatively, if he wishes he can leave the lands under the possession of its inhabitants and impose on them a land tax like what 'Umar did with the dark lands of Iraq and the land of Egypt. This is the opinion of the Ḥanafis (see *al-Amwāl* by Abū 'Ubayd al-Qāsim ibn Sallām, the paragraphs 149 and 153; *Bidāyat al-Mujtahid* by Ibn Rushd, 1:324; and *Radd al-Muḥtār,* v. 3, *"bāb al-mughnim wa-qismatihi")*.

Important Note

It is nonetheless, noted that the *Qur'ān* did not mention the obligation of distributing the war-booty including the movable ones among the conquering fighters, rather; the verse of *Sūrat al-Anfāl* stated the specific recipients of the war-booty.

The distribution of the remaining four fifths of the share among the fighters is found in the *Sunnah,* and this type of *Sunnah* is considered, according to the principles of the *Sharīʿah,* part of *al-siyāsah al-sharʿiyyah* and beneficial administrations that the Prophet (s.a.w.) undertakes by virtue of his general authority on governorship and administration, and not by virtue of the Prophethood and legislation. Thus, it does not denote a constant legislative right that is unchangeable like the ruling of the Prophet (s.a.w.) on the grandmother that she deserves a share of sixth of the inheritance, rather; anyone who succeeded the Prophet (s.a.w.) in this general custodianship is entitled to resort to another process when in need as it was possible for the Prophet (s.a.w.) himself.

Therefore, when circumstances change and the need dictates another military policy under which the rights of the fighting army are not based on distributing the war-booty but based on organized payable jobs for the army, and where all the plunders would belong to the State such that the soldiers have no right in them, as in our present system and time; it is also acceptable by law, and is part of *istiṣlāḥ* in the affairs of the general management (see para 5/9)

However, the system of distributing war-booty was, in the early phase of Islām, the possible system from the financial perspective, and was also the most suitable for the policy of *jihād* with respect to the Arabs at that time from the customary viewpoint.

SECTION 12

PHASE 3: FROM THE MIDDLE OF THE FIRST CENTURY TO THE BEGINNING OF THE SECOND CENTURY

12/1 This phase was the beginning of the era of fundamental of *fiqh*. We have seen that the scholars from among the Companions in the early caliphate of 'Uthmān ibn 'Affān (may Allāh be pleased with him) dispersed in several countries, and they lived in different places, after not being allowed by 'Umar to leave Madina so he may consult them during occurrences (*nawāzil*).

These Companions carried with them to their new places in Hijaz, Yemen, Iraq, Egypt and Shām the traditions of the Messenger (s.a.w.) and the rulings of the *Sharīʿah*, and a generation of sncccessors from different countries graduated from them.

Ibn al-Qayyim said, "The *fiqh* spread in the *Ummah* (nation) through the companions of Ibn Masʿūd in Iraq, the companions of Zayd ibn Thābit and Ibn ʿUmar in Madinah, and the companions of Ibn 'Abbās in Makkah (*Iʿlām al-Muwaqqiʿīn* by Ibn al Qayyim, 1/23).

And the great Companions such as a 'Umar, 'Uthmān, Ibn Masʿūd, 'Alī, and Muʿādh, may Allāh be pleased with them, had a direct impact, and thus schools,[100] based on their personalities and opinions, were established in different places by their stndents among the *tābiʿīn* (successors) who became leaders of those schools, such as Saʿīd ibn al-Musayyab in Madinah, 'Aṭā' ibn Abī Rabāḥ in Makkah, Ibrāhīm al-Nakhaʿī in Kūfah, al-Ḥasan al-Baṣrī in Baṣrah, Makḥūl in Shām, Ṭāwūs in Yemen. Through these people and their likes and tbose following them among the successors, the wheel of *fiqh* rotated around its scholastic phase. Each of them was influenced by the *fiqh* of the one whom he accompanied among the Companions and their *ijtihād* approach.

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100 In modern terms, *madrasah* (school) in this context refers to the people who attach themselves to a particular theory, or knowledge or philosophic opinion. It may also refer to the *madhhab* itself.

12/2 Emergence of the School of Tradition (*Ahl al-Ḥadīth*) and the School of Opinion (*Ahl al-Ra'y*)

The most important schools established are the schools of Madinah and Kūfah, that is, the school of Ḥijāz and Iraq.

It appears to the student or researcher of the jurisprudential movement from the era of the rightly-guided caliphs that the first starting point from which the jurisprudential schools emerged and thus formed the schools of thought was the appearance of two approaches among the Companions in understanding the legal texts. These two approaches are:

a. Complying with the specific boundaries of the text in understanding, interpreting and implementiug it without looking at its effective cause, motives, and the circumstances for its existence, and the knowledge of the aim of the legislator in it, especially the texts of the Prophetic traditions which comprised specific issues, and are not general, whereas the texts of the *Qur'ān* are dominated by constitutional generalities.

b. Deploying the opinion and investigating the effective cause of the text and its wisdom, and the aim of the legislator in it so as to apply it in a way that fulfills the same objective in the light of the general objectives of the *Sharī*ʿ*ah*, by considering that the *Sharī*ʿ*ah* came to establish the interests of the human life in the most complete manner, and to prevent it from harms as noted by the glorious *Qur'ān* where Allāh says, "*...but Allāh knows the man who means mischief from the man who means good...*" (Al-Baqarah, 2:220). Thus, its rulings, pertaining to matters other thau pure acts of worship (*ibādāt*), such as the commands and prohibitions even in the minor details, are explained, using the effective cause by the [principle of] *maṣaliḥ and mafāsid.* As for pure acts of worship such as having two units for morning prayer and four units for *ẓuhr*; there is no opportunity for investigating their effective causes.

   The inclination towards the first approach was apparent in some Companions for fear of making a mistake in implementing the commands of the Messenger (s.a.w.) and his prohibitions. Other [Companions]– especially those who have been assigned

certain responsibilities – were inclined to adapting the second approach.

12/3 The eminent scholar Shaykh Muḥammad al-Khuḍarī said in his invalnable book, *Tārikh a-Tashrī al-Islāmī*:

"Indeed, the leading Companions in the first era relying for their *fatāwā* on the Book then the *Sunnah*. If they conld not derive from them, they gave *fatwā* based on their opinion which is *qiyās* in its broadest meaning. However, they were not inclined to nsing the opinion in a broad manner, and because of this, it was reported from them that they blamed the use of opinion; and we have explained before which is the acceptable opinion and the opinion which deserves blame.

When the snccessors came (after them), it was found that some of them, in issning *fatwā*, stood by the *ḥadīth*, and does not go beyond it. They issue the *fatwā* in every issue with what they perceive from the Prophetic tradition, although there are no links that relate the issues with each other.

Another group was fonnd that perceives the *Sharīʿah* as of rational meanings and that it has fundamentals that it refers to. Thus, they were not going contrary to the opinion of the first generation in implementing the [teachings] of the Book and the Sunnah as long as they found way for that. However, because they were convinced with the rationality of the *Sharīʿah* and its formation from concrete fundamentals that are understood from the Book and the *Sunnah*, they did not refrain from issuing *fatwā* according to what they perceived as being closer to the objectives of the *Sharīʿah* in matters that they do not find divine text for them. In addition to this, they desired to know the effective causes and the goals for the legalization of the rulings. In some cases, they may reject certain Prophetic traditions because they contradicted the fundamentals of the *Sharīʿah*, especially when they contradict other Prophetic traditions.

The emergence of this approach was prevalent among the people of Iraq as most of the *fuqahā'* of Iraq were of the school of opinion (*ahl al-ra'y*), whereas most of the people of Ḥijaz were of the school of *ḥadīth* (*ahl al-ḥadīth*)" (summarized from *Tārīkh al-Tashrīʿ al-Islāmī*, pp. 107-108).

12/4 Example: The difference between *Ahl al-Hadīth* and *Ahl al-Ra'y* in *Ṣadaqat al-Fiṭr*

It appears in the sound *ḥadīth* narrated on the authority of the Companions that the Messenger (s.a.w.) obliged responsible persons (*mukallaf*) to give charity for fast-breaking (*ṣadaqat al-fiṭr*) to the poor at the end of the month of Ramadan and the first day of Shawwāl an amount equivalent to one *ṣā*ʿ of wheat, barley, dates, raisins or desiccated cheese,[101] given by every *mukallaf* for himself and the one whom he takes care of, male and female. This form of charity was named as *ṣadaqat al-fiṭr* or *zakāt al-fiṭr*; and it is a monetary act of devotion for thanking Allāh the Almighty for having eased for the believers the accomplishment of the obligation of fasting. The charity also contains a relief for the poor on the occasion of completing the fasting and commencing the feast of fast-breaking (*'īd al-fiṭr*).

The school of *ḥadīth* opined that it is compulsory for this charity to be given to the poor in the form of tangibles from one of the staples that have been mentioned in the Prophetic traditions. Substituting any of these staples with an equivalent sum of money will neither be correct nor will it exonerate the giver, because the text of the *ḥadīth* has specified these types [of staples].

Meanwhile, the school of opinion asserted that the intended meaning of these charities is not the staples themselves, as these are not the place of devotion [to Allāh], and there is no legal objective attached to them. Rather, the intended meaning [of the charity] is to assist the poor so that their need for nutrition is realized. Thus, the hadīth came as response to the simple nutrition that was prevalent around their surroundings. The meaning is thus assigned to the financial aspect rather than the type of commodity, and the poor knew their needs better at that time. Their need for clothing could be dire but they could not afford its value while money is suitable for fulfilling needs of all types. Therefore, if a responsible person gives out sum of money equivalent to the value of one of the staples for the compulsory quantity, it will be acceptable from him.

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[101] *Al-Ṣā*ʿ*:* a measure equivalent to 2.75 litres. *Al-Aqiṭ* is dried coagulated sour milk that is used for cooking and cuisine.

Beginning of Independence of the Science of Jurisprudence and Consequently Becoming a Specialization

12/5 In the second half of the first Hijrī century, a new initiative emerged where some pious people among the scholars and people of *fatwā* detached themselves from the general social life, and turned to *fiqh*; learning and teaching it in some countries. Previously, *fiqh* and narrations of the Prophetic traditions were overlapping and concurrent with each other. The *faqīh* was at the same time a hadīth scholar, and his abundant knowledge and *fiqh* comes from the abundance of narrations from the Messenger (s.a.w.), while the holder of the Prophetic tradition is a *faqīh* who issues *fatwā* to people in their issues according to what he memorizes from the hadīth that he narrates.

However, the deviation of the Umayyad caliphs from the way of life of the four rightly guided caliphs in adhering to the exalted attributes of the religion and practical life in the second half of the first century of *hijrah*, and the tests as well as revolutions that appeared in this period, made a group of the people of knowledge and *fatwā* to detach themselves from the social life and its political and social demands. Thus, in a number of towns and countries, these people turned to studying and teaching *fiqh*; sometimes criticizing the rulers, and spreading the knowledge among their students who stayed with them.

This was the beginning of the independence of the science of *fiqh*. By independence, we mean that it became a specialization to which those who aspire to learn and teach it devote themselves. Every leading figure in *fiqh* was joined by a group which received his knowledge and approach, and spread it amoug people. In the second half of the first century, there were many successors who received [knowledge] from the Companions when they spread in the countries.

In the early second century, the students of the successors were also mauy, and a lot of the successors and their students had their own *fatāwā* and opinions in several issues and affairs which were recorded after them by authors who wrote on differences among the *fuqahā'*. For those of them whose schools of thought *(madhāhib)* have been recorded fully, that is, their opinions and *fatāwā*, in all books of *fiqh*, despite being few, are the ones who have been provided with excellent and prudent students who narrated and recorded their

different opinions in many affairs and matters. Thus, for each of these leading figures, a school of Islamic law was formed that was complete and comprehensive encompassing all the sections of rulings ranging from acts of devotion, transactions, crimes, to family affairs (personal statutes). Hence, what was recorded by the early students from each of the leading scholars became the reference in knowing his *madhhab*, approach, and the *(qawā'id uṣūliyyah)* that he relied on.

Then, came students of later stages among the *fuqahā'* of each schools, and they revised and expanded in diversification, extrapolation, and authorship in the schools of their leaders until their jurisprudential writings in every schools reached tens or hundreds of commentaries and *fatāwā* both in summary form and in lengthy explanations such that one of them may go up to thirty volumes or more.

The Schools of Islamic Law

12/6 The schools of Islamic law whose leaders were lucky enough to have excellent and energetic students who recorded their opinions, and which remained everlasting while being served by explanation, extrapolation and branching out on the basis of the principle of every schools throughout the ages, are three categories:

The first category: Includes the four schools that represent the *fiqh* of *ahl al-Sunnah*. Some of them are dominated by the trend of the school of opinion, while others are dominated by the trend of the school of ḥadīth. Their doctrines are until today followed by the majority of the Muslims in every part of the Muslim world. They are, according to their chronological order, Ḥanafi, Mālikī, Shāfi'ī, and Ḥanbali.

The second category: Includes the school of the Ẓāhirīs (literalists). This can be classified under the four Sunnī school because it endorses their very sources [of *fiqh*]. It however, differs from them in that its leading figure and his companions are excessively attached to the literal aspect of the text to the extent that in some issues they go against logic, oppose the legislative rational, and contradict the school of ḥadīth themselves let alone the school of opinion. Because of this, their schools vanished; it did not have dominance in any place except that, today, some of their opinions are discussed in the study of comparative *fiqh*. For this reason, we

decided to categorize it alone as a second group in the school of Islamic law.

The third category: They are the schools that represent the sects whose *fiqh* differs from that of the first two categories because it is related to some of the creedal fundamentals which are contrary to the path of the Sunnīs. This category comprises of the following four[102] other schools:

1. **The school of the Zaydīs**: named after Zayd ibn 'Alī ibn Zayn al-'Ābidīn (d. 122 A.H.), from the family of the household of the Messenger (s.a.w.). He was an Imām with a multidimensional knowledge personality. It is said that Abū Ḥanifah was among his students. This school is dominant in Yemen.

2. **The school of the Ibāḍīs:** named after its leader 'Abd Allāh ibn Ibāḍ (d. 86 H) who was inclined to the opinion of the Khawārij, but in reality he did not proceed with their extremism. This doctrine is dominant in the Arabian Gulf state of Oman in the Arabian Peninsula, and has many followers spread all over Zanzibar, parts of Tunisia in North Africa, and in Northern Algeria. It also has vast jurisprudential literature.

   Al-Zaydī and al-Ibāḍī are the two closest schools to *fiqh* of the Sunnīs, and they endorse the very sources of the *Sunnah* that are endorsed by the Sunnīs.

3. **The Doctrine of the Shī'ah Imāmiyyah**: This is the *fiqh* of the Twelve Shī'ī Imāms. The Shī'ī attribute the origin of this school to Imām Ja'far al-Ṣādiq (may Allāh be pleased with him) (d. 148 A.H.) who is a salient member of the household of the Prophet (s.a.w.), known for his knowledge and status. He was a contemporary of Abū Ḥanīfah. The Shī'ah Imāmiyyah school is prevalent in Iran, in the Shi'ite headquarters in Iraq, and it could be found in some other places. It also has abundant literature.

12/7 In this era, the term *'Ilm* is distinguished from *fiqh* in denotation. The term *'Ilm* has become a reference to the knowledge of *nuṣūṣ* (texts) while *fiqh* became a reference to the talent of

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[102] [The author however, mentioned only three schools in his text].

understanding the rulings from these texts. In other words, *'Ilm* stands for narration (*riwāyah*), and *fiqh,* for comprehension (*dirāyah*). This is similar to the distinction between the terms "*Sunnah*" and "*Ḥadith*" in denotations as has been explained in the opening discussion on *Sunnah* (para 3/3).

APPENDIX TO SECTION 12

CLARIFICATIONS ABOUT THE DIFFERENCE BETWEEN THE SCHOOL OF *ḤADĪTH* AND THE SCHOOL OF OPINION

We have mentioned in section 12/2 that the foundation for the difference between the School of *Ḥadīth* and the School of *Ra'y* to the scholars among the Companions themselves is with regard to the approach of inference from the legal texts. We shall cite two examples that elaborate the two approaches; one of them from the Prophet's era, and the other after the emergence of the two schools.

12/8 First Example: Justifying a clear command

In the Year of the Trench, the Messenger (s.a.w.) ordered his Companions to go to Banū Qurayẓah who betrayed the treaty, and he said, *"None [of you] should offer 'asr prayer except at Banū Qurayẓah's place"* (reported by al-Bukhārī in the [Book of] Campaigns (*al-Maghāzī*), Muslim and Aḥmad). On their way, the prayer time for *'asr* was almost due and thus some of them wanted to stop to offer the prayer for fear of its [prescribed] time may pass. They understood from the Prophet's saying, *"None [of you] should offer 'Asr prayer except at Banū Qurayẓah's place"*, that the objective is to hasten and avoid delaying or moving slowly. On the other hand, others thought that they should proceed with the journey without stopping for prayer as a way of implementing the apparent command of the Messenger (s.a.w.). Therefore, a group of them stopped for prayer then continued while the other proceeded without stopping, and were not able to offer *'asr* prayer except after the time of *'ishā'* prayer. And when the Messenger (s.a.w.) knew about what had occurred in their difference of opinion, he did not say to any of the two groups that it

had made a mistake, rather; it approved the action of each of them.[103]

12/9 Second Example: The Issue of Udder-tied Ewe

It was narrated by Abū Hurayrah (Allāh be pleased with him) that the Messenger of Allāh (s.a.w.) forbade the tying of [the udders] of camel and sheep[104] when he said, *"Do not allow the milk of camels and sheep to collect in the udders. If anyone buys it, he has a choice between the two views after he has milked it. If he wishes, he keeps it, and if he wishes, he returns the animal with a ṣāᶜ of dates."*[105]

The school of *ḥadīth* say that the buyer returns it with a *ṣāᶜ* of dates as a compensation for the milk he has obtained from it as mentioned in the Prophetic tradition.

On the other hand, the school of opinion say that the law of guaranteeing a damaged item in the *Sharīᶜah* provides that an equivalent fungible item should be returned if the damage is in fungibles or its economic value if the damage is in non-fungible goods. This *ḥadīth,* by its apparent meaning, renders the milk that was consumed by the buyer estimated without considering whether the item damaged is fungible or non-fungible. Their opinion regarding the outcome differed, but their best opinion is that [the buyer] returns it with the value of the milk which he obtained from it, and not with a *ṣāᶜ* of dates because the dates may be more or less than the value of the milk obtained.

They interpret this *ḥadīth* by saying that the Prophet (s.a.w.) valued the milk in that case is equal to a *ṣāᶜ* of date which at that time was the affordable wealth to all of them, and thus judged based on it. Thus, the above mentioned *ḥadīth* will not be generalized in this case; indeed it was a particular case. In general, it was not originally

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[103] See Ibn Taymiyyah, *Rafᶜ al-Malām 'an A'immat al-Aᶜlām* (Bayrūt: al-Maktab al-Islāmi, pp. 46-47). The grand Imām then comments, "...nonetheless, the ones who prayed on the way were more correct". See also *Zād al-Maᶜād* by Ibn al-Qayyim (3:130).

[104] *Al-Taṣriyah*: Tying of the udder of the camel or the ewe (that is a dairy) when the owner wants to sell it, so that it is full of milk, and then he presents it to the buyer, so that the latter thinks that it is full of milk. After the first milking by the buyer, no milk like the previous amount is produced by the dairy ewe. This is swindling with deception that gives false attribute.

[105] Reported by al-Bukhārī in *al-Buyūᶜ* (3:92) and Muslim in *al-Buyūᶜ*(3:1155).

intended to be a general ruling, rather; it is for a particular incident. As for the general ruling, reference is made to the principle itself.

These are two classical examples of difference between the school of *ḥadīth* and the school of opinion. There are other examples which are clearly extreme from the school of *ḥadīth*, not acceptable by the jurisprudential consideration that focuses on the objectives of the *sharīʿah*. Similarly, the school of opinion, in some cases, are also extreme in interpreting some prophetic traditions in a away that takes the traditions out of the normal understanding of the discourse, characterized by *al-takalluf* and *al-tamaḥḥul*.

The Meaning of *Ra'y*

12/10 At this juncture, it is noteworthy to mention that the intended meaning of *al-ra'y,* when we say: *ahl al-ra'y* and *ahl al-ḥadīth,* is not the declaration of rulings through desires or what is chosen by a *muftī* and judge (*qāḍī*) by his pure intellect without adhering to anything from the texts of *Sharīʿah* and its general objectives that have been elaborated in the first part of this discussion, as may be misconceived by he who has no knowledge [of this field]. Rather, the intended meaning of *ra'y* according to the school of opinion is when there is no elaboration from the text or for the purpose of understanding and implementing it, the analysis of the effective cause of the text, its goal, and the reason of its occurrence to know its intended meaning so as to implement it appropriately. In a situation where the text is not available, the intended meaning of *ra'y* is to return to the objectives of the *Sharīʿah* and the scale of benefits and harm from the perspective of the Legislator and not the perspective of the person and his desire as explaiued before.

The grand Professor Muḥammad Abū Zahrah (may Allāh have mercy ou him) says: Indeed, the one who investigates the *fatāwā* of the Companions and their successors...will understand from the meaning of *ra'y* that which includes the reliance of the *faqīh* in his *fatāwa* on the aspects that have been known in the Religion by its general spirit or that which coincides with its rulings in geueral from the *mufti*'s perspective or that which resembles an issue that has a *naṣ*. Based on this, *ra'y* is, therefore, comprising of *qiyās, istiḥsān, maṣāliḥ mursalah,* and *ʿurf* (summarized from *Mālik,* p. 149).

From here, we couclude that the difference between the school of *ḥadith* and the school of opinion is not that the school of opinion

reject the application of the Prophetic tradition if it is proved authentic, and they prefer to it the application of *qiyās* or general opinion, nor is it that the school of *ḥadith* [merely] apply the *ḥadīth*. This is a misconception arising from the ignorance of the realities. It is certainly known to the school of knowledge and recorded in the references that each one of the four Imāms said and quoted by their students as having said, "If a *ḥadīth* is found to be authentic, it is my way (*madhhab*)."

However, the imāms may differ on the soundness and weakness of the *aḥādīth*, because the perceptions of *mujtahid* scholars may differ regarding the [soundness of the] chain (*sanad*) of a *ḥadīth* and understanding its text. Thus, the real difference among the school of opinion and the school of *ḥadīth* is actually in the approach of inferring from the Prophetic Sunnah as has been explained before.

A Remark on the Geographical Interpretation of the Emergence of the two Schools

12/11 The geographical interpretation for the concentration of the school of the school of opinion in Iraq (particularly in Kūfah), and of the school of *ḥadīth* in Ḥijāz (particularly in Madinah), and the difference in their approach, has circulated among those who have written on the history of the *fiqh*. It is typical in this context to say that the extensiveness in using opinion arose, at the beginning, as a result of the deficiency of *ḥadīth* narration in Iraq. The complication of civil life in it, the divergence of thoughts and customs, and the abundance of incidents that had no known explicit texts were all factors that contributed to the use of opinion. It is also typical to say that the school of *ḥadīth* was named so because of their many narrations of Prophetic traditions among them in Ḥijāz (particularly in Madinah) where their need for using opinion in *ijtihād* was less because they had fewer complicated civil incidents.

This is what has actually been resolved in the previous editions of *al-Madkhal*. We conformed to some [of the writers] who wrote before us. However, it appears upon contemplation that this interpretation of the emergence of the two schools and their geographical positioning at the beginning is not congruent with a number of famous historical and jurisprudential facts such as:

a. Iraq was the country with the greatest number of Companions. "Kūfah and Baṣrah were the base for the Islamic armies...aud many scholars among the Companions settled in them,[106] and Kūfah was the headquarters of the caliphate during the time of 'Alī. Before him, there was Ibn Mas'ūd, Sa'd ibn Abī Waqqāṣ, Ammār ibn Yasīr, Abū Mūsā al-Ash'arī, al-Mughīrah ibn Shu'bah, Anas ibn Mālik, Hudhayfah ibn al-Yamān, 'Umrān ibn Huṣayn, and many Companions who were in the party of 'Alī and the those with him such as Ibn 'Abbās. These all are the bearers of *ḥadīth* and its narrators.[107] This fact disagrees with the assumption that there were few Prophetic traditions in Iraq.

b. There is no doubt that the most famous *mujtahid* in Ḥijāz was Mālik, but his *fiqh* is considered under the school of opinion, despite his abundant narrations of *ḥadīth*.

c. If the social environment in Iraq was the motive for resorting to opinion, then how did this very environment prodnce a leader of the school of *ḥadīth*, Aḥmad ibn Ḥanbal?

d. If we look at the *fiqh* of Imām al-Shāfi'ī we will see him closer to the school of *ḥadīth*, and it is not possible to attribute this to his environment because he had lived in Ḥijāz, Yemen, Iraq, then Egypt, and he studied the opinions of the school of *ḥadīth* and the school of opinion, before emerging with a distinguishable school.

12/12 Conclusion

The geographic interpretation of the emergence of the schools and their concentration does not apply to any of the four *madhāhib*. The closest one on which it applies is the school of Ḥanafi, although this application is hindered by point (a) above.

It, therefore, appears to us that the interpretation that is closest to the reality and farthest from affection is:

That the difference in the approach of the two schools of *ḥadīth* and opinion is a phenomenon for two fundamental approaches in

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106 The number of companions that settled in Kufah reached mote than 300.

107 *Tārikh al-Fiqh al-Islāmī* by Muḥammad 'Alī al-Sāyis (al-Qāhirah: Dār al-Ma'ārif, p. 74).

dealing with the legal texts in general, and it is rare for any civilized human environment to be deficient of them: an approach that is strictly adhering to the literal meaning of the text, and another one that gives greater weight to the general objectives on which the text was founded, and its intended wisdom.

SECTION 13

PHASE 4: FROM THE BEGINNING OF THE SECOND CENTURY TO THE MIDDLE OF THE FOURTH CENTURY

13/1 In this broad domain, *fiqh* expanded enormously and had its magnificent renaissance after its previous fundamental phase.

In this broad phase, many schools of Islamic law and *ijtihād* developed, among them the four schools, and many others.[108]

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[108] The four schools *(madhāhib)* are: Ḥanafī, Mālikī, Shāfi'ī and Ḥanbalī.

a. The Ḥanafī School: Attributed to its Imām Abū Ḥanīfah al-Nu'mān ibn Thābit of Persian origin, and is known as "the greatest Imām". He was born in 80 A.H. and died in 150 A.H., and was the Imām of the Iraqis and the leadership of the school of opinion shifted to him, and rested on him. He strengthened the *Istiḥsān* approach, and was famous for his strong evidence, quick convincing response, and genius in understanding and deductions. His most famous students were two: The first one: Abū Yūsuf Ya'qūb ibn Ibrāhīm who presided over the judicial authority in the Abbāsid state during the rulership of al-Rashīd, and authored for him the book *al-Kharāj*. The second one: Muḥammad ibn al-Ḥasan al-Shaybānī who was one of the genius and intellectual jurisprudents as well as the leaders of Arabic language. The two students are nicknamed, "The two Companions" and to whom the first class credit goes in writing down the jurisprudence of Abū Ḥanīfah and spreading his school.

b. The Māliki School: Attributed to its Imām Mālik ibn Anas al-Aṣbaḥī where he was the scholar of Madinah and the Imām of the people of Ḥijāz. He was born in 93 A.H. and died in 179 A.H., and his school is considered as a balance between the school of *ḥadīth* and the school of opinion because of his heavy reliance on *ḥadīth* as his narration is spread, especially in the city of the Prophet. Besides this, Mālik is also well regarded among the school of opinion, and his school and principles are closer in relation to the approach of *ra'y*. Based in Madinah, he benefitted from the continuous contact with the scholars from all over the globe during the pilgrimage (*ḥajj*) season, and he met Abū Ḥanīfah and debated with him, and said about him, "He is indeed a jurist". See *Mālik* by Muḥammad Abū Zahrah, p. 1.

c. The Shāfi'i School: Attributed to Imām Muḥammad ibn Idrīs al-Shāfi'ī al-Qurashī who was born in 150 A.H. in Gaza, and brought up as an orphan. He travelled to Iraq and Ḥijaz and acquired [knowledge] from the companions of Abū Ḥanīfah and Mālik. He then settled in Egypt, and abandoned his old opinions after establishing his new school. He died in 204 A.H. in Fustāt. He was highly gifted, and his school is considered to be closer to the school of *ḥadīth*. He, however, refuted the principle of *istiḥān* bought by his mentor, Mālik.

d. The Ḥanbali School: Attributed to its Imām Aḥmad ibn Ḥanbal al-Shaybānī, a student of Imām al-Shāfi'ī. He was boru in Baghdad, 164 A.H, and specialized in

Differences between the school of *ḥadith* and the school of opinion had aggravated in the early period of this phase, and later, the consideration of *ra'y* as a correct jurisprudential approach with its limits and legal principles was affirmed. The scholars eliminated the doubts surrounding this approach by using evidences that isolated it from the sayings based on desire which is not backed by any legal evidence.

Shaykh Muḥammad Abū Zahrah says, "However, the difference between the school of opinion and the school of ḥadith did not last long as the generation that came after the four Imāms – leaders of the *madhāhib* - and their students had met each other despite the differences among their mentors. Thus, Imām Muhammad, who is among the companions of Abu Ḥanīfah, went to Ḥijāz and studies *al-Muwaṭṭa'* of Imām Mālik. Al-Shāfiʿī, on the other hand, studies the *fiqh* of the school of opinion from Muḥammad ibn al-Ḥasan,[109] and Abū Yūsuf himself supports the views of many schools of opinions using *ḥadīth*. Hence, we find the different books of *fiqh* are abundant with *ḥadith* and opinion together, which signifies that their authors met with each other, even though Muslim jurists differ in terms of how much more or less they are adopting from either of the two groups (see the introduction of *al-Mulkiyyah wa-Naẓariyyat al-'Aqd* by the said Professor, para 16, p. 37).

ḥadith until he surpassed and became famous in it. As such, his school is mostly related to *ḥadith*. He died in 241 A.H.

Besides these four, there have been other great *mujtahidīn* who are many in number, some contemporaneous while others successive. They all had great [knowledge of] jurisprudence and valuable opinions some of which are still recorded in the books which compiled the differences of [opinion of] scholars. However, their schools were not meant to be long lasting for reasons, among them: they did not have students who had the ability and vigor to memorize and spread the opinions.

Among these *mujtahidīn* are the mentors of the abovementioned four Imāms such as Ḥammād ibn Abī Sulaymān, the teacher of Abū Ḥanīfah, Ibrāhīm al-Nakhaʿī and al-Shaʿbī, the teachers of Ḥammād, Rabīʿah al-Ra'y, Ibn Shihāb al-Zuhrī, Yaḥyā ibn Saʿīd, the teachers of Mālik.

Among them are also many who were not the mentors of the four Imāms such as Jaʿfar al-Ṣādiq, Zayd ibn 'Alī Zayn al-'Ābidīn, al-Awzāʿī, 'Abd al-Raḥmān ibn Abī Laylā, Ibn Shubrumah, who were all compeers of Abū Ḥanīfah; Layth ibn Saʿd in Egypt who was among the great contemporary of Abū Ḥanīfah and Mālik, and had several meetings and correspondences with the later which have been recorded and published. See the two letters exchanged between Mālik and Layth ibn Saʿd in the book, *Mālik* by Shaykh Muḥammad Abū Zuhrah, part 1, para 102, pp. 103-114.

109 I [the author] added, "Aḥmad ibn Ḥanbal studied *fiqh* and *ḥadith* from al-Shāfiʿī.

In this phase, the governments had adopted a *madhhab*-based direction in judiciary, stewardship (*ḥisbah*),[110] and levying (*jibāyah*) among other duties. For example, the *fiqh* of Abū Ḥanīfah and his school was the dominant school in the judiciary system of the Abbasid state where all the traditions and local customs were tied with jurisprudence, and on which rulings were based.

13/2 In the early period of this phase, *fiqh* started to be written in a scientific and *madhhab* form. Among the most ancient books in this filed are the books of Mnḥammad ibn al-Ḥasan al-Shaybānī, student of Abū Ḥanīfah who compiled his *madhhab*, *al-Muwaṭṭa'* of Imām Mālik ibn Anas and *al-Umm* of al-Shafiʿī.

Also in this phase, the writing of the science of fundamental of jurisprudence (*uṣūl al-fiqh*) started in order to regulate the laws of deduction of rulings after the quality of Arabic language, in relation to other languages, was impaired.

This significant knowledge was previously in the form of fundamentals and principles which were not compiled together. They were known to the firmly established [scholars] in the knowledge of *Sharīʿah*, and from them emanated the understanding of their *fiqh*.

The first book written on *uṣūl al-fiqh* is *Risālat al-Uṣūl* by Imām al-Shāfiʿī. However, he was not the one who introduced this science and its rules as every *mujtahid* applies in his *ijtihād* fundamentals which he observes and is challenged with. Rather, al-Shafiʿī was the first person to dictate and document the foremost and main issues in the field of *uṣūl al-fiqh*.

In this phase, many jurisprudential terminologies emerged which were a living treasure in the language of *fiqh* and law. These terminologies differed with the difference of schools and their places [of origin].

Also in this phase, the theoretical side of *fiqh* was intensified, and the approach of assuming events before they happen, and resolving their rulings in advance, emerged and had great influence in the expansion of *fiqh* and sharpening the minds in it.

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[110] *Al-Ḥisbah* in Islam refers to a procedural duty of supporting the obligation of enjoining good and forbidding evil that is, protecting the public good known in the legal terms today as "public order", such as suppressing cheating, vagrancy, and all types of incorrectness. The officer who carries out this task is known as *muḥtasib*. See *Maʿālim al-Qurbah fi Aḥkām al-Ḥisbah*, by Ibn al-Ukhuwwah, chapter 1.

But thereafter, going into details with this approach became unpleasant as *fiqh* was, in many of its issues, far from the practical needs and the timed benefits. It also resulted into a section of issues that are almost impossible to happen, and thus their study was a waste of time.

Within the wide boundaries of this phase, there was the codification of many general maxims and jurisprudential rules derived from inferences of texts, such as *"Certainty is not superseded by doubt"; "freedom from liability is the original"; "Customary practices are built on the bases of laws"; "Harm shall be eliminated"; "Hardship begets facility";* and many other maxims which were circulating within the principles of the *madhāhib*, and later their meaning transformed to fixed spoken structures of wide coverage. Details of this will appear in the third part of this *al-Madkhal*; the part that has specifically been allocated for the general maxims and their discussion (see para 80/1-80/5).

SECTION 14

PHASE 5: FROM THE MIDDLE OF THE FOURTH CENTURY TO MIDDLE OF THE SEVENTH CENTURY

14/1 In this phase, the spirit of *ijtihād* had stagnated, and the aspirers of *fiqh* had confined themselves to the schools of the former *mujtahidūn*, especially the four Imāms. Each of the four *madhāhib* had concentrated in a place, and produced great specialists of *fiqh* who dealt with the respective school by writing, revising, and organizing.

14/2 Closure of the Door of *Ijtihād* and the Activation of the Movement of Extrapolation and Preponderance in Schools of Islamic Law

In the first part of this phase, the scholars of the four schools issued *fatwā* on the closure of the door of *ijtihād* owing to the collapse of the vigor in acquiring the set of attributes, language and legal knowledge to the extent that [makes one] qualify for *ijtihād* in legal rulings. It has become weak for the commoner to distinguish between the one who is supposed to be imitated [i.e. in his decisions] and the one who is not. In addition, the scholars were afraid that the ignorant anomalies and haphazardness in the knowledge desires may destroy the *fiqh* of *Sharīʿah* that has been accurately and knowledgeably built by those great Imāms.

Shaykh Muḥammad Abū Zahrah[111] opines that the main factors that directed the minds of the men of the schools of Islamic law into issuing *fatwā* on closing the door of *ijtihād* are the following:

1. Bigotry of the *Madhhab*

The students were bigoted with the teachings of their mentors – the great Imāms in *ijtihād* who enlightened the early period and solved the difficult issues by the distinct light of their minds.

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[111] See *al-Mulkiyyah wa-Naẓariyyat al-ʿAqd fī al-Sharīʿah al-Islāmiyyah,* pp. 38-39.

It is clear that the bigotry of any notion leads a person to stick to the notion rigidly, and calling people to it. This is how the followers of the Imāms did; they were concerned with studying their schools and spreading them instead of following their approach and performing *ijtihād* like what their mentors did. Thus, they had confidence in the previous scholars and doubted their own abilities.

2. Administration of Justice

The Caliphs were initially choosing judges from among the *mujtahidīn*, and not from their imitators (*muqallidīn*). However, later on, they preferred to choose them from among the imitators so as to restrict them to a particular school, and to appoint for that which will be used as the basis of their judgment such that the people would be excluded from any judgment which contradicts that particular school.[112] It was also because some of the judges who were *mujtahidun* were subjected to criticism from the jurists, and thus the rulings of the judges were not easily acceptable to them. This way, the restriction of a judge to a *madhhab* of caliph's choice was a reason for many people being contented with him and turning to him.

3. Compilation of *Madhāhib*

The compilation of the *madhāhib* had made them easy for people to deal with them, as people always seek the simple and easy rather than the complicated and difficult. In the previous eras, the thing that was

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[112] There is no doubt that it is part of *maṣlaḥah* to restrict the judiciary with specific codified rulings so that people know in advance the consequences of their action; thus, they become aware of their validity or invalidity.

This however, does not mean that the codified rulings are selected from one madhhab, rather; the ruling with the most pertinent evidence, wisdom and *maṣlaḥah* should be chosen. It will thus become a jurisprudential compilation in the form of law that the judiciary is restricted to, and then the choice [of the rulings] among the schools is renewed in terms of adulteration and modification every time the need and *maṣlaḥah* arises according to the change of time.

This is what 'Abd Allāh ibn al-Muqaffa' pointed out to the Abbasid Caliph, Abū Ja'far al-Manṣūr, that he unifies what is used as judgment for people in a law that he chooses and records from the opinions of the judges and jurists of that time, after refining and weighing between the rulings.

We shall discuss this topic in much more details in the second appendix of section 22 under the title: Codification of Jurisprudence.

driving people to *ijtihād* was the necessity of knowing rulings of new events and affairs, which they did not know their legal rulings. When the *mujtahidūn* came in the previous phases, and compiled the incidents that were presented [to them], people were left in such a condition where whenever an issue was brought to them, they found that the previous people had dealt with it. They thus became contented with their sayings regarding the issues, and their need was fulfilled with what they found. Hence, there was no incentive for driving them into conducting new research.

This situation was exacerbated by the scholars' great position in knowledge which deserves all respect; the honor that they are earning from their excellence with the passage of time, and the duty of every nation to honor their rightly guided predecessors so that their present is strongly related to their past.

Because of all these, people turned to imitation *(taqlīd)* [i.e. of the decisions worked out by earlier scholars], except in knowing the effective causes of the rulings in a school of thought or outweighing certain opinions in a *madhhab*. The person who has been given this ability is known as "*mujtahid* within the *madhhab*" (*mujtahid fi al-madhhab*), that is, not an absolute *mujtahid* (*mujtahid muṭlaq*) of an independent *madhhab*, rather; he is a follower of an imām who is *mujtahid*, but he has an opinion that is considered within the *madhhab* of his imām, and based on the principles of his Imām.

It is worth mentioning that it has been reported from most of the imāms that they forbade people from imitating them without being fully convinced by their evidences.[113]

Abū Yūsuf, the companion of Abū Ḥanīfah says, "It is not permissible for anyone to say what we have said until he knows from where we have said it."

Al-Shāfiʿī says, "The one who seeks knowledge without evidence is like the one who collects firewood at night, he may carry a bundle of woods that contains a snake which may sting him while he is unaware."

Aḥmad ibn Ḥanbal says, "Do not imitate anyone in your religion." And he has distinguished between imitation and *ittibāʿ* by

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113 See *Iʿlām al-Muwaqqiʿīn* by Ibn al-Qayyim (2:301-302). The forbiddance of imitation (*taqlīd*) goes to the one who is qualified to look into the legal evidences and weighing them. As for the one who is not, and they are the majority of the people, they have to imitate a reliable Imām.

saying: "*Ittibā*ʿ is where a person follows what has come from the Prophet (s.a.w.), and from his Companions, and then he is free to choose among the followers of the Companions."

14/3 Collective *Ijtihād*

If the protection of the rulings of *ijtihād* which resulted into sufficient fortune of *fiqh* in the past had led to the closure of the door of individual *ijtihād*, then in this era, the approach of *maṣlaḥah* has changed with the new wonders of civilization. Man has exploited whatever he wished of the power of universal nature until he flew in the air, dived in the sea as a traveler and fighter, and now he has split the atom, and has used its power in what has puzzled the minds. He has made a television set through which he sees and hears from the remote countries. He invaded the space and launched the artificial satellites that rotate around the earth. Then he realized his dream of travelling to the moon. Transportation between different parts of the world has become extremely fast by the power of electricity. The economic relationships among the nations have become interrelated, and their laws linked with each other.

Thus, it has become part of *maṣlaḥah* in the *fiqh* itself that a different type of *ijtihād* is established, which is the collective *ijtihād* in the way of knowledge consultation (*al-shūrā al-'ilmiyyah*) in the academies of *fiqh* which comprise of eminent scholars from different schools of thought and places in order to cater for the need of the unlimited *fiqh* in the modern era.

This *shūrā* is the method which the rightly guided caliphs were resorting to whenever faced by political and knowledge problems. 'Umar bin Al-Khattāb had a special *shūrā* and general *shūrā*. His special *shūrā* was restricted to the most distinguished Companions among the early immigrants (*muhājirūn*) and the senior helpers (*anṣār*). He was consulting them in every small and big matter concerning the affairs of the state. For the general *shūrā,* he was gathering the people of opinion of Madinah in matters of serious concern for the state. He used to gather them in the *masjid* of the Prophet (s.a.w.), and if not enough to accommodate them he would gather them outside Madina and present the issue and his view to them.

Among the issues of consultation are the large land mass of Iraq when he differed with the conquering soldiers who wanted its

distribution among them as war booty (see para 11/4). He gathered the Companions and discussed the matter for two or three days until they resolved that the lands should be *fay'*, that is, not distributed among the conquerers because its yields are connected to the future generations as well (see the introduction of *al-Mulkiyyah wa-Naẓariyyat al-'Aqd* by Abū Zahrah, para 12, p. 18).

The origin of this *shūrā* is from the *Qur'ān* where Allāh the Almighty says about the believers, "*...and their rule is to take counsel among themselves...*" and the rule comprises matters pertaining to knowledge and politics.

The Prophet (s.a.w.) has elaborated the method of *shūrā* in judicial affairs by gathering the people of knowledge and engaging them in a discussion as reported by Mālik bin Anas through his *sanad* to 'Alī ibn Abī Ṭālib (may Allāh be pleased with him) that he said: "I said, O Messenger of Allāh! If something befalls on us which is neither revealed in the *Qur'ān* nor mentioned in your *Sunnah* [what should we do]? He replied, gather the scholars among you and let it be decided by consultation among you, but not by one person's opinion."[114] (See *I'lām al-Muwaqqi'īn* by Ibn al-Qayyim, 1:73-74).

There is no doubt that this knowledge-based opinion that is issued by collective *shūrā* and thorough examination is closer to accuracy and *maṣlaḥah* than the opinions of individuals. It has been mentioned that this knowledge-based *shūrā* in the era of the rightly guided caliphs is the one which gave rise to *ijmā'* as a source of *fiqh*.

The Mālikī *ijtihād* has adopted this knowledge-based *shūrā* among the scholars of every period when there is need to change the jurisprudential rulings with the change of people's custom and their knowledge-based objectives. This is the collective *ijtihād* which we conceive its discontinuity as non-permissible.[115]

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[114] Reported by al-Tabrānī in *al-Awsaṭ*, and its men [narrators] are reliable, the men of *al-Ṣaḥīḥ* as said by al-Haythamī in *al-Mujma'* (1:178). It was classified as *ṣaḥīḥ* by al-Suyūṭī in *Miftāḥ al-Jannah* as in *Kanz al-'Ummāl* (4188). It was also reported by Ibn 'Abd al-Barr in *Jāmi' Bayān al-'Ilm* (1:16) from the channel of Mālik, but not in *al-Muwaṭṭa'*.

[115] See the lecture that was written and published by the writer and great historian Rafiq Bek al-'Aẓm entitled *Qaḍā' al-Jamā'ah wa-Qaḍā' al-Fard*.

14/4 Distinct Features of this Phase

- For many jurists of the schools of Islamic law in this phase, there was a restricted and bounded *ijtihād*, that is, the opinions of the jurists stand on the principles of the *madhhab* which they are affiliated to. They may differ in these principles from the [opinion] of the *imām* of their *madhhab* in some rulings; a difference which relies on extrapolation (*takhrīj*) of the very principles but from a different viewpoint (see para 14/2).
- This restricted *ijtihād* took the place of the absolute *ijtihād* that was found in the class of their *imāms*.
- The jurisprudential output in this phase and the one before it had reached an unprecedented level in the hands of leading authors of the *madhāhib*.
- Despite the cessation of *ijtihād* in this phase, there were great efforts in organizing and compiling the *madhāhib*; explaining the causes of the issues contained in them; extrapolating the new events based on the principles of the *madhāhib*; and giving weight to differing opinions and sayings within them.
- As a result of this also, the knowledge of *uṣūl al-fiqh* also widened in the hands of the leading scholars of the *madhāhib*, and this expansion was the inevitable product of the jurisprudential extensions which have to rely on the said knowledge.
- The branching of jurisprudential opinions in every *madhhab*, because of the expansion of its scope; the difference of opinion of the extrapolators of the new events in addition to the different narrations of the imām himself in many issues. There may be numerous narrations reported from an imām on one particular issue. This is what led to the continuation of the movement of *tarjīḥ* and correction *(taṣḥīḥ)* of some opinions and narrations, and weakening others so that the muftis and judges rely on those which are stronger.
- The books of *fatāwā* which we shall discuss in the sixth phase appeared in this phase.

14/5 The Dialectics of the *Madhāhib*

In this phase, there were numerous competitions, discussions and dialectics among the scholars of the *madhāhib* which continued even after this phase, characterized by bigotry more than the knowledge

objective. The dialectics in the following eras reached the extent of hatred among the late followers of *madhāhib* although a lot of jurisprudential novelties and precise knowledge has been left behind by the dialectics. The Mālikīs were the furthermost people from these arguments compared to their counterparts.

This bigotry to the jurisprudential rulings among the late followers of the *madhāhib* was driven by time factors that directed them to the opposite of the spirit of tolerance and knowledge-sharing among the imāms of the *madhāhib* themselves. To the extent that some of the scholars of the *madhāhib* said that among the conditions of *taqlīd* is when a *muqallid* believes that the *madhhab* of his imām is all accurate and bears the possibility of a mistake while the *madhhab* of his counterpart is wrong and bears the possibility of accuracy! This is despite the fact that all the schools of Islamic law rely on the legal sources of *Sharīʿah* through various correct methods which are acceptable in understanding the texts of law and extrapolating them based on its priuciples. This differeuce [of opinion] is considered a great treasure in the *fiqh* and its theories as we shall see in the coming sectiou (19).

Indeed, the devotion for the *Sharīʿah* that demonstrates what the difference among the schools has of the ability to last longer and expand in order to accommodate various jurisprudential theories, obliges the scholars of each school to be proud of the existeuce of the opposiug *madhhab*, and to exchange respect as was previously done by the *imāms* of their *madhāhib*.

SECTION 15

PHASE 6: FROM THE MIDDLE OF THE SEVENTH CENTURY TO THE EMERGENCE OF *AL-MAJALLAH* IN 1286 A.H.

15/1 In this era, *fiqh* started to decline. In the early stages it started with stagnation and ended in its late stages with rigidity, although within this phase, some shining scholars of *fiqh* and its fundamentals (*uṣūliyyīn*) have emerged.

In this period, the traditional closed-thinking [concept] was dominant, and the thoughts turned from the search for causes and objectives of the *Sharīʿah* in the jurisprudential rulings to memorizing blindly and being contented with accepting all what is in the books of *madhāhib* without discussion.

The vigor that was found in the phase of extrapolation (*takhrij*), *tarjīḥ*, and organization (*tanẓīm*) of the *fiqh* of *madhāhib* started to diminish. The one who seek to learn *fiqh* was left with studying a book written by a certain *faqīh* among the men of his *madhhab*, and thus does not look at the *Sharīʿah* and its *fiqh* except within the lines of the text [he reads], whereas previously, the seeker of *fiqh* was studying the *Qur'ān* and the *Sunnah*, the fundamentals of the *Sharīʿah* and its objectives and the evidences of the *aḥkām*.

Similarly, in the later phase of this period, the compilations of *fiqh*- except a few of them – became either a summary of the previous compilations or a commentary on them. Thus, the jurisprudential work was limited to repeating what has previously been done, and studying terminologies and memorizing them.

Also in the late period of this phase, the knowledge related thought (*al-fikr al-'ilmī*), for most of the later followers of the jurisprudential *madhāhib*, was replaced with the general thought *(al-fikr al-ʿām)*.

15/2 The Methodology of Texts (*al-Mutūn*)

As a result of the above, the methodology of *al-mutūn* in jurisprudential authorship had spread, and became the dominant

and general method, and the books of the later followers replaced the classic jurisprudential books of the former scholars.

This methodology of *al-mutūn* is where the later followers turn to compiling summaries in which they collect all the chapters of knowledge in narrow words while competing for brevity that reaches the level of becoming conundrums, and every word or statement indicates a wide research or detailed issue, like the one who attempts to confine the statements in a bottle-neck. This summary is known as *matn*.[116]

Then, the same author of the *matn* or another author turns to compiling an interpretation (*sharḥ*) that explains its statements, expands the details of its issues, and providing additions. Then other people compile commentaries (*taᶜlīqāt*) on these interpretations which are known as *ḥawāshī* and for these commentaries, remarks are compiled which are known as *taqrīrāt*.

These interpretations *(sharḥ)*, commentaries *(ḥawāshī)* and remarks *(taqrīrrāt)* comprise of plenty of literal discussions for solving the statements and terms and not the principal objectives of the knowledge. And a particular topic may be diffused in or scattered within the texts, interpretations, commentaries, and remarks. We do not mean by this that the commentaries are deficient of beneficial knowledge, in fact, they are stuffed with plenty of analysis, examination, verification, and related discussions, but the useful in them has been mixed with the non-useful resulting into weak methodology from which the *fiqh* has suffered.

15/3 The history of *al-mutūn* (sing. *matn*) actually goes back to even earlier than this period. However, when it appeared in the ancient time, it had a wise purpose which is to compile the basic and simple issues in small *mutūn* using simple sentence as a foundation for the beginners of *fiqh*[117] like the *al-Ajurrūmiyah*[118] in the knowledge of

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116 *Al-Matn*: The original lexical meaning of *matn* refers to what is beside the heart and nerve of the animal comprising of meat. In usage, *matn* may refer to the back as a whole (see *al-Miṣbāḥ al-Munīr*). As a term, it refers to the scientific abbreviations, because it encompasses the fundamental issues that carry the others, like the back is the base for riding and carrying.

117 *Al-Shādī* means the beginner who undertakes to improve knowledge and education. The plural of *al-shādī* is *shadāt* like *qāḍin* whose plural is *quḍāt*. The original lexical meaning refers to one who cuts a piece of camel (meat) and markets it (see *al-Miṣbāḥ wal-Qāmūs*).

Arabic syntax. This goal entails that the *matn* must remain small, simple, and easy to cover the elementary issues for the learning purposes. Thus, neither wide interpretations nor complex commentaries are to be compiled for them.

However, the *mutūn* in this era changed into a general and complicated way of compiling *fiqh* such that the one who intends to leave behind him an impact and a remembrance in knowledge does not think of serving the knowledge through an independent compilation in which he aims at renovating the style and language of *fiqh*; refining and dividing it; sequencing and dividing it into chapters; and reorganizing the scattered issues under irrelevant chapters into their relevant chapters; thus supplementing to the praiseworthy efforts of the previous scholars, his own new efforts;[119] rather, every recent author confines his effort to compiling a commentary on an interpretation or an interpretation for a complicated text or he compiles a text in the same pattern of the previous riddle-like texts.

From here, we observe that the method of *al-mutūn* started in the earliest time with a reasonable thought and aim so as to compile the elementary and simple knowledge which is meant to be simplified for the beginners. Later on, by traditional factors, they [*al-mutūn*] became [like] spines in the hands of the recent scholars with which the path of *fiqh* is made barren and difficult for the uon-specialist of the field, and the tree of *fiqh*, in the late stages of this period, had plenty of leaves instead of ripe fruits.

15/4 Features of this Phase

All in all, this jurisprudential phase is distinguished from other phases by three things with three important acts:

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[118] It is an introductory book in the knowledge of syntax (*naḥw*) by Muḥammad who is famously known as Ibn Ājurrūm, which means in the language of the Barbarians, the poor Sufi (see *Fatḥ Rabb al-Arbāb* by Shaykh 'Abbās Riḍwān).

[119] We mentioned in this context that among the glorious authors in the *fiqh* of Ḥanafī is Imām 'Alā' al-Dīn al-Kāsānī (d. 587 A.H.) who compiled *Badā'i' al-Ṣanā'i' fī Tartīb al-Sharā'i'* which is an expansion of *Tuḥfat al-Fuqahā'* of his master, 'Alā' al-Dīn al-Samarqandī. The former has disseminated in his *Badā'i'*, the *fiqh* of the school from the books, then, he framed it in an unprecedented way into seven volumes, using a wonderful style and sequence. Thus, he was really among the revivers of the compilation of *fiqh*.

15/5 The First Feature: The vigor of the movement of compilation of the application of *fiqh*, and what it produced of the many *fatāwa* books, which appeared before this, but in this phase became aplenty. This is because many of those who undertook the official task of *iftā* or reached a stage where they became people's references, have compiled their *fatāwa* in special books arranged in most cases in the order of jurisprudential chapters.

These *fatāwa* books represent the practical side of *fiqh*, and demonstrate the products of the basic theories and established rulings, and the extent to which they abide by the applied *maṣlaḥah* when unexpected incidents occur. Such books are also good source of exploring the texts of *fiqh* in expected events every time as the late events mostly resemble the past incidents.

The style of the *fatāwa* books mostly adopts the method of mentioning a question followed by an answer which is accompanied by the jurisprudential texts on which the answer is based. Sometimes, the questions are omitted and only a series of events are mentioned.

Some *fatāwa* books bave been found, during this phase, as being, and still are, among the most important jurisprudential references such the *Fatāwā al-Tatārkhāniyyah, al-Khāniyah, al-Bazāziyyah, al-Ḥāmidiyyah*, and *al-Hindiyyah*.[120]

15/6 The Second Feature: The issuance of sultanic decrees on some practical jurisprudential issues during the reign of the Ottoman

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[120] *Al-Fatāwā al-Hindiyyah*, also known as *al-Fatāwa al-Ālamkīriyyah* is among the most famous voluminous books of the Ḥanafī jurisprudence, and is attributed to King Muḥammad Aurangzab who descends from the Mughal tribe which ruled India for a long period. He was given the title Alamgir, meaning the conqueror of the world. He was a good king who had high aspiration and asceticism, and who eradicated all the elements of corruption in his family, antl subjected almost the entire India to his rulership thus spreading his control over it from 1069 to 1119 H (1658 – 1707 A.D). He was making his living from the sale of *maṣāhif* [sing. *muṣḥaf*] which he used to write by his own hands.

The said king gathered the *fuqahā'* (jurists) of Ḥanafī during his time under the leadership of Shaykh Niẓām al-Dīn, to compile the *fatāwā*, and paid for all their expenses, and provided them an access to a huge library. Thus, they selected from all the books of Ḥanafī school the most accurate rulings, and they formulated them in this eminent compilation, along with referring every ruling to its source. It, therefore, contained that which is not found in any other source. It has been published in Egypt for the first time in 1282 A.H. in six big volumes, and later published by al-Amīriyyah in Boulaq [a district in Cairo] in 1311 A.H. See *Iktifā' al-Qanū' bimā Huwa Maṭbū'* p. 146, and *Mu'jam al-Maṭbū'āt al-'Arabiyyah* by Sarkis, 1:498).

Empire, i.e. forbidding the hearing of lawsuits after the lapse of a particular time period; which is known as prescription (*taqādum*), and several other procedures that are issued by sultanic decrees.

The *ijtihād* has approved that the supreme ruler such as a caliph can limit the comprehensivenes of some legal rulings and their implementation or order the application of a weak opinion if required by a timed *maṣlaḥah* thus becoming the preferred opinion which has to be implemented as openly stated by our *fuqahā'* based on the principle of *al-maṣāliḥ al-mursalah* and the maxim of changing of rulings with the changing of time.

The texts of the *fuqahā'* in different chapters signify that when a sultan commands something in an *ijtihād* topic (that is, a topic that is subject to *ijtihād* which is not conflicting with the clear-cut texts of the *Sharīʿah*), then his order must be respected and legally executed. Thus, if he forbids some contracts, which are legally lawful and executable, for emergent *maṣlaḥah* that has to be observed, then such contracts become either void or suspended according to the order[121] (see *Radd al-Muḥtār*).

This is part of the tolerance of the *fiqh*, its beauty, and flexibility which earned it the ability to fulfill the interests of all times and conditions.

15/7 The Third Feature: Beginning of the movement of codification at the end of this period, that is, the issuance of laws that have been modelled on the legal rulings of *fiqh* that are applied in the *madhhab* of Ḥanafī which is the *madhhab* of the Ottoman state owing to the emergent needs of the local [people] that were noticed, as well as other needs which arise from the economic relationships with the European countries and their laws.

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[121] We have explained this in detail in this section's appendix with supporting evidences.

APPENDIX OF SECTION 15

AUTHORITY OF THE RULER: ITS EXTENT AND RESTRICTION

15/8 We said at the end of the previous section (15.6) that the *ijtihād* has approved for the ruler, whether an individual (such as a head of state) or a group (such as a representative council), to restrict the generality of some *Sharīʿah* rulings and their applications or to order the implementation of a weak and non-preferred opinion or to order forbid some contracts and things which are originally permissible, if there is an emergent *maṣlaḥah* that requires the same. Each of these is under the condition that the goal of all these dispositions is to realize the public benefit with its *Sharīʿah* measures because it is among the *Sharīʿah* principles that the disposition of the ruler [on his subjects] is dependent on *maṣlaḥah* (Article 58). We will mention in the following section the supporting evidences for this principle from the *Sunnah*, then, the *fiqh* of the Companions and finally the opinions of latter *fuqahā'*.

15/9 First: Declaring some parts of land as reserves (contrary to the original principle)

The customs of the early rulers and kings during the pre-Islamic period was to declare lands as protectorates in which the citizens were prohibited from grazing their animals and hunting. Yet the Prophet (s.a.w.) had abolished this act by his saying: *"There should be no reserve land (ḥimā) except for Allāh the Almighty and His Messenger (s.a.w.). Allāh's Messenger (s.a.w.) has also reserved a place called al-Naqīʿ where 'Umar declared other places as reserves for grazing the animals of zakāt and the horses of jihād".*[122]

Some of the great *fuqahā'* (including Imām al-Shāfiʿī may Allāh have mercy on him) concluded from the preceding [*ḥadith*] that the

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[122] Reported by al-Bukhārī 3:148, in *Kitāb al-Musāqāt* from the *ḥadith* of al-Ṣaʿb ibn Jaththāmah, Chapter of "there is no reserved land except for Allah and His Messenger". See *Fatḥ al-Bārī* by Ibn Ḥajar, 5:44-45.

lands which have been reserved by Allāh's Messenger (s.a.w.) were not by way of permanent legislation, rather; by his disposition as the Imām (head of the state). Thus, it is permissible for his successor to reserve some lands for public need and welfare. This reservation for public welfare is on the basis of forbidding people to benefit from lands which are initially permitted for them by the Sharīʿah, and this is the point of reference in our discussion.

15/10 Second: Prohibition of Preserving Meat of Sacrificed Animals for a Temporary Cause

It is permissible for a Muslim to eat from the meat of his sacrificed animal, preserve some of it, and give as gift and as charity. But it is established in the authentic *Sunnah* reported by Imām Muslim and others that the Prophet (s.a.w.), in one of the years, prohibited the consumption of the meat of sacrificed animals after three days.

When he was asked the following year whether the meat was prohibited like in the previous year, he informed them that the prohibition was due to the advent of poor Bedouins who were in need in the previous year. Thus, he prohibited the accumulation of meat after three days so that they give out the remainder in charity, but now since the cause of the prohibition has gone, they are allowed to preserve as much as they can.[123]

The point of reference here is that when the Prophet (s.a.w.), in his capacity as the supreme leader of the Muslims, prohibited them from preserving meat of sacrifice, which is something permissible, because of a temporary cause, the Companions were obliged to abide by his order.

15/11 Third: *Fatāwa* of 'Umar in the Year of Famine (*Maja'ah*)

A public famine occurred in the Arabian peninsula during the caliphate of 'Umar (may Allāh be pleased with him) and thus, he issued in that year two important rulings: First: He suspended the collection of animals' *zakāt* (camel, sheep, etc) until the end of famine

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[123] Reported by al-Bukhārī in *Kitāb al-Aṭʿimah* (5423); and Muslim in *Kitāb al-Aḍāḥī* (1971), chapter on explaining the prohibition of eating the meat of sacrifice after three days.

as a way of sympathizing with the owners of the animals. When the famine ended, and rains poured on the dry lands making them good for pasture, he collected from the farmers *zakāt* for the previous and the current years. Second, he ordered the suspension of the penalty for theft which is the cutting off the thief's hand, due to the doubt that the thief may have been forced to steal out of necessity and hunger because penalties are suspended with the presence of doubts as in the *ḥadith* (see para 11/4).

15/12 Fourth: Debtor's *waqf*

It is mentioned in *Kitāb al-Waqf* in *al-Durr al-Mukhtār* and its commentary *Radd al-Muḥtār* cited from the recommendations of al-Mawlā Abū al-Saʿūd (who was the mufti of the Ottoman kingdom, then the *qāḍi* of Constantinople in the reign of the two sultans Sulayman and Sulaym, and was among the senior men of the Ḥanafi *madhhab* whose *fatāwa* and preferences are relied upon), that:

The sultanic decree has been issued that the *waqf* of a debtor is not executable on the amount which he is indebted in order to discourage people from resorting to *waqf* as a means to hide their wealth from the creditors.

Based on the above order, the *fuqahā'* after him declared that such *waqf* is not legally executable although the texts of the *madhhab* were clear that the *waqf* of a debtor is executable even if his debt covers all his wealth, because the debt is associated with his obligation (to pay) and not the essence of his wealth (see *Radd al Muḥtār* 3:395-396).

You are, therefore, noting from these explicit texts that the order of the sultan to permit or forbid based on *maṣlaḥah* changes a legally valid and executable contract into a void or suspended contract in the perspective of the same legislation as a result of this forbiddance from the supreme leader.

The most important thing in these texts is not the topics which have been mentioned in them, but the jurisprudential principle that they contain because of its profound effect iu several other rulings.

Today – for instance, after the issuance of the laws that obligate the registration of property contracts such as [contracts of] sale, and security with the property registry, and the registry rules that all contracts initiated outside the registrar's office are void or non-executable – it is compulsory to consider these contracts in the legal

perspective as void or non-executable according to the legal text, because this prohibition is issued by the supreme leader for a *maṣlaḥah* that extends for a certain time and decided by him legally in order to organize the property registry.

Therefore, there is no basis in some people's assumption that these property contracts remain legally valid and executable in the real sense, and that they have to be executed from the religious perspective even if they are not executable from the legal perspective. Their justification is that the *Sharaᶜ* did not make registration of these contracts a condition, rather; it was contented with the verbal offer (*ījāb*) and acceptance (*qabūl*).

The fact that the religious and legal perspective go together must be considered in the issue of separation of the spouses from the religious point by the request of the woman on the basis of our personal statutes law. Thus, the assumption that from the religious perspective the woman remains under the wedlock with her husband who has ruled the separation between them has no basis.

15/13 Fifth: Sale of *Mu'āmalah* According to the Latter Ḥanafi Scholars

There is another important example that is related to this principle, which I will convey here from the Ḥanafi scholars on the basis of presenting it for discussion only, and not on the basis of accepting all its details.

The author of *al-Durr al-Mukhtār* said at the end of The Chapter of Loan *(bāb al-qarḍ)* from the Book of Sales *(Kitāb al-Buyūᶜ)* that "Buying something cheap at a high price in exchange for obtaining a loan from the seller is permissible when in need." They termed it as *bayᶜ al-muᶜāmalah* (which, as you see, is a way of circumventing the (prohibition of securing) loan with usufruct as we shall elaborate in the appendix of section 21 on the issue of banking profits).

It is mentioned by the same author at the end of the chapter of *murābaḥah* (where the debtor sells something at a higher price than its value such that the seller gains a profit equivalent to the excess that he wants in return for deferring debt to the period of time demanded by the debtor) citing from the *fuqahā'* of the *madhhab* that "If the debtor settles the debt before its stipulated date in the contract of *murābaḥah* or if the debtor dies after *murābaḥah* (contract) before the expiry of the date then the creditor collects the debt from

the legacy (*tarikah*) of the debtor due to the lapse of the deferred debt as a result of the death (of the debtor). In this case, the creditor does not deserve from the *murābaḥah* except an amount of what has elapsed, and if he has possessed the profit, it is obligatory for him to return what is left of the period of *murābaḥah*.

Ibn 'Ābidin also quoted from the author of *al-Qunyah* that Najm al-Din was asked: Do you also issue the same *fatwā* on this? He replied: Yes. The same *fatwā* was also issued by al-Ḥānūtī, Abū al-Sa'ūd (the Mufti of Rome), and Shaykh Ḥāmid al-'Imādī in his *Fatāwā al-Ḥāmidiyyah*.

Ibn 'Ābidīn also contended that mere violation of the sultanic order in a contract does not render it invalid. However, this implies that when a sultanic order contains a provision on the annulment of a contract that violates the order, the contract definitely becomes void (see *al-Durr al-Mukhtār* and its commentary *Radd al-Muḥtār* 4/171 & 175).

He also mentioned in *Radd al-Muḥtār* (at the end of the first chapter of the Book of *Qaḍā'*) that the author of *al-Baḥr* (Ibn Nujaym) has cited from the great scholars of the *madhhab* that "obeying the Imām [supreme leader] in other than something that contains disobedience to Allāh is obligatory, even if he orders to fast a particular day, the fasting will become legally compulsory" (see *Radd al-Muḥtār* 4/344).

15/14 The problem of Giving Jurisdiction to Supreme Leaders and the Appropriate Solution for it

Giving this jurisdictiou to a supreme leader leads to the possibility that the ruler may act on his own desires in changing the rulings derived by *ijtihād*, and in restricting them with timely laws that he issues. He may not bother if the laws agree with the principles of *Sharī'ah*, and he may be an illiterate or *fāsiq* who does not mind destroying the *Sharī'ah*. How then it is compulsory to obey him in such kind of orders?

The answer is: These jurisprudential texts are made compulsory in either one of these two situations:

First: The ruler himself is among the people of knowledge, *taqwā* and *ijtihād* in *Sharī'ah* like how it was in the first generation of the Islamic era. Second: The ruler is not himself a scholar and *mujtahid*, and in this case his orders do not carry the legal sacredness unless

they are issued after consultation with the people of knowledge of *Sharīʿah* and their endorsement.

For this reason, the legal orders that were issued during the reign of sultan Sulaym and Sulaymān, and which had relation with the legal affairs were mostly issued from the *fatwā* of *al- Mawlā* Abū al-Saʿūd who was among the greatest jurisprudential muftis. Then, at the end of the Ottoman era, the sultanic orders were issued with the endorsement of Dār al-Mashyakhah al-Islāmiyyah.

The latter senior *faqīh* of Ḥanafi school, Shaykh 'Abd al-Ghanī al-Nāblusī (may Allāh have mercy on him) said in his article on cigarette smoking: "The order by the leaders of our time does not signify obligation, and their disapproval does not signify prohibition".

I said, it is not religiously compulsory upon the *mukallaf* to obey a ruler as long as he does not present (his order) to the reliable people of knowledge for their endorsement.

15/15 The Issue of Some Scholars Endorsing Sultanic Orders that are Contrary to the *Sharīʿah*

We have previously mentioned that the orders issued by a supreme ruler who is not a scholar and *mujtahid* do not carry *Sharīʿah* weight except when they are issued after consultation with and endorsement of *Sharīʿah* scholars. Here arises another issue where the endorsement may be made by scholars who are subservient to the rulers themselves and agreeing with them willing or unwillingly, and have no courage to defy the ruler's order. Such an endorsement has no value even if it is made by scholars.

This issue may also take another form whereby the supreme rulers appoint people who are not well versed in *Sharīʿah* or those who abide by the ruler's order out of fear or greed to take over some of the significant legal positions such as *al-iftā'* (the issuance of *fatāwā*).

We have witnessed and read in this era a number of *fatāwā* and declarations issued by such high ranking scholars in the name of the religion to satisfy the interest of some of the immoral and tyrannical rulers who have the powers of eliminating the scholars from their positions and controlling their livelihood. In such *fatāwā*, there are wonders.

Such mercenary scholars no longer realize the belittling of the principles of Islām by the immoral ruler; his misuse of power and authority to achieve his desires and tyrannical ambitions; his use of state properties in manipulating the minds of people through false advertisements; his opening of opportunities to plunder the wealth of the public, his provision of access to evils and immoral behaviours to men and women who are astray so as to cover the evil of his governance; and his prevention of any attempt to enjoin good or forbid evil.

This is a reality that we have witnessed in this era, and is still progressing in some countries. Having said this, what then is the value of enjoining good and forbidding evil by this type of rulers? What is the value of the *fatāwā* and declarations that are made by this type of mercenary scholars who support the rulers in the cause of achieving the worldly benefit?

Ibn 'Ābidīn has cited at the end of the Book of Drinks (*Kitāb al-Ashribah*) in his commentary (*Radd al-Muḥtār 'alā al-Durr al-Mukhtār*) from the scholars al-Bīrī and Shaykh 'Abd al-Ghanī al-Nāblusī a valuable comment on the description of a ruler whose command must be obeyed as mentioned in the Qur'ānic verse: "*O you who believe! Obey Allāh and obey the Messenger and those in authority from among you...*" (al-Nisā': 59). He cited from al-Bīrī (may Allāh have mercy on him) that he said, "Among other conditions, an *imām* should be just, adult, trustworthy, pious, male, reliable upon in matters pertaining to blood, marital relations, and wealth, ascetic, humble, and a good administrator in political issues. When the people who have the "opinion authority" pledge their loyalty to an imām whose qualities are as mentioned, his obedience becomes compulsory (as in *Khizānat al-Akmal*).

Ibn 'Ābidīn also cited from al-Nāblusī that *ulī al-amr* (people of authority) in the verse refers to the scholars according to the most accurate opinion as mentioned by al-'Aynī at the end of *Masā'il Shattā* in *Sharḥ al-Kanz* (Commentary of the Treasure). In addition, does the prohibition made by the unjust rulers who continuously plunder the wealth of the *bayt al-māl* (treasury) and approve the corruption of the judges, establish any legal ruling?!

After mentioning these opinions, Ibn 'Ābidīn then affirmed that the command given by the rulers of our time does not signify obligation... (see the end of *Kitāb al-Ashribah* in *Radd al-Muḥtār*, v. 5).

From the preceding citations, it is clear that the meaning of *uli al-amr* (people of authority) in the verse is scholars, according to the most accurate opinion as quoted from al-Nāblusī. Indeed they are scholars who are reliable (*thiqāt*) in their knowledge, wisdom, God-consciousness, their asceticism to the wealth of the rulers, and are not carried away by fear of or hope in the rulers so that they become their hypocrites. The term does not refer to the hypocritical scholars who trade with knowledge and religion.

SECTION 16

PHASE 7: FROM THE EMERGENCE OF *AL-MAJALLAH* TO THE END OF THE SECOND WORLD WAR (1287-1354 A.H.)

16/1 This phase is characterized by two features which have an important historical role in the approach of the *fiqh* and its judicial dominance.

First: The emergence of the *Majallah al-Ahkām al-Sharᶜiyyah* in the form of civil code based on the Ḥanafī *fiqh*.

Second: The expansion of codification which had started at the end of the previous era, and the establishment of a large civil framework besides the existing framework of legal jurisprudence. The following is a detailed discussion of these two points:

I. The Emergence of the *Majallah* and Its Reason

16/2 The *fiqh* is scattered in the books of *fiqh* in every school. There are also many rulings that are not discussed under their relevant chapters, but by digressional occasions in irrelevant chapters. In addition, these books differ in terms of their capaciousness of the rulings and opinions of the schools of Islamic law depending on whether they are abridged or not. Thus, you may find in one book rulings that are not found in another or that contradict it. Likewise, the books differ in their linguistic style and structure as how the commentaries of codes of law differ today from each other.

And since every school contains different opinions and sayings regarding a particular issue owing to the difference in the narrations from the respective master of the school or the difference among the extrapolators or the selectors of the best opinion, the level of the books of the *madhāhib* also differ depending on the knowledge prestige found in their authors or the owners of the opinions and sayings cited in them. Thus, searching the texts of the jurisprudential rulings from such books, and distinguishing the strong and preferred opinion from the weak and non-preferred one, requires sound

jurisprudential ability and flexibility which are difficult for many people to achieve.

With the establishment of regular courts in the Ottoman era which looked into certain type of lawsuits that were previously referred to the law courts, and with the rise of the need to simplify the revision of jurisprudential rulings before the non-*Sharīʿah* rulers, and to make them aware of the strong opinion rather than the weak ones without delving into the voluminous *fiqh* material, the high sultanic degree was issued to form a committee that will compile a collection of legal rulings that are more relevant to the prevailing incidents than others.

In 1286 A.H., the committee developed this collection [of rulings] chosen from the *mu'āmalāt* (transaction) section from the Ḥanafī *fiqh* which the state relies on. The committee arranged the contents of the book in the familiar format of jurisprudential books and chapters but distinguished the rulings in the form of articles with sequence numbers like modern laws for easy reference. The total number of articles contained in it is 1851. The *Majallah* also adopted some weak opinions in the [Ḥanafī] school for the interest that was required at that time. The topics covered are contained in sixteen books which are divided into chapters, which are further divided into sections. Its first book is the Book of Sales (*Kitāb al-Buyūʿ*) while the last one is the Book of Judgment (*Kitāb al-Qaḍā'*), and the sequence of the books is as follows:

Sales (*al-Buyūʿ*) – Lease (*Ijārah*) – Guarantee (*Kafālah*) – Legal transference (*Hawālah*) – Pledge or Mortgage (*Rahn*) – Trust (*Amānah*) – Gift (*Hibah*) – Usurpation and Destruction of Property (*al-Ghasb wal-Itlāf*) – Interdiction, Coercion and Right of Preemption (*al-Hajr, al-Ikrāh wal-Shufʿah*) – Partnerships (*al-Sharikāt*) – Agency Contracts (*al-Wakālah*) – Arbitration and Rebate (*al-Ṣulḥ wal-Ibrā'*) – Confession (*al-Iqrār*) – Prosecution (*al-Daʿwā*) – Evidences and Exculpatory Oath (*al-Bayyināt wal-Tahlīf*) – Judgment (*al-Qaḍā'*).

16/3 The committee named this group [of topics] as *Majallah al-Ahkām al-ʿAdliyyah* and introduced it with a report on *Lā'iḥat al-Asbāb al-Mūjibah* followed by an introduction that contains two articles:

First: Definition of *Fiqh* and Its Division. Second: Discussion of a group of collective maxims *(al-qawāʿid al-kulliyyah)* each of which constitutes a *fiqh* principle that covers numerous rulings. A total of ninety nine maxims were mentioned starting with the maxim,

"Things are [judged] by their intentions", and ending with the maxim, "whoever attempts to revoke what has been concluded from his part, his attempt is rejected."

In Shaʿbān 1293 A.H., the high sultanic decree was issued to authorize the implementation of the provisions of the *Majallah* in the State courts. As a result, the *Majallah* whose contents were selected from the jurisprudential rulings became the Public Civil Code. Whatever is found in other books of *fiqh* that contradicts the contents of the *Majallah* is not relied upon since the Code has been endorsed by the sultanic order. The only instance where the judges refer to other texts of *fuqahā'* is when the issue at hand is not contained in the *Majallah*, which is the Public Code.

16/4 The new distinct feature of the *Majallah* is that it explicitly distinguishes between the method of writing *fiqh* based on knowledge and teaching references and the method of judicial references in the areas of sequence, numbering, simplicity of sentences, and limiting the different views of *fuqahā'* in an issue to one opinion. This is part of the requirements of legal drafting as the law is supposed to contain only the ruling that is compulsory to be implemented. The field of opinions is the commentaries of *fiqh* texts which provide explanation as source of knowledge or teaching.

The *Majallah* has been keen in attributing the themes and branches to their relevant areas of discussion and sources. The contract of *muḍārabah* [for instance] is mentioned by the *fuqahā'* in other than the topic of *sharikāt* (partnerships) while the *Majallah* has mentioned it under *sharikāt* because *muḍārabah* is not but a partnership contract: one party contributes the capital while other party provides labor. The *Majallah* also divided the issues of each book into main and sub topics such as definitions, conditions, rulings, etc. It divided them with clear precise sections, and every issue was linked to its [relevant] topic.

II. The Expansion of the Field of Codification and its Factors

16/5 In this last era, the scope of codification expanded to an unlimited level. Laws were issued in different topics and aspects in all Islamic countries, and the codification in all the three branches (civil, criminal, and administrative) was moving rapidly.

The most important areas of civil codification, which is itself having a link with this historical discussion on *fiqh*, are three:

- Commercial laws
- Property laws
- Procedural laws such as the law of execution ordinance, law of civil procedure, which is known to us as "laws of judicial procedures".

The legal legislation had penetrated the body of *fiqh* in the kingdom of Ottoman state. In the neighboring countries such Syria, Palestine and Iraq it reached an extent where it was hard to find a chapter of *fiqh* that has not been legally altered or repealed in many or few of its rulings.

16/6 Among the main factors that lead to the expansion of the field of codifications were the following:

1. The economic aspects internally and externally, and the birth of new aspects in this country some of which are local and customary while others are imitated from the European countries such as the different types of legal partnerships, and commercial methods like commission, insurance, pledges, etc.

2. The need to consider contractual conditions some of which are prohibited by the applied Ḥanafī *ijtihād* as well as other legal opinions.

3. The government's plan of linking dispositions and property contracts with formal systems that put the contracts under government's eye for financial, legal and political purposes.[124] For this purpose, the property registry together with its rules and

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[124] Financial purposes *(al-gharḍ al-mālī)* here refer to the tax imposed on commercial contracts. Legal purpose *(al-gharḍ al-ḥuqūqī)* is like preventing a real estate owner from selling his property to several buyers and receiving the prices without any of the buyers knowing about the previous sale. Political purpose is like specifying the type of ownership of property by foreigners. All this is not possible to be achieved without the property laws.

office was developed, and hence the property contracts that are made outside the registry are considered non-binding.

4. The need for organizing the ceremonial formalities, that is, the methods and principles that must be adopted in transactions, reviews and lawsuits, settling disputes, implementation of the laws, registering contracts, etc, for which ceremonial laws were developed such as law of Judicial Procedures, law of execution, and notary public law.

5. The rigidness of *fiqh* that accompanied the huge public economic development in the hands of the latter scholars, and paralyzed the productivity of *fiqh* as explained in the previous phase. Thus, the levels of renewers and extrapolators of *fiqh*, who were responsible for its expansion and elevation, discontinued. At last, *fiqh* remained nothing but a theoretical and memorized field instead of being remedial and productive.

6. Basing the development of *Majallah* on the Ḥanafī *fiqh* only. Indeed, a single school, whatever its expansion, cannot fulfill all the needs and developing interests that may lack their legal remedy from that school, but may be found in other legal opinions (*madhāhib*).

16/7 The Opinion Regarding the Necessity of the Codification and Its Non-necessity in the Presence of *Fiqh*

The laws that have resulted from the aforementioned factors, like all the laws that can be found with us or with others, are two types:

First: Laws of the *ahkām* (rulings), and these are the laws which mandate and affirm for every saying or action its cause and ruling.

Second: Laws of Ceremonies or Procedure, and these are the laws which illustrate and elaborate the ways which are compulsory to be followed, and the frameworks to which the actions must abide, and are also known as "formal laws". Thus, the permission or prohibition of selling this property of a minor, for instance, comes under the laws of the *aḥkām*. But the obligation to carry out the contract at the property office and registering it comes under the ceremonial laws. Under this class also is the law of Judicial Procedure which is known today as Procedural Law, and all its laws are formal.

16/8 We deduce from this an opinion which we find moderate between the Islamic *fiqh* and codification. We assert that the ceremonial laws are a necessity that we cannot afford without them because they do not rely on the established principles of law and justice, rather; they are procedures that are more related with the legal policy *(al-siyāsah al-sharʿiyyah)* and the organization of its implementation. This organization is among the rights of the supreme leaders and their timely jurisdiction who may change its contents and direction according to what they see as most beneficial and precise. Thus, they may obligate today a procedure for authentication of contracts or filing lawsuits or recording the laws or executing them, but tomorrow they may find another easier, better and more precise procedure to adopt, and they will follow it.

The leaders may also specify a period for prescription, then, they see that it is beneficial to extend or reduce it without changing the principles and legal theories that govern the main right or law.

As such, the Islamic legal system did not come with anything concerning ceremonial laws except when there is consideration for a permanent *maṣlaḥah* such as the obligation of testifying (*ishhād*) a *nikāh* contract, the method of undertaking the oaths of *mulāʿanah* when the husband accuses his wife of adultery, the general guidance to authenticating contracts by writing or testimony or pledge, and judicial procedures such as hearing a lawsuit, questioning the opponent, and the order to produce an evidence or take an oath.

16/9 For the laws of *ahkām,* the Islamic legislation is self-sufficient above all fundamental adaptations of other nations and foreign legislation because the *fiqh* its wide horizons contains a variety of general principles, and well-established foundations on which lies the notion of affirming the truth, destroying falsehood, preventing harm, acquiring benefits, respecting the wills and contracts, preventing coercion and disregarding what results from it, eliminating harm, considering necessities, responsibility of being a cause, variation and distribution of liabilities with justice and balance, consideration of custom and habits in contracts, deeds and obligations, and plenty of other fundamental principles in Islamic legislation and *fiqh*.

The *fiqh* is an open ground for unlimited legal opinions but within the limits of the *Sharīʿah* we have previously mentioned. These opinions are countless and their ideas and theories never run short of the legislative need, as we shall soon explore.

For the newly emerging transactions such as companies that guarantee risks, nowadays known as insurance contracts or public listed companies[125] which handle enormous economic projects, and several other transactions and situations resulted by the change of time and foreign impacts, it is easy to extrapolate *(takhrīj)* their relevant rulings based on the main principles and *fiqh* maxims by the way of *qiyās* or *istiṣlāḥ*. This is similar to the way how the *fuqahā'* previously extrapolated numerous types of transactions that were emergent during their time such as *bayᶜ al-wafā'*,[126] *istiṣnāᶜ*,[127] borrowed pledge,[128] and other transactions that required precise

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125 These companies are called *al-Sharikāt al-Mughfalah* i.e. joint-stock companies. It is derived from *al-ighfāl* which means omission. Such name is given to these companies since the actual names of the companies are omitted. Yet on the title, only the name of the underlying project is mentioned such as petroleum company, textile company, air-condition company, and electricity company and so forth. See what was mentioned regarding insurance contract as in para 21 (para 21/6).

126 *Bayᶜ al-wafā'* is a contract by which a borrower, who owns a certain property, sells that property to a lender, leases it hack, pays rent on it, and then invokes the right to repurchase the property for the original sale price. It differs from pledge [contract] in that the aim of the latter is mere authentication of the loan whereas *bayᶜ al-wafā'* involves authentication of the loan as well as the borrower benefitting from the property. This type of sale occurred in Bukhārā [a place in Persia] towards the end of the fifth century after Hijrah. Eventually, the opinion of *fuqāha* regarding this type of sale hecame established that it resembles three contracts: valid sale, invalid sale and pledge. Thus, from each of these three contracts, (*bayᶜ al-wafā'*) was given the rulings that are relevant to its goal.

The evidence for the date that we have specified for *bayᶜ al-wafā'* is that Imām Najm al-Dīn Abū al-Hafṣ 'Umar ibn Muḥammad al-Nasafī (461-537 A.H.) said about it in his *Fatāwā*: "The sale that is familiar with the people of our time as a way of circumventing the prohibition of interest, and they named it *bayᶜ al-wafā'* but in reality it is a pledge..." See the last part of the Book of Sale *(al-buyūᶜ)* in *al-Durar*.

127 Al-*Istiṣnāᶜ* is a contract of buying what is yet to be manufactured as per request of the buyer. It is a familiar contract before Islām but its ruling had initially been analogous to the *fuqahā'*: Is it the same as *bayᶜ al-salaf* (that is *al-salam*) such that it requires the conditions of *al-salam* or an ordinary sale contract or a promise to buy? Moreover, is the subject of sale the substance to be manufactured or the labor? Is it subject to the option of inspection *(khiyār al-ru'yah)* as in an ordinary sale so that the buyer is not affected by not inspecting a product manufactured specifically for him? All these issues have been resolved by the jurists *(fuqahā')* in their rulings which rhyme with the principles and the needs of time.

128 Borrowed pledge *(al-rahn al-mustaᶜār)* is when a person borrows something from his friend not for using it but to use it as mortgage to obtain a loan. This contract contains contradicting obligations since the contract of lending (*iᶜārah*) is a voluntary contract which can be revoked by the lender whenever he wishes, while the pledge is a binding contract that involves protection of the pledged property against defect or

extrapolations based on several principles, and the way how they remedied and extrapolated, on the basis of emerging *'urf*, abundant rulings of the rights of *qarār* that were drawn from *awqāf* (immorable) properties.[129]

misuse. However, the Ḥanafīs have extrapolated for it rulings from several principles that considers the benefit of all the three parties involved. See *al-Majallah*, 372.

129 Such as monopoly, sublease, labour, goodwill etc. which are among the well known controversial ruling of the *waqf*. Further details about these rights will be provided in the third volume of this series entitled *al-Madkhal ilā Naẓariyyat al-Iltizām al-'Āmmah fi al- Fiqh al-Islāmi*, in the chapter of the types of essential right(s) (see para 4/6-7).

APPENDIX TO SECTION 16

MAJALLAH AL-AHKĀM AL-'ADLIYYAH: ITS HISTORY, DESCRIPTION, EVALUATION AND FATE

16/10 We shall soon see in the second appendix of section twenty two that the awareness towards the need to codify the rulings is a deep-seated awareness since the early eras of *ijtihād*. The differences in the judgments that were issued by the judges during the 'Abbasid period, each of them using his own opinion, was a motive for Ibn al-Muqaffi' to propose to the 'Abbasid Caliph al-Manṣūr a method of unifying all the judgments in a particular topic in which contradictory judgments were issued.[130]

16/11 *Al-Fatāwā al-Hindiyyah* Paved Way To the [Compilation of] *Majallah*

After the cessation of the movement of *ijtihād* and contentedness with the schools of Islamic law which were strongly supported by imitating followers, each school occupied a stronghold region where it had strong influence. Then the classes of extrapolators of each school, its editors, correctors, and selectors of the best opinion were developed. Similarly, jurisprudential opinions in a particular topic within each school were augmented owing to the numerous facets and possibilities of *qiyās*. Books and authorships became aplenty such that some jurisprudential opinions and preferences in some books of a certain school may not be found in other books. Since the *madhhab*-based books were all manuscripts scattered in different countries and stores, not every hand could reach them, it was impossible for a *faqīh* of a particular school to have knowledge of all the opinions and preferences of his school. The Ḥanafī School was at the forefront of the schools of Islamic law that were impossible to be acquainted with the knowledge of every issue contained in the literature of its school

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[130] See *Risālat al-Ṣaḥābah* by Ibn al-Muqaffa' in *Jamharah Rasā'il al-'Arab* by Aḥmad Zakī Ṣafwah, vol. 3, *Risālah* no. 26, and see also appendix of section 22 (para 22/12).

because of the widespread influence, abundant literature, ampleness of its branches, diversification of opinions, and the difference in correcting and preferring [opinions of the school]. Thus, after a long time, the jurisprudential need for a near-codification attempt in the school of the Ḥanafī arose in the reign of the great King (Emperor) Mughal of India, Muḥammad Aurangzab (which means "beauty of the throne") who was given the title "Alamgir" meaning "Conqueror of the World". Hence, it resulted in the launch of the great jurisprudential book in the Ḥanafī School namely, *al-Fatāwā al-Hindiyyah* (or *al-Fatāwa al-'Ālamkīriyah*).

The brief account of this book is that this believing and pious king – who devoted himself to Islām and its dignity, and ascended the throne of Delhi in 1658 A.D. (i.e. around 1069 A.H.), and who was also a scholar and a *faqīh* – wanted to pave way to *fiqh* in order to make it an easy reference for *fatāwā*, and codification for the use of the administrative and judicial affairs. Therefore, in the year 1073 A.H., *Majlis al-Fuqahā'* was compiled under the leadership of Mullā Nizām al-Dīn Burhān Borā assisted by approximately forty *faqīh* among the senior *fuqahā'* of the time including the *quḍāh*, *muftis*, and well-versed scholars. The king prepared for them a fully-equipped library which he ordered to be collected from all regions [of the world]. He provided them with sufficient sustenance to make them devoted to the desired task. He ordered them to compile the rulings of *fiqh* from a variety of topics especially the ones related to *mu'āmalāt*, *qaḍā'*, administration, and authentication. All those rulings which are scattered in different books of *fiqh* that are not easily attainable are to be put them in a single comprehensive book in Arabic language where the jurisprudential rulings are presented in an orderly composition with sequence, chapters, and revision to make them easily understandable while accrediting each ruling to its source. An adequate budget was set aside to finance the project.

The scholars had divided themselves for this project into four groups: the first one headed by Shaykh Wajīh al-Dīn and was assigned the first quarter of the work. The second group was presided by Shaykh Jalāl al-Dīn, and was assigned the second quarter, while the third group, which was assigned the third quarter, was headed by Shaykh al-Qāḍī Muḥammad Ḥasan. The final group was headed by Mullā Ḥumayd Jūnbūrī and was assigned the final quarter. All the groups were working under [the supervision] of

Shaykh Nizām al-Dīn. They completed this auspicious project that gave birth to the al-*Fatāwā al-Hindiyyah* in eight years.

Because the Ḥanafī School is the dominant school all over the empire, this work was limited to the rulings of the Ḥanafī School, and the *al-Fatāwā al-Hindiyyah* did not include the differences of opinion and *ijtihād* in other *madhāhib*. The king was himself supervising the progress of the work and following it up on a daily basis. On each day, the head of the council presented to the king the work that has been completed in the previous day. The king used to highlight his observations and criticisms on the work to update it. The project was progressing at an average of approximately four pages per day.

After completing this great monumental work that compiled the laws of *Sharī'ah* represented by the Ḥanafī *fiqh*, and after copying and distributiug (similar to publishing in our moderu time), the emperor issued a royal decree to implement the rulings contained in the compilation all over the kingdom, and in all the judicial courts.[131]

This compilation (*al-Fatāwā al-Hindiyyah*) is published and available today in six huge volumes, and is considered amoug the greatest, most important, reliable and autheutic references in the *fiqh* of the Ḥanafī.

We have previously mentioned that this mouumental work was an attempt that resembles the codification of *fiqh* because the book aforementioned was not structurally in the forun of law in its modern meaning. Instead, it is a *fiqh* book comprising of rulings and issues in *ʿibādāt* and *muʿāmalāt*. It, however, resembles, to a certain extent, the drafting of the laws in geueral in some styles of legal drafting, in the absence of fundamental evidences and their critique, and in its confinement to one opinion, which is the preferable one in the Ḥanafī School. With this, the compilation draws some similarities with the method of codificatiou, although it is closer to the detailed books of *fiqh* especially with its composition of rulings of *ʿibādāt* which have uo place in the Civil Code. The term "codification" in its modern meaning appears in the *Majallah al-Ahkām al-'Adliyyah* in the Ottoman era (1293 A.H.) as previously discussed.

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131 Summarized from an English lecture on *al-Fatāwā al-ʿĀlamkīriyyah* by Anwar Aḥmad Qādirī, professor of law at College of Sind for Islamic Law in Karachi, the capital city of Pakistan, translated [into Arabic] by Dr. Burhān al-Shiṭṭī (unpublished).

16/12 *Majallah al-Aḥkām al-'Adliyyah* and the Motive for the Compilation

The motive for the compilation of the *Majallah* and its issuance by the royal decree as the Civil Code in the Ottoman state is as explained by the official board committee of the *Majallah* comprising the Arab and Turkish *fuqahā'*, who were tasked with its compilation. This motive was explained in their report that was presented to the Prime Minister, 'Āli Bāshā in early Muḥarram 1286 A.H., along with their initial works i.e. *al-Muqaddimah* and *Kitāb al-Buyū'*.

The summary of what was noted in the above mentioned report regarding the motive of compiling the *Majallah* is that: "with the expansion of the commercial transactions that required a number of exemptions from the general ruling that comprise of the so-called Civil Law, and thereby by the increase of communication with outside world, a new problem emerged. Thus, by this expansion two separate laws, one for commerce and one for penalties were set; and courts for commerce and courts for crimes were established, for there was no mention on these in the Commercial or the normal Civil Laws which referred to the crimes related to the original law, i.e., the jurisprudential ruling corresponding to all the needs. The newly emerged problem was that judges and the Nizamite courts, and the councils who rectified these rights had no knowledge on jurisprudence and its rulings, which is a vast ocean, especially the Ḥanafi School. Similarly, the many differences on the jurisprudential opinions and reports with a particular school of thought, and the differences among the owners of opinion among the credible group had made it extremely difficult to distinguish between the sound and the weak opinion. Then, there is also differences caused by the change of time, customs and habits among the *fuqahā*" of the earlier and later era. Thus, it is very difficult to distinguish between the time-based differences and the evidence-based differences, for it required a very precise jurisprudential perspective. This necessitated to having a book on jurisprudential transactions, a book that would be accurate, easy to comprehend, free from the differences of opinion, and easily referable to everybody. The board commissioned by the royal decree of the department of law met and initiated with organizing a journal comprised of the most common issues and problems, that is from the department of jurisprudential transactions, also compiling the authentic opinions based on the Ḥanafi school. It was named as

Majallah al-Aḥkām al-ʿAdliyah and it was introduced with the Islamic legal maxims that are owing to their collective benefits while endorsing the [*fiqhī*] issues.

The committee officially started to work on it in 1286 A.H., and it was preceded by a preparatory work by the Academic Society under the Administrative Council of Planning, which wrote on plenty of issues and deduced jurisprudential texts on them. However, none of these works were implemented, and we do not know how long did that preparatory work lasted, for it was also discontinuous. Nonetheless, as soon as the official committee was formed, and as it devoted entire time and engaged on the compilation of the *Majallah* in the form of Civil Code, its writing completed from seven to eight years (from 1286 A.H. to mid 1293 A.H.), and it was initially written in Turkish language.

The committee was forwarding what it had accomplished respectively, one book after another, and the first book to be presented was the book of sales together with the introduction aforementioned.

Whenever the committee completed [the writing of a book], a copy of it is presented to the supreme spiritual leader and other copies are distributed to those who have sufficient knowledge and skills in *fiqh*. The committee then receives the feedback on the [distributed] copies and carries out the necessary editing and modifications in the light of the observations made. It then writes the final copy and translates it into Arabic language and forwards it to the supreme leader to endorse it using the Diwani script for implementation. The final book that concludes the *Majallah* is the *Kitāb al- Qaḍā'*. In 26 Shaʿbān 1293 A.H., a royal decree was issued to authorize the contents of all the *Majallah*.

16/13 General Description of the *Majallah*

a. The *Majallah,* in reality, is the first official experiment for a Civil Law (in the modern usage of the word Civil Law), but in its entirety derived out of the Islamic jurisprudence *(fiqh)*. Before this, there was uo general Civil Law in the Ottoman Empire and the Arab countries which followed its footsteps such as Syria, Palestine, Iraq, etc. Instead, jurisdictions were based on the most valid and preferred opinions of jurists of the Ḥanafī school, which was the school of state.

b. Three classes of *fiqh* have been eliminated from the *Majallah*:

   i. *'Ibādāt*: This is because the purpose of developing the *Majallah* is to serve the judiciary and the new judges, and to simplify for them the difficulty of referring to the *fiqh* in matters that do not have clear texts especially the Commercial Law.

   ii. Personal statutes ranging from marriage to inheritance and what lies between them as these issues contain numerous considerations of permissibility and prohibition besides the judicial rights. It is therefore; better if these issues have their own independent law governing it. The Ottoman state had issued after this the Personal Statutes Law in 1336 A.H. under the title: Decree of the rights of family, which is limited to the rulings of *nikāh*, and separation. The law of Judicial Separation was also included in it based on the *fiqh* of the Mālikīs.

   iii. Rulings pertaining to penalties because they were left for the Penal Code which was issued in 1274 H.

c. Each of the ninety nine collective *fiqh* maxims or a group of them that were included in the outset of the *Majallah* dominated a great area of *fiqh* depending on the theme of the maxim. For example, the maxim, "Things are judged by their intentions", lays the foundation of the differences in judicial rulings according to the differences in the good and bad intentions of actions and dispositions. Similarly, the maxim, "Contracts are considered in the light of objectives and meanings" that lays the foundation of observing the intentions of the contractors in interpreting the contracts. This section ends with the maxims of organizing evidence that are related to confession and evidences and the limits of their usage.

These maxims have a great role in developing the jurisprudential talent as well as the understanding of legal and judicial concepts, even though the *Majallah*'s report has warned against the *qāḍī*'s complete reliance on the maxims without reference to other texts.

This is because, in most cases, every maxim has exceptions which are mostly applicable to another different maxim.

16/14 Critical Examination of the *Majallah*

The publication of the *Majallah* is considered a great event of its time in the history of *fiqh* and its codification activity. The dream of Ibn al-Muqaffaʿ since the reign of the ʿAbbasid Caliph Abū Jaʿfar al-Manṣūr was realized. However, like any other invention, there are, at the beginning, certain features and shortcomings, and has to be subjected to development and renewal.

In the following section, we will look briefly at the features and shortcomings of the *Majallah*.

a. The Features of the *Majallah*

With respect to the jurisprudential compilations that were the main reference in the former Ottoman period, the *Majallah* had unprecedentedly introduced the difference between the commentarial approach of *fiqh* and the commanding approach of legislation. The *Majallah* thus drafted the *fiqh* in the form of a judicial reference modeled on the modern laws in terms of sequencing, numbering, the method of expressing commands, simplicity of the sentences, and selecting one opinion to be implemented without mentioning the evidences or discussions and differences found aplenty in the *fiqh* books. The field of such *fiqh* books is the commentarial *fiqh* and not judicial reference even though this is huge legal treasure enlightens the mind of the law student and researcher.

b. The Shortcomings of the *Majallah*

The *Majallah* contains three shortcomings with respect to the modern standards of codification. The shortcomings are related to the layout of legal explanation, the structure, and the theme or subject matter.

i. Shortcoming of the Plan: The provisions of the *Majallah* contain lengthy practical examples as explanation for the principles and rulings. They also contain obvious definitions such as defining the seller as the one who sells, and the buyer as the one who buys. All this does not comform with the modern method of

codification which dictates that the legal drafting has to be marked with the commanding nature, by considering that the law is commanding and not teaching. Thus, the scope of the practical explanation and teaching is the commentaries [of *fiqh*] and not the texts of law.

This shortcoming however, is covered by the fact that the *Majallah* was developed to fulfill the need of the regular employees and judges who were mostly Turkish and have no legal study. Therefore, the environment at that time called for such an explanatory action.

ii. The defect of style is that the *Majallah* contains rulings which are known today as the law of Judicial Procedures or formal rulings whereas the Civil Law in its moderu connotation does not include except the objective rulings rather than the formal ones.

The explanation for this is that the *fiqh* books coutain chapters of formal rulings which overlap with the chapters on thematic rulings. Thus, the *Majallah*, being derived from the jurisprudential sources, has followed the same trend. This trend does not relate to the essence of codification, rather; it is an issue of separating or combining the portions of law, but the separation or combination does not affect the practical results. It therefore, comes under the modern perception of classifying the law. A day may come when the old perception will dominate, and it will then be wise to combine the two parts in one law. This is as we see today where the formal laws themselves are until present containing the Procedural Laws aud Laws of Execution, whereas the legal perception is presently inclined towards separating Laws of Execution into an independent law.

iii. The final defect [of the *Majallah*], and the most important, is related to the subject matter where it is noted that the *Majallah* has adopted one school namely the Ḥanafī.

There is no doubt that a single school of *ijtihād*, no matter how wide is the scope of its principles and branches, and its theories and extrapolations, is not able to fulfill the needs of the *Ummah* in its evolving legislative needs. The wide scope of the capabilities of the great *fiqh* is revealed in its collection of *madhāhib* of *ijtihād* and not in a single school. It was necessary therefore, that the *Majallah* obtains, from all the schools of

Islamic law, the best of what each of them has, and the most congruent with the interests of time and needs of the society that looks forward to a huge development in the fields of economy and dealings as a result of economic, political and cultural link between the East and the modern West.

As a result, the publication of the *Majallah* could not last longer, for it was not snfficient to fulfil the contemporary needs arising from the modern economic trends in trade, employment and other sectors of production. These in turn called for remedies supported by consecutive laws, which otherwise abrogated some sections of the *Majallah*.

Among the notable sections abrogated is the law of contractual conditions, which has a very narrow scope in the Ḥanafī School, and for which there is a pressing need. The state therefore, resorted to amending the rulings pertaining to nullifying contracts, invalidating them, and the conditions of their invalidity. It also set the freedom of contractual conditions except those which contravene the morals and public order, and other exceptions. All this was made by article 64 of the law of Judicial Procedure.

If the committee of the *Majallah* had based their compilation on what it sees as more useful and fulfilling to the needs of time from all the schools of *ijtihād* rather than confining their compilation to the Ḥanafī School, there would have been no need of these amendments and adjustments.

The Jurisprudential school as a whole is adequately sufficient to fulfill the needs of all the times, and therefore, the reliance of the *Majallah* on them made it very stable and steady over the time. Thus it was necessary for the *Majallah* to rely upon the madh'hab of Shurayh al-Qāḍī, Ibn Shubrumah or the Ḥanbalī School, for example, for the rulings on the mutual contractual conditions- an area where the narrowness of the *Majallah* was very evident. That is because, as per these schools of thought the validity as well as invalidity of the contractual conditions are congruent with the best of legal theorites of modern times, i.e., in terms of the acceptable and non-acceptable of these conditions which is based on the principle that states, 'the contract is the law of mutual contractors'.

It was necessary, for example, to derive rulings from both schools of Shāfiʿī and Ḥanbalī on the issue of commercial of value of usufruct, and of evaluating it to its essence, and of the liability of the

usufruct of the usurped property. These two schools condier the usufruct as wealth secured by its essence like any other the material goods. Similarly, it was necessary with regards to the demand of preemption to derive ruling based upon the periods that disqualifty preemption, and the difference in the value of the preemptive immovable property as in the Mālikī School. Likewise, it was necessary to derive rules pertaining to witness and the like, referring of the oath to the one who asserts, and in non-devisibility of confession to depend upon those schools that endorese the same, that is because all these were emerging needs, which in turn were not acceptable to the stands of the *Majallah* derived on the Ḥanafī school.

Similar views are raised in many other places of the *Majallah,* such as the issue of selling at a future fixed price found in the Ḥanbalī School, and many other issues which cannot all be mentioned in detail because of limited space.

Nevertheless, the committee of the *Majallah* has to be excused as the circumstance at that time did not permit this step to be taken. That is because, the biasness to the Ḥanafī school as held by the high ranking centres of the Ottomon state, and it was for them the *Majallah* was established, did leave no door open to the merits, valuable and considerable creative self-exertions *(ijtihādāt),* which may be highly valid rulings than what is there in the Ḥanafī School. Such a bias to a school showed to the followers of each school that the ijtihādic rulings found in other school were not taken by them as they were deviation from the *Sharīʿah,* since the *Sharīʿah,* as they viewed, was represented by none other than their schools.

16/15 The Fate of the *Majallah*

In the Ottoman era, the awareness of the inability of the *Majallah* to fulfill the need of time was increasing in the hearts of the people responsible. For this reason, abrogation and amendment were always common.

Meanwhile, in the Arabic world, which is separated from the authority of the Ottoman Empire after the First World War, there was an increased awareness for the necessity of replacing the *Majallah* with either another one or a new Civil Law drafted from different schools as a way of minimizing the incompetency found in the *Majallah.* In Syria, the *Majallah* was revoked in 1949 in the hands of the commander of the first military coup in Syria, al-Sayyid Ḥusnī al-

Zaʿīm assisted with the devils surrounding him, and was replaced with a Civil Law of foreign origin, which is the new Civil Law of Egypt.

After some years, Iraq followed suit by revoking the *Majallah* and replacing it also with a Civil Law of foreign origin introduced by a collection of Islamic legal maxims that were found in the *Majallah*, and which carried academic rather than practical value, in order to delude a first-time reader that it carries the spirit of the *Majallah*.

In Kuwait, the entire *Majallah* was the Civil Law of the country applied judicially in all civil transactions along with the *fiqh* of the Mālikīs applied in the Personal Statutes as proven by the explanatory note of the law of organizing the judiciary issued by Emir Decree No. 19 of 1959, and another explanatory note of the Law of Commerce Decree No. 2 of 1961. However, the Commerce law had surpassed the civil area which is the dominant area of the *Majallah*. It introduced new principles and rulings for obligations that are of foreign origin, and are regarded as part of the Civil Law (and not the Commerce Law which is supposed to be limited to exceptional rulings of the Civil Law). And this way, it appeared that the laws of the *Majallah*, and even the idea of obtaining the civil legislation from the *fiqh* was diminishing in the Arabic world.

Nonetheless, the strong patriotic awareness of the necessity of preserving their Islamic identities and their great treasure of Islamic *fiqh*, followed by the conference on *Fiqh* Week held in the College of Law in Paris in 1951, then, the second round of the conference held in Damascus in the days of unity between Syria and Egypt in 1961, including the important researches that were presented in the abovementioned conferences regarding the features of *fiqh*, followed by the jurisprudential encyclopedia project, and several other developments that we shall mention in the following section on the eighth phase of jurisprudence, all these [factors], renewed the intention for codifying the *fiqh*. Thus, new civil laws derived from *fiqh* emerged, and many forms of shortcomings that were noted on the *Majallah* were rectified.

We shall mention this briefly at the end of the following section (under codification of *fiqh*), and in section twenty two and its appendix, we shall discuss it in details under "civil laws and the benefit of basing them on the *fiqh*".

SECTION 17

PHASE 8: FROM THE POST SECOND WORLD WAR UNTIL PRESENT

17/1 Introduction

The end of colonialism – after the Second World War -which was aimed at separating the colonized countries from their origins and history, as well as eliminating their personality, sparked the feeling of self-complacency among the Islamic nations in general and the Arab nations in particular. Thus, several movements emerged in Egypt, Syria, Iraq, Pakistan and Northern Africa including Libya, Tunisia, Algeria and Morocco, calling for the reinstatement of Islamic originality and the dominance of *fiqh*. At the same time, other movements were established especially by non-Muslims to oppose the above movements, and thus called for the continuation of the legal and administrative status quo of the colonial rule. Among the justifications made by this second group is the absence of an accessible and comprehensive Civil Law derived from *fiqh* that would be an easy reference for the judges and the students of law.

The majority of the public opinion was with the first group while the rulers and secularists were inclined to the second group. Throughout this period, new constitutions were drafted in some newly independent countries, and as a way of considering the opinion of the majority, the constitutions contained texts which imply that Islām is the religion of the state or *fiqh* is the source of legislation or *fiqh* is the primary source or the primary source of legislation.

Following this were the demands for developing a modern civil law based on *fiqh*. At the individual level, there were concerns among the *fuqahā'* of the *Sharī'ah* and law for developing a practical model of the Civil Law. This was followed by concerns at the official level: for instance, in 1949 the Syrian Ministry of Justice delegated one of its senior judges to Egypt, with a letter to Dr. 'Abd al-Razzāq al-Sanhūrī, the famous legislator (who developed the modern Egyptian Civil Law, and later turned to the studying and teaching of *fiqh*) in order to help each other in developing a civil law based on the *fiqh*. This coincided

with the occurrence of the first military coup in Syria that toppled the constitutional rule throwing the country into a complete state of imbalance. The project of developing the Civil Law based on *fiqh* was thus scrapped off and was replaced by the Egyptian Civil Law of foreign origin. However, there was a strong force in Syria, Egypt and a number of Arab countries that was pressing for the return to the beginning and accomplishing the abandoned project. This modern direction towards modernizing *fiqh* and using it as basis [of Civil Law], produced outcomes and activities of great importance, which we shall summarize as follows:

17/2 Call for Collective *Ijtihād*, and the establishment of *Fiqh* Academies

The notion of developing a new Civil Law that responds to the needs of the contemporary time requires two inevitable issues:

- Deriving from *fiqh* by its general meaning, that is, from all its reliable sects and schools instead of limiting to a single school like how the *Majallah* drafted was based on Ḥanafī School only.
- New extrapolation of *usūl al-fiqh* and *maqāsid al-sharī'ah*, and resorting to the use of *qiyās*, *istiḥsān* and *istiṣlāḥ* in contemporary issues which the jurisprudential *madhāhib* have no comment in their ancient texts such as the contract of insurance, investment companies and others.

This requires the practice of *ijtihād* as was done by the previous *fuqahā'* in the new issues which faced them. Thus, it is necessary that the spirit of *ijtihād* is revived after its door has been closed since the fifth century of *Hijrah*.

If the fear that surrounded individual *ijtihād* at that time had necessitated the preventive measure of closing its door, then the remedy is to transfer the [task] of *ijtihād* from an individual to a group such that it becomes collective *ijtihād* undertaken by the reliable *fuqahā'* of the time by way of *shūrā* among them. In this way, the fruits of *ijtihād* will be realized as *fiqh* is not able to fulfill the needs of time without it, and through this means, the risks of the individual *ijtihād* that led to the closure of its door will be eliminated.

From here, the idea of forming a *fiqh* academy that comprises of a selected group of contemporary jurists *(fuqahā')* in different parts of

the Muslim world grew out. The academy would have its own permanent office and annual sessions in which research papers are presented, contemporary matters are discussed, and relevant solutions are resolved in the light of the principles of *Sharīʿah* and its general objectives, the opinions of former *fuqahā'* and the needs of time.

Among the fruits of this propagation and direction is the organization of several conferences for Islamic *fiqh* which include:

a. *Fiqh* Week Conference, Damascus, Shawwāl 1380 H (April 1961)
b. Al-Azhar Academy of Islamic Research Conference, Cairo, 1961.
c. Al-Bayḍā' City Conference, hosted by the Libyan University
d. *Fiqh* Conference in Riyāḍ, 1396 A.H. (1976) hosted by the Islamic University of Imām Muḥammad ibn Su'ūd.

Regarding the [*fiqh*] academies, the first academy to be established is the Academy of Islamic Research at al-Azhar in 1961. It was followed by the *Fiqh* Academy established by the League of Islamic Countries in Makkah, and held its first session in Shaʿbān 1398 A.H. (mid 1978). Later, the Organization of Islamic Conference established the Academy of *Fiqh*, which held its first session in Makkah in Ṣafar 1405 A.H. (11/1984). This academy comprises of a representative from each of the member countries.

Each of the three academies has its permanent office, and holds annual sessions that look into important issues for the purpose of determining the stance of *fiqh* pertaining to the issues and its ruling in terms of permissibility or prohibition. Examples of topics on which the academies have covered and issued resolutions are:

- Transplantation of human organs, artificial insemination, and in vitro fertilization (embryo transfer).
- Determination of prayer times in areas near the North Pole, and the starting of lunar months.
- Literal and Intellectual Property Rights and ownership for general purposes.
- Payment of *Zakāh* on modern forms of wealth.
- Plenty of resolutions related to Islamic economic, finance and financial market issues.

All the academies publish academic journals that contain the research papers presented in their academies' sessions, discussions, and the resolutions issued. By this way, *ijtihād* was revived in the form of collective *ijtihād*.[132]

It is noted that the aforementioned academies are international in the sense that they comprise members from different countries. There are other academies that are national, the most known of which is the Council of Islamic Ideology in Pakistan. The formation of the council is provided in the constitution [of the country] since early 1950s, and it became active from early 1970s. The council gathers scholars from different schhols of *fiqh*, and presents its legal recommendations regarding all the legislations that are brought before the parliament (national council). Among the great accomplishments of this council is the detailed plan that it drafted for more than two years, and submitted it to the government in June 1980 regarding the method of annulling bank interest in the Pakistani economy and replacing it with *Sharīʿah*-based transactions. In preparing this plan, the council sought the assistance of a group of economic and banking experts. Similarly, the Council helped in drafting the important law pertaining to the implementation of [the payment of] *Zakāt* in Pakistan which was issued in June 1980.

It is worth to note that the aforementioned *fiqh* academies call upon the experts of such fields like medicine, astronomy, and biology in all matters where the input of the said experts is necessary in deriving the *fiqh* ruling. The academy would thus listen to their inputs, experience and opinions and record them, and later, the members of the academy would issue their resolution on a certain legal ruling, by *ijmāʿ* or opinion of the majority of the members, based on the scientific facts explained by the experts.

17/3 Revised Approach of Teaching and Writing *Fiqh*

Since the establishment of the colleges of *Sharīʿah* in universities after the colonial period, and the establishment of entirely Islamic universities, the teaching and writing of *fiqh* adopted a new approach.

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132 The first person to write on collective *ijtihād* and the need for it in this era (to my knowledge) is the great Muslim writer and historian Rafiq Bek al-ʿAẓm) before more than half a century in a small article which he published in Egypt under the title *Qaḍāʾ al-Fard wa-Qaḍāʾ al-Jamāʿah*.

It was found that the classical *madhāhib* books, which had been written using the ancient approach or as reference to scholars, are not consistent with the needs of modern university teaching. Thus, *fiqh* professors from the colleges of *Sharīʿah* bravely compiled modern books of *fiqh* that are consistent with the need of the students at degree and graduate levels. This is because the undergraduate level has its own approach of teaching and so is the doctoral level which requires a detailed approach in specific topics. As a result of this, master and doctoral theses were written in numerous topics of *fiqh*, while each topic discusses a particular issue in great depth from different angles. The theses, which are now counted in dozens, suffice the researchers and those who refer to them, and some of them have been written in the constitutional *fiqh* such as the government system and *shūrā*, in *fiqh* of economics, the rights peace and war in Islām (International Islamic law), human rights, and rights of women.

17/4 The Openness to Other *Madhāhib*, and Interest in Comparative *Fiqh*

The revised approach in teaching and writing *fiqh* at universities had been accompanied by the openness to all the schools of Islamic law; four of which represent the *fiqh* of the partisans of *Sunnah* (*ahl al-Sunnah*), and the other four that have been mentioned before. In fact, the openness encompassed the opinions of the *ṣaḥābah* and *tābiʿīn*, and all the *fuqahā'* of the predecessors whose schools of thought have not been recorded completely, rather; their opinions have been reported in different topics in the books of differences [of opinion] of *fuqahā'*. They include al-Awzāʿī, al-Layth ibn Saʿd, Ibn Shubrumah, Ibn Abī Laylā, al-Ḥasan al-Baṣrī, Sufyān al-Thawrī, and others, for the purpose of benefitting from the opinions that have been reported from them.

This openness has eliminated the prejudice of the schools of Islamic law that was there among the followers of the schools in the past as mentioned previously. As a result, the study of *fiqh* at universities has displayed to the student the features of different schools and what they have of the *fiqh* treasure, intellectual development, expansion of the mental abilities through discussion of evidences, simplicity of implementation for the *mukallaf*, and facilitation of the process of codification of *fiqh* for the people in the authority such that they select from each topic in every school that

which is more relevant and most fulfilling to the needs of place and time.

17/5 The Openness to the Law Contrasted With the *Fiqh* Studies

Among the most important things that has resulted from the modern approach in revising *fiqh*, is a new dimension that has a huge impact in serving the *fiqh* and displaying its original quintessence and valuable contents that had been hidden in the classical books of *madhāhib* because of their complicated approach, which is no longer understood except by the one who grew up with them, and is well acquainted with the language and technical terms of the books like the way how a child acquires his mother-tongue in the family, especially the books of the latter *fuqahā'* of *madhāhib*.

This new approach is the entry into the field of positive law and using it to access the opinions of law scholars in every topic in *fiqh mu'āmalāt*, which benefits the teaching of *fiqh* in universities, and writing modern books of *fiqh* to the students of this specialty. The openness to the schools of Islamic law aud the reading of what they contaiu of opinious, theories and principles that are valuable, aplenty and beneficial, has led to the opening of this new window of positive law, and goiug through the contents of its theories and principles, and the simple and easy way of presentation that has no complications or difficulty.

This link between *fiqh* and positive law has produced good fruits and has helped iu presenting *fiqh* contrasted with law in several books, research, and doctoral theses, in a way that is understood by the men of law and using language and titles that are familiar to them. Before this, they did not know their variance in the *fiqh*. As such, the persistent estraugement between the *fuqahā'* of *Sharīah* and scholars of law in the first half of the present century diminished.

In the 1950s the teaching of the principles of law and a brief general theory of obligations in Civil Law was incorporated in some colleges of *Sharīʿah*. More attention is drawn by the fact that in Syria a statutory law was issued which requires that *Sharīʿah* judges should be appointed if they have earned a bachelor degree in law. Since then, everyone who desired to join the judiciary fouud himself forced to study in a law college. This made the *Sharīʿah* judge (*qāḍī*) parallel to the judge of regular courts in all aspects. In fact, the former is superior as he has, in addition to the law education, the background

of *Sharī'ah*. This procedure has never been found before in any other Arab country.

17/6 The Encyclopedia of *Fiqh* Project

After the establishment of the college of *Sharī'ah* in the Syrian University (present University of Damascus) in 1954, one of its initial activities was to execute the recommendation of the *Fiqh* Week Conference in Paris regarding the compilation of an encyclopedia of *fiqh*. Thus, in 1956, the college formed a committee for this project and it started its duties with the extraction of the key terms of the topics, issues and rulings of *fiqh* from different books of the four schools to form a literal framework of the encyclopedia, which will contain all the rulings of *fiqh* in the four schools arranged in the Arabic order of alphabet. Thus, it is possible for the one who wants to refer and know about any topic in every school to just refer to its key word in its alphabetic order, which is a simplified way for the non-specialists of the field who do not know the location of an issue in the *madhhab* books.

In the reign of the union between Egypt and Syria in 1958, a joint committee was formed to help each other in accomplishing this huge project, but with the collapse of the union in 1961, the work was discontinued. Later on, Egypt continued with the project slowly. In 1966, the Ministry of Justice and Islamic Affairs in Kuwait resolved to undertake the project for which it formed a special body, and moved at a fast pace with the project for five years. This spurred the zeal of the Egyptian Ministry of Justice to also proceed with the project. In this way, the two projects of compiling the encyclopedia were simultaneously adopted in Egypt and Kuwait. By 1414 A.H. (corresponding to 1994), both the countries had published twenty volumes, but none had accomplished the topics by half of the alphabet letters.[133]

If this project is destined to be completed, and the encyclopedia would become available in the international libraries, and would be translated into the language of countries concerned with law, it would

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[133] At the time of publishing this new edition of this *al-Madkhal al-Fiqhī al-'Ām* in 1417 A.H. (1997), the *Kuwait Encyclopedia* has completed thirty five volumes covering up to letter *Lām* in the Arabic alphabet, thus, they have neared completion.

then be a contribution to the *fiqh* with ample contents and simple for legalists to use. It will occupy a significant place among the sources of legislation in the future world, and not only in the Islamic and Arab world.

17/7 *Fiqh* of Banking Activities and Methods of Islamic Investments

From the mid 70s until the present days, dozens of Islamic financial institutions and investments have emerged in the Islamic world and other countries. Such institutions desire to adhere to the *Sharīʿah* in their activities especially in what is related to the prohibition of giving and taking bank interests. Similarly, there has been a great shift in a number of countries in the Islamic world by eliminating interest from their entire financial system.

This development posed as a huge challenge for the *fiqh* and it is upon the *fuqahā'* to practice *ijtihād* and develop practical modes of financing and investment which are acceptable by *Sharīʿah* and economically sound.

We note that the response of the *fuqahā'* to this contemporary challenge was very good and practically expresses the modern approach towards revising the *fiqh*:

a. In many Islamic financial institutions, *Sharīʿah* committees have been set up to exercise collective *ijtihād* in a lesser shape. This form of *ijtihād* has also emerged through the dozens of specialized conferences and workshops which have been organized by the financial iustitutions and resulted in the issuance of plenty of specific recommendations and *fatāwā*.

b. There also emerged in this field of *fiqh* activity the complete openness among the schools of Islamic law as none of the *Sharīʿah* committees of the financial institutions restricts itself to a particular school, rather; all of them seek guidance in their *ijtihād* and *fatāwā* from all the schools of Islamic law.

17/8 Codification of the *Fiqh*

Since the enactment of *fiqh* as the primary source of legislation in the Arab countries after their independence, as mentioned previously,

the calls for reconciling the laws with the rulings of *fiqh*, and changing whatever conflicts them, started. The calls, which were concentrated in Egypt, Syria, Iraq, and Jordan, stressed on the development of a modern Civil Law derived from the *fiqh* in its wider meaning as explained before.

This idea has been realized in some Arab countries namely Jordan, which was a pioneer in this move, then the United Arab Emirates and Sudan. Similarly, the preparation for the project of unified Arabic Civil Law derived from *fiqh* started, and a portion of it has actually been accomplished. We shall explain all this in section twenty two and its appendices concerning the civil laws and the virtue of basing them on *fiqh*.

CHAPTER FOUR

DERIVING CONTEMPORARY CODIFICATION FROM ISLAMIC JURISPRUDENCE

Chapter Outline

Section 18:	Contemporary Perspective for Benefitting from the *Fiqh* through the Schools of Islamic Law.
Appendix:	Contemporary Examples of Codification of the *Fiqh* in Its Various Schools.
Section 19:	Necessity and Value of the Differences in *Ijtihād*.
Section 20:	The Merit of Religious Attribute in Islamic *Fiqh*.
Section 21:	Contemporary Challenges Facing the Implementation of the *Sharīʿah*.
Appendix 1:	The Panelty for the Crime of *Zinā*.
Appendix 2:	The Problem of the Interest-based System.
Section 22:	Civil Laws in Islamic Countries and the Merit of Founding Them on *Fiqh*.
Appendix 1:	Resolutions of International Conferences and Testimonies of Laws Leaders on the Merit of Islamic Law.
Appendix 2:	Codification of Islamic Law and Codifying from it.
Appendix 3:	Unification of Criminal System in the Arab World based on *Sharīʿah*.

SECTION 18

CONTEMPORARY PERSPECTIVE FOR BENEFITING FROM THE *FIQH* THROUGH THE SCHOOLS OF ISLAMIC LAW

18/1 In many of today's Arab and Islamic countries, there is a resort towards the entire *fiqh* for the purpose of benefiting from its schools of thought.

When the thinkers, who studied modern laws and became acquainted with the positive laws of the Arab region as well as the European Civil Laws, look beyond the Ḥanafī, Shāfiʿī or any other schools, and compare the positive laws with what the various *ijtihād* have produced the views, theories and abundant *fiqh;* they will find that the deficiency in the contemporary legislative demands is not found in the general *fiqh*, rather; it is found in every individual school.

What one *mazhab* and its theories is deficient, there is a place and solution for it in another school. There is no legislation in which *ijtihād* and opinions have become plentiful and broad like the Islamic legislation.

The attribution of all these schools – whether the four completely documented ones that have been mentioned before or the ones not completely documented, rather; the opinions of their proponents have been cited correctly in the books of jurisprudential differences – to the *Sharīʿah* is equal. The opinions of the *fuqahā'* among the Companions *(ṣaḥabah)* and their successors such as Ibn Abī Laylā, Ibn Shubrumah, Makḥūl, al-Awzāʿī, al-Ḥasan al-Baṣri, Saʿīd ibn Jubayr and many others, carry of value and consideration that which is not found in the opinions of Abū Ḥanīfah, Mālik, al-Shāfiʿī and Ibn Ḥanbal.

It is not compulsory for every country to adopt one of the schools of thought completely. Rather, it is possible for the country to adopt from the principles and rulings of the school of Islamic law that which it finds most congruent with the *maṣāliḥ* of a given time. The committee of the *Majallah* itself was also faced with a similar need of [adopting] other schools.

This is understood from what is mentioned in the report on compelling causes, found at the beginning of the *Majallah* regarding the committe's research on considering the conditions of contract absolutely based on the school of Ibn Shubrumah, and regarding the discussions made concerning the adoption of his school of thought whereby it was preferred to confine to the Ḥanafi School owing to its moderateness, and the lack of need (in the committee's perspective) of adopting the school of Ibn Shubrumah, because the Ḥanafi School considers and endorses every condition that stems from *ʿurf* if there is no *naṣṣ* that forbids it or it does not contradict the objectives of the *Sharīʿah*.

18/2 Commencement of the Implementation of the Idea of Codifying Personal Statutes:

The idea of benefiting from different schools of Islamic law through the codification of the Laws of Personal Statutes started officially at the end the Ottoman period. The Ottoman government had compiled the Law of Family Rights in 1333 Roman year in which it adopted and expanded the Mālikī School on the ruling of compulsory juridical separation between husband and wife through the arbitration method that is mentioned in the *Qur'ān* when the couple disagree. With that, it was made possible for a woman to get rid of an evil husband by seeking separation, and for a man to get rid of an evil woman by divorce. The Ottoman government also adopted other reformative laws from other schools.

The Law [of Family Rights] had also adopted from the school of Mālik the freedom of marriage for the wife of a missing person after four years of his missing, whereas the Ḥanafi school requires the woman to wait until the death of all his coevals thus leaving the wife suspended until her old age.

18/3 In 1920, the Egyptian government adopted the same rulings on the issue of separation and the wife of a missing husband.

Then, in 1929, it made a major step in adopting from different *ijtihāds* besides the four schools. It thus issued a law [under number 25] that repealed the suspension of *ṭalāq* (divorce) with a condition in most of its situations, and considered the pronunciation of tripple or double *ṭalāq* in a single word as one *ṭalāq* thus implementing the opinion of Ibn Taymiyyah and his legal basis. This was approved by

the Shaykh al-Azhar in order to get rid of the tragedies of suspended and triple *ṭalāq* pronounced by the ignorant people among the men at times of dispute or anger. As a result, they cross the boundaries of the *Sunnah* and fundamental objectives of the legal divorce.[134] Then, only after *ṭalāq* has occured, they seek an exit by finding various strategems and religious ways which are known to the scholars.

18/4 Some thinkers among the contemporary scholars are of the view that a group of schools should be considered as one school in the *Sharīʿah*, and each individual school in the group such as the Ḥanafī, Mālikī, Shāfiʿī, and Ḥanbalī are to be considered, in relation to the main general school of Islamic law, as different opinions and sayings under one individual school. Thus, scholars of the *ummah*

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[134] Divorce has been legalized in Islam as a means for dissolution of marriage when the husband and wife can no longer live together peacefully.

If the husband suspends the divorce by saying, for example, "if such and such a thing does not happen, his wife is divorced," he would be using divorce to strengthen his intention for a certain action or to emphasize information thus it replaces it with an oath using the name of Allah for these emphases have been legitimized by an oath with Allah's name and not divorce.

Therefore, in doing so, the man would be using *ṭalāq* for other than what it has been legitimized and would be going against the objectives of the *Sharīʿah*.

People fall victims of divorce tragedies by making *ṭalāq* conditioned upon their actions or actions of their wives or other people such as eating, drinking, going, coming, visiting or talking to a person or wearing dress, etc, so as to persuade or prevent an action from happening depending on whether the condition is positive or negative (for example, "if I do this" or "if I do not do this"). In fact, they often condition *ṭalāq* upon actions that take place between them and their friends or their enemies, not related in any way to their wives. When the action occurs, the wife is surprised by *ṭalāq* that breaks up her family ties, and did not have any prior knowledge about it nor did she cause it. And if the *ṭalāq* is pronounced thrice (in a single word), it means the end of their relationship.

The origin of all this is peoples' deviation, since the earliest time, from the legal method and purpose of divorce and their use of conditional *ṭalāq* to strengthen their intention on doing or not doing an action instead of swearing by Allah. This is in violation of the legal purpose of *ṭalāq* which the Holy *Qur'ān* has mentioned its rulings.

Meanwhile, the scholars are not aware of this and they accept people's carelessness and ignorance in altering the legal path in the most serious issue.

Egypt has eliminated these consequences by forbidding conditional *ṭalāq* and nullifying it judicially if it is only meant to persuade or prevent an action. If this procedure had no basis in the classic jurisprudential schools that Ibn al-Qayyim has cited in his *Iʿlām al-Muwaqqiʿīn* from the senor *fuqahā'* among the *ṣaḥābah,* it would have been compulsory for the *ummah* scholars today to resolve it through *istiḥsān* or *istiṣlāḥ* as a way of making people return to the path of *Sharīʿah* in using *ṭalāq,* and to eliminate the consequences of their ignorance in this matter.

would select, for codification in judiciary and issuance of *fatwā*, that which they find most fulfilling to the demands of the time and requirements of *maṣlaḥah* in each era. This opinion is apposite.[135]

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[135] At last, a general law of Personal Statutes appeared in Syria in 1953 (after the 3rd edition of this *al-Madkhal al-Fiqhī al-ʿĀm*) that encompasses all the family rulings under the following four chapters:

- Marriage *(al-ziwāj)* and what stems from it of alimony, affinity, childcare, *ṭalāq*, separation, *ʿiddah*, etc.
- Capacity *(al-ahliyyah)* and custodianship *(al-wiṣāyah)* and what stems from them of legal representation of the minors in its different forms such as guardianship, caretaking, etc.
- *Al-Waṣiyyah* and all that is related to it of conditions and laws.
- Inheritance *(al-mīrāth).*

I was one of the members of the official committee to which the Syrian Government assigned the task of compiling the law. We extracted the rulings from all the schools and opinions of *fiqh*, and we borrowed all the rulings of reformation adopted previously by the Ottoman Law of Family Rights, and separate Egyptian laws that handled different issues on Personal Statutes some of which we have mentioned before such as the issue of missing husband, suspended *ṭalāq*, triple *ṭalāq*, period of pregnancy, brothers' inheritance with grandfather, the issue of *al-mushtarakah* (see : *s* 4.10), and the principle of inheritance for the maternal relatives (*ẓawil arḥām*), the famous issue of *ibn al-marḥūm*, compulsory *waṣiyyah*, and many others. Thus our law was the first comprehensive law of its kind in the whole Islamic world comprising of codification of the rulings of Personal Statutes and what it contained of reformative rulings and progressive steps in line with the *Shari'a* and its boundaries.

This constitution has come in its theme as the best practical evidence for what Islamic *fiqh*, in its broad meaning under its different schools and principles, has of competence and readiness to respond to the variety of legal demands of a given time.

We have earlier mentioned this law under the discussion on *istiṣlāḥ* and [said that] it has repealed and replaced our Ottoman Law of Family rights (see the footnote of para 5/12). We shall also mention in this section's appendix two modern projects of codifying personal statutes in *fiqh* with all its different schools without limiting [ourselves] to one school.

APPENDIX TO SECTION 18

MODERN EXAMPLES OF CODIFICATION OF *FIQH* IN ITS VARIOUS SCHOOLS

PROJECT 1
PERSONAL STATUTES LAW OF EGYPT AND SYRIA DURING THEIR UNITY

18/5 During the period of unity between Syria and Egypt (1958-1961), it was resolved between the leaders of the two countries that some laws, which are required by the knowledge-based need to be unified, should be unified. This trend covered four laws the first of which is the law of Personal Statutes.

For each of the laws, a three-member joint committee was formed from among the specialists, and I was chosen to head the committee on Personal Statutes, and with me are the *muftī* of Egypt and the Under secretary of the State Council of Egypt as members. We compiled a comprehensive project for a unified law of Personal Statutes that covers all its chapters from *nikāḥ* to inheritance and all what is between them of chapters and sections. We handled all the problems faced by the life of a Muslim family including marriage, *ṭalāq*, child custody, alimony, *waṣiyyah*, inheritance, etc. We also sought the input of legal judges by asking them about the problems that make one of the spouses to file a lawsuit against the other. We did not confine to any particular school, and moreover, we borrowed from the *ijtihād* of the former *fuqahā'* whose schools of thought have not been documented but their appropriate opinions have been narrated in the books of differences [of opinion] among *fuqahā'*. We then forwarded this first comprehensive law project on Personal Statutes, along with an explanatory note that accompanies its articles and elaborates the source from which it was derived, to the two Justice ministers, federal and regional, so that it is issued by the president of United Arab Republic. However, the military coup that occurred in Syria in 1961 and the dissolution of the unity hampered

the release of the law, and thus, the project became a historical fact.[136]

PROJECT 2
UNIFIED PERSONAL STATUTES LAW FOR ARAB COUNTRIES

18/6 The first conference of Arab Ministers for Justice (held in Rabat 12/1977) emphasized on the importance of unifying the legislations between Arab states, and that adherence to the rulings of *Sharīʿah* is the safest and most productive way of achieving this aim.

Then, a ministerial committee was formed from the conference that recommended on the necessity of mobilizing the efforts, expended at the Arab level, of codifying the rulings of *Sharīʿah*, and giving a special priority to unifying the law of Personal Statutes in the Arab countries in a way that will ensure necessary reforms in the family system obtained from different schools and from the principle of *istiṣlāḥ*.

A committee of *Sharīʿah* judges and specialized *fuqahā'* was formed to compile the project. It worked on the project for three years (3/1982 – 2/1985), [and after its completion], it was presented to a general council that represented the Arab countries which met in Amman, the capital of Jordan in the late 1980s. The representative of the Kingdom of Saudi Arabia and the rest of the Arabian Gulf states had some reservations and hesitated to endorse it because of the inclusion of compulsory *waṣiyyah* in the project as well as some other rulings which were contradicting with the dominant school in their respective countries. It was then resolved that every Arab state should be left to decide on the source of the rulings.[137] It does not appear from the contents of the project that its founding members had looked at the unified project of Egypt and Syria.

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[136] This project was at last published under the title *Mashrūʿ Qānūn al-Aḥwāl al-Shakhṣiyyah al-Muwaḥḥad lil-Iqlīmayn: al-Maṣri wal-Sūri fi 'Ahd al-Waḥdah Baynahuma* (Dimashq: Dār al-Qalam, 1416/1996).

[137] The full text of this project was published in *al-Majallah al-'Arabiyyah lil-Fiqh wal-Qaḍā'* issued by the General Secretariat for the Council of Arab Ministers for Justice in Morocco (Issue No. 2, 1985, pp.19-262).

SECTION 19

NECESSITY AND VALUE OF THE DIFFERENCES IN *IJTIHĀD*

19/1 Some of those who do not possess knowledge or insight think that the different *ijtihād* [opinions] in the *fiqh* are a shortcoming, and wish that there was only one school.

They may even go further in their delusion by thinking that the differences [of opinion] among the schools may imply a contradiction in the source of legislation!

In refuting this delusion, we say: The appalling difference among the schools that has only evil consequences on the *ummah* is the difference in the creedal matters. The jurisprudential difference in the civilian practical laws is among the prides and treasures because it is a legislative resource which, whenever it expands it becomes more magnificent, more beneficial and more effective.

The meaning of this difference is plurality of legal theories, principles and ways of deriving the rulings and establishing them. This makes the *ummah* sufficient with its legislation such that it does not run short of its legislative needs; provides it with suitable foundations of solving emerging problems under different circumstances; and opens the opportunity of choosing the best solutions whenever there is a need and whenever the implementation reveals some of the problems. This resembles a person who has chairs of different styles and design in his house; when he is bored of sitting on one of them, he changes to another or like having several pharmacies which meet all the requirements. If a person does not find his medicine in one of them, he would find it in another.

The same is the situation with the schools of Islamic law in Islamic legislation.

In his *Manāqib al-Imām Mālik* (p. 46), al-Suyūṭī quoted the saying of Imām Mālik that "Hārūn al-Rashīd consulted me regarding the hanging of *al-Muwaṭṭa'* on the Ka'bah and people be forced to adhere to its contents...I said, O commander of the believers! Certainly the Companions of the Messenger of Allāh (s.a.w.) differed in subordinate [matters] and they thus spread across the countries, and each of them believes that he is correct." It appears that al-

Rashīd reiterated this request and thus Mālik said, "O commander of the believers! The disagreement among scholars is a blessing from Allāh on this *ummah*, everyone follows that which he finds correct to him, all of them are guided, and all seek the pleasure of Allāh" (adapted from "*Mālik*" by Abū Zahrah, pp.191-192).

The Mālikīs, Abū Bakr ibn al 'Arabī (d. 543 A.H.) said in his *al-Aḥkām al-Sughrā* (1/153, edited by Sa'īd A'rāb, publication of Islamic Educational, Scientific and Cultural Organization – ISESCO, 1412 H/1991 A.D) while commenting on the verse: "*And hold fast, all of you together, to the rope of Allāh (i.e. Islām) and be not divided among yourselves*" (Āl 'Imrān, 2:103):

"*...Be not divided*", that is, in faith. Others interpret it as "do not envy one another" while others say it refers to "holding one another wrong in subordinate matters", that is, "do not wrong one another, and everyone should proceed with his *ijtihād* as all are holding fast to the rope of Allāh. The division that is forbidden is that which leads to adversity and division. Otherwise, differences in subordinate matters are among the beauties of *Sharī'ah* because of the Prophet's saying, "If a ruler practices *ijtihād* and reaches a right decision, he will get double reward (i.e. one for his *ijtihād* and the other for his right decision. And if he is to reach a wrong decision, he gets one reward only" (reported by *al-shaykhān* [al-Bukhārī and Mulsim] and other leading scholars of *ḥadith*).

Imām Abū Isḥāq al-Shāṭibī says in *al-I'tiṣām* (3/11): "Ibn Wahb also narrated from al-Qāsim ibn Muḥammad who said: "I am impressed by the word of 'Umar ibn 'Abd al-'Azīz that: "I do not like the fact that the Prophet's companions were not disagreeing with each other for if they had agreed on one opinion, people would have been in a tight situation. They are leaders to be emulated, and if a person adopts any of the Companion's opinion, he would be at ease".

This means that the *ṣaḥabah* opened for people the door of *ijtihād* and the possibility of disagreeing in it because if they did not open it, it would have been a tough situation for *mujtahidūn*. Thus, with the presence of the differences, Allāh made it convenient for this *ummah*, and an access to mercy."

Commenting on the above quotation, Professor Muḥammad Abū Zahrah said: "The difference [of opinion] among the *ṣaḥaba* over subordinate issues was driven by *ikhlāṣ*. As a result, they had no dispute or prejudice, rather; it was the search for truth and rightness that was taken from whichever direction it appears.

Moreover, their disagreement resulted into sharpening their minds, extracting rulings from the *Qur'ān*, and deriving of general legal law, even if it was not written down. We also see the difference in subordinate matters as ripe fruits of what the *Qur'ān* and the Sunnah have transmitted to the minds of people of researching and conducting their affairs by *shūrā* and exchange of opinions in the light of the *Sunnah* and rulings of the *Qur'ān*" (see the introduction of *al-Mulkiyyah wa-Naẓariyyat al-'Aqd* by Abū Zahrah, para 13, pp.19-20).

Today, we see European law scholars boasting of what has been passed to them, in their legislative legacy from the Romans, of opinions and different theories narrated from jurists of the Roman law and its interpreters. They do not consider these different opinions as part of shortcomings, which they wish did not exist in their legal legacy, even though the Roman jurisprudence, despite its vastness, is considered scanty compared to what we have inherited of *ijtihād* in the *Sharī'ah*.

19/2 Jurisprudential difference is an inevitable product that cannot be avoided as long as scholars have differing views and understanding. Moreover, it does not indicate a contradiction in the legislative source from which it is derived in the same way how the differences of courts' opinions over the meaning of certain legal provision does not signify a contradiction. Rather, it signifies how flexible the text is and how broad is its ability to be implemented.

In fact, if explicit clarity in a subordinate legal provision is better and more protective, there is no doubt that flexibility in the fundamental sources of constitution, which the subordinate legal provisions rely upon, is more preferable in order to make it possible for laws and rulings to be formulated on its basis.

Furthermore, the plurality of possible meanings of the fundamental texts of *Sharī'ah* along with the various forms of *qiyās*, make the differences in *ijtihād* opinions inevitable despite being a valuable treasure.[138]

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[138] In the introduction to *Bidāyat al-Mujtahid*, one of the classical books written by al-Qādi Ibn Rushd al-Ḥafīd, there is a summary of the research on the differences in *ijtihād*, its causes and necessity. Also in *Fiqh al-Qur'ān wal- Sunnah fi al-Qiṣāṣ*, one of the contemporary books written by Shaykh Maḥmūd Shaltūt (may Allah have mercy on him), a member of senior scholars of Egypt and former Shaykh al-Azhar, is a valuable detailed explanation on this topic. Whoever needs further elaboration should consult

To elaborate the necessity of this jurisprudential difference and its value, we cite the following two examples: the first one on the plurality of ways of understanding the *naṣṣ*, and the second one on the plurality of forms of *qiyās* in a particular issue.

19/3 (a) Understanding the *Naṣṣ*

In the Qur'ānic verse of debt, Allāh says, after guiding [people] to authenticating debts and contracts through writing and witnessing: "*And if you are on a journey and cannot find a scribe, then let there be a possessed pledge.*"

The word *maqbūḍah* (possessed) may be taken as an adjective (*waṣf*) that denotes the meaning of condition and thus possessing a pledged property is a legal condition for the fulfillment of a pledge contract. Therefore, a pledge contract is not complete without possession because a non-possessed pledge does not guarantee the collection of a debt. With this, a pledge differs from, for instance, a sale contract, which is concluded by mere contract without need for possessing the sold commodity at the contractual meeting (*majlis al-'aqd*), and these are the views of the Ḥanafis and Shāfi'īs.

It is also possible that the term "possessed" is an adjective that denotes the entitlement of possessing the pledge, but not as a condition in the contract. Thus a pledge [contract] is made without possession, and if the mortgager denies, he is forced by court to

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the two books. It is possible to attribute most of the causes of differences [of opinion] among *fuqahā'* to the following issues:

1. The ability of legislative text to cover than one meaning.
2. Plurality of the forms of *qiyās* in *qiyās* issues.
3. Difference among the jurists over some sources of *fiqh*, and in some principles of *uṣūl al-fiqh* upon which derivation of legal ruling from text is based, such as their disagreement on the rationality of *istiḥsān* and *istiṣlāḥ*.
4. Contradiction of the connotation of some *nuṣūṣ* and difference of scholars' views in reconciling them.
5. Difference of views in determining the *maṣlaḥah* and *mafsadah* in issues related to *istiḥsān* and *istiṣlāḥ*.
6. Their varying contentment in the authenticity of some Prophetic traditions, that is, the soundness or weakness of a reported *ḥadith*. While some of them see a particular *ḥadith* as sound, others see it as weak (doubtful in its authenticity) and thus they would not use it. See *Āthar al-Ḥadith al-Sharīf fī Ikhtilāf A'immat al-Fuqahā'* by Shaykh Muḥammad Awwāmah.

deliver the pledged [property] to the mortgagee (and this is the view of the Mālikīs).

Also from another perspective: Is the purpose of possessing the pledged property, in the sight of the *Sharīʿah,* pure authentication, such as writing a debt document, because the verse has made it a precautionary measure to authenticate a debt as a substitute of writing the document when writing material is not available, thus it takes the ruling of the document, and the pledge remains with the (creditor) mortgagee as non-guaranteed trust such that if it perishes in his hands nothing is discounted from the debt the same way nothing is being discounted if the document perishes? (which is the view of al-Shāfiʿī).

Or, is consideration given to the meaning of collection along with authentication in the possession of a pledge as a result of the creditor placing his hand on the debtor's property and his privilege of preceding other creditors in collecting the debt, such that it does not become mere trust, rather; it is a trust from one dimension and guaranteed from another? (This is the view of the Ḥanafis). Thus, if the pledge perishes in the hands of a creditor (mortgagee) and its value is more than [the value of] the debt, the latter is forfeited, and whatever remains of the value of the pledge becomes a non-guaranteed trust.[139]

Thus, look at the term "possessed" and the context of the verse, what results from them of jurisprudential theories and different subordinate rulings, and consider the same example in many texts of the *Qur'ān* and the *Sunnah,* which we cannot list down due to space limitation, in relation to the opinions which has left for us, in the *fiqh* the greatest legislative resource that history of any nation has ever known.

19/4 (b) Forms of *Qiyās*

One of the analogical issues in which the opinion of the former Imāms differed due to the many forms of *qiyās* is a novel issue where two people enter into partnership with three dīnārs as their capital; one of them contributing two dīnārs, and the other, one. The three dīnārs then become mingled together such that any one of them

139 For more detail on these *ijtihād,* see *Bidāyat al-Mujtahid, Kitāb al-Rahn.*

cannot be distinguished from the other. Afterwards, two dīnārs are lost. What then would be the share of each partner in the remaining dīnār?

Abū Ḥānīfah was asked about it and replied that the remaining dīnār should be divided into three [shares] between them. Two thirds of it goes the owner of the two dīnārs while one third to the owner of one dīnār, in line with apparent *qiyās*. Indeed, when the [three] dīnārs were mingled such that they cannot be distinguished, they all became jointly owned by the two partners by the percentage share of their contribution and thus they deserve to share the remaining in the ratio of two is to one. This is the analogy of the ruling which is acceptable in partnerships.

Ibn Shubrumah was also asked about it and he answered that the remaining dīnār is to be divided equally between the two persons; each of them takes half of it. This is because one of the two lost dīnārs is certainly from the contribution of the owner of the two dīnārs, and thus, it is deducted only from his share, and will be left with one dīnār like his partner. There is no certainty in the other lost dīnār as to whom it belongs, and thus it perishes between them into halves, and the remaining dīnār is shared fifty-fifty between them (see *Ḍuḥā al-Islām* by Aḥmad Amīn, 2/88, 2nd ed.).

If only one dīnār was lost, the remainder is then divided between them into three thirds due to the possibility that the lost dīnār belongs to both of them.

Abu Ḥanifah therefore, considered the mixing [of dīnārs] a cause of partnership in ownership based on *qiyās* of the other causes of partnership. He does not consider the loss an adjustor to the shares because it occurred after the affirmation of partnership. Thus, he also used *qiyās* of the loss of a portion of joint capital.

Ibn Shubrumah looked at the fact that the loss of one dīnār differs from loss of two because of the certain knowledge that a portion of the loss of two dīnārs contains share of one of the two partners, while the other portions carries doubt. Thus, the certainty is given its ruling, and the shares are first adjusted. Thereafter, the remaining portion that carries doubt is treated using the *qiyās* of the loss of joint capital.

These are two examples; one textual and the other analogical, which provide a clear idea about differences of *ijtihād* in subordinate rulings. It is evident from both of them that this difference is occurring and inevitable, and is, in reality, a valuable and worthy

resource especially if we add to it what comes out of the differences of opinions in matters under *istiḥsān* and *maṣāliḥ al-mursalah.*

19/5 Nonetheless, despite the differences that occur in the jurisprudential *ijtihād*, they all relate to the Islamic *Sharīʿah* in a correct and considerable way, although they may differ in their degree of closeness to accuracy and conformity to wisdom of the legislation.

The fact that many of the subordinate jurisprudential rulings in the *madhāhib* are indeed the work of the *fuqahā'* themselves – as said by 'Alī Ḥasan 'Abd al-Qādir, in his book, *Naẓrah 'Āmma fī Tārīkh al-Fiqh* (p. 3) – this does not disprove the validity of its relation to the fundamentals of *Sharīʿah* and its extraction from it. This is because the work of the *fuqahā'* in producing the unlimited detailed rulings in various schools is indeed an *ijtihād* or extrapolation of the fundamentals of *Sharīʿah* and connotations of its fundamental texts as we have seen in the previous two examples.

SECTION 20

THE MERIT OF RELIGIOUS ATTRIBUTE IN ISLAMIC JURISPRUDENCE

20/1 We presented in the beginning of this book (para 2/3) that *fiqh* is both spiritual and civil system, because the *Sharīʿah* came to organize the religious and worldly matters (see para 1/7).

We explained that *fiqh*, even its civil part, that is, *muʿāmalāt*, differs from the positive laws due to the notion of *ḥalāl* and *ḥarām*. We also mentioned that when a court judges that something is in favor of a person, when that person proves it with apparent evidences together with the availability of the reasons of judgment. In fact, it does not make the illegal legal and *vice versa*, nor does it religiously permit a person to take what the court has ruled for him if it turns to be actually illegal or fabricated even though it is imperative that the court's judgment is executed and respected as the legislative policy requires that the civil judiciary is based on the apparent evidence and leaving the concealed to the religion. From this understanding, the rulings of *muʿāmalāt* in *fiqh* have two considerations: judicial and religious considerations (see para 2/1-4).

This religious feature in the *fiqh* in relation to its derivation and fundamental sources, and the notion of *ḥalāl* and *ḥarām* contained in it, does not hinder its civil rulings from being built on observing the worldly *maṣlaḥah* and sound customs, and establishing a civil and judicial condition that builds its rulings on pure apparentness the way how the positive laws are established. However, the religious element found in it has surpassed the civil elements by its solemnity and respect, and has bequeathed to it an authority over the hearts [of mankind] that has made *fiqh* a civil law and a moral deterrent at the same time. This is due to what the *fiqh* contains of the sacredness of the commanding Qur'anic source, and from the hidden religious deterrent to the judgment based on apparentness. Thus, a person does not need an authority that always compels him nor does he find

any benefit in evading from the authority of his conscience if he is able to evade, whether he is a great king or a weak destitute.[140]

20/2 As a result of their understanding, some people conceive that the religious quality found in *fiqh* is overwhelmed by rigidity and inability to accommodate the demands of times as the positive legislation which is capable of adjusting according to the demand.

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[140] For this religious attribute in *fiqh*, many times in Islamic history, the caliphates were being summoned before the council of legal judiciary as defendants. They were tried just like ordinary people leaving behind them the grandeur of their kingdom, and they enter the courtroom with all humbleness. At times, a judgment may be made against them and they submit to the legal ruling while proud of being humble, like the judgment pronounced by Abū Yūsuf, a companion of Abū Ḥanifah, against Caliph Hārūn al-Rashīd.

Another one is the case of al-Manṣūr that was narrated by al-Irbilī in his *Khulāṣat al-Dhahab al-Masbūk al-Mukhtaṣar min Siyar al-Mulūk* where he said: "Numayr al-Madīni said: al-Manṣūr came to us in Madinah and Muḥammad ibn 'Umar ibn al- Ṭalḥī was the *qāḍi,* and I was his scribe. The carriers then filed a suit to the judge against the leader of the believers about something they mentioned. He then ordered Numayr al-Madīnī to write a letter to the leader of the believers to appear in the court with the plaintiff for justice to take place. I said: "Relieve me of this task as the Caliph knows my handwriting". He said, "Write", and I wrote. Then, he stamped it and said: "I swear by Allah, no one except you will take this letter".

I carried the letter to al-Rabīʿ, and kept on apologizing to him. He said: "Do not do it". Thus, he took the letter to him. Then, al-Rabīʿ came and told to people, in the presence of dignitaries and the noble people of Madīnah: "The commander of the believers is greeting you, and is telling you: I have been summoned before the judicial council, and therefore, no one should dare to meet or greet me when I leave my place".

Then, he went out while Musayyib and al-Rabīʿ are before him, and I was behind him wearing a waist wrapper (*izār*) and a mantle (*ridā'*). He greeted the people but no one stood up to him. Then, he left and passed by the grave of the Messenger of Allah (s.a.w.), and greeted him. He then turned to al-Rabīʿ and said: "I caution you O al-Rabīʿ! I am afraid that when Muḥammad ibn 'Umar al-Ṭalḥī sees me, he will be overwhelmed by fear and move from his chair [in respect]. I swear by Allah, if he does, I will never entrust him with governorship over any state."

When the *qāḍi,* who was leaning, saw him, removed the mantle from his shoulders and wrapped with it his back and legs. He then called upon the plaintiffs (the carriers) and the defendant (the caliph). After litigation, the *qāḍi* ruled in favour of the carriers.

When Caliph al-Manṣūr entered the house, he told al-Rabīʿ: "Go to him, when the litigants leave call him". When he came, al-Manṣūr said: "May Allah reward you on behalf of your religion and your Prophet (s.a.w.) and on behalf of your noble descent and your caliph, the best of reward". See *Khulāṣat al-Dhahab al-Masbūk al-Mukhtaṣar min Siyar al-Mulūk* by 'Abd al-Raḥmān al-Irbilī, on Caliph al-Mansūr of the Abbasid, pp. 62-63.

We have seen that *fiqh* has established a consideration for *istiḥsān*, public welfare and customs that has an unlimited ability to accommodate the needs of time except the boundaries of public welfare itself and fundamental sanctities which the *Sharīʿah* has come to reform the humankind by observing them as a way of safeguarding the life, intellect, wealth and materials in the present and future.

Professor Muḥammad Abū Zahrah says, "The one who attempts to understand the *Sharīʿah* as mere laws, and as approaches of reforming certain people in a society and organizing their dealings without linking them to Islām, such a person cannot understand *Sharīʿah* in its right manner as the correct understanding is that which is based on relating the subordinate matters to their origin; the results to their premises, the rulings to their objectives, and the opinions to objectives of their proponents. Surely, the one who makes this attempt is like one who conceives a fruit is formed without a tree or a tree can exist without branches.

The fact that *fiqh* is derived from the springs of the Religion, and rests on its foundations is not a drawback in its value or deficiency in the status of those deriving it and ramifying its branches, because that first generation of Muslims saw, with their penetrant vision and sound rationality, that laws which are derived from religion are more influential on the soul, stronger to the conscience, and upheld more by the spirit. People abide by these laws not because of rulers' compulsion but through a voice from the heart, an awe of the Allāh the All-Rewarding, and desire to live in the eternal comfort. Therefore, obedience acts as a tool that sharpens the sense, awakes the feelings, develops an inclination to virtue and purifies the heart from inclinations to evil. Obedience is not a kind of destitution and absolute subservience without touching the soul with what is contained in the law of elements of righteousness and objectives of reformation since it is implemented as a will of the government and ruler's desire, which are both compulsory to abide without any consideration beyond the obedience.

Indeed, making the laws derivable from the religion is meant to reduce the act of running away from the rulings (of the law) as people realize the fear of Allāh when trying to escape the rulings. They feel Allāh's vigilance in their inner souls when the human regulation is weak.

Linking the Islamic law with the religion has made it strongly associated with the law of morality, and with what has been

unanimously agreed by the humanity as virtues. Thus, neither the branches of the Law nor its principles deviate from the decent morals. The *Sharīʿah* has therefore truly become the first law in which the *Sharīʿah* and the morality come together, and become united counterparts. This was previously a dream of philosophers and reformers – whenever they tried to implement it, the truth awakens them, and firm reality dashed their hope.

Deriving the sources of *fiqh* the religion has made it comprehensive in its authority for the ruler and the individuals, and has made the law authoritative on the ruler and the subjects. People are therefore, entitled to tell the rulers: you are bounded by the rulings of the *Sharīʿah*, and answerable for its implementation. This was during the time when the ruler's power was absolute, and thus *Sharīʿah*, through its association with the religion, became a restrainer for the ruler and an edifier for the subjects (see the introduction of *al-Mulkiyyah wa-Naẓariyyat al-ʿAqd fī al-Sharīʿah al-Islāmiyyah* by Shaykh Muḥammad Abū Zahrah).

SECTION 21

CONTEMPORARY CHALLENGES FACING THE IMPLEMENTATION OF THE *SHARĪʿAH*

21/1 A group of young Muslims, who grew up in a developed environment that does not provide them with the opportunity to know the realities and the wide flexibility of the *Sharīʿah*, find it impossible to implement the *Sharīʿah* in the modern time as there are challenges that hinder the implementation and for which the *Sharīʿah* does not provide solutions in their opinion. The following sections discuss briefly these challenges and offers solutions to them.

21/2 The First Challenge: The Islamic Attribute found in the *Sharīʿah*

A group of scholars of foreign law misconceive (and this misconception has shifted to many Muslims) that Islamic *Sharīʿah* is (made up of) permanent religious rulings, and therefore, not subject to the required development in the modern laws according to the timely and economic situations. The origin of this misconception is lack of knowledge of the meaning of religious attribute in the legal system of the *Sharīʿah*. The civil part of it (as it is appears from summary of the fundamentals that we have presented) contain in their fundamental legal texts of the *Qur'ān* and *ḥadith*, principles and fundamental rights of permanent international values such as the principle of gratification and good intention in contracts, the principle of responsibility to damage and its compensation, and several other principles that have been adopted presently by the modern positive laws.

Therefore, the religious attribute is that the Islamic creed (*ʿaqīdah*) obliges Muslims to respect all the practical jurisprudential rulings that emanate from the abovementioned principles so that they deliver the required rights even if they are far from the judiciary because administering justice and *maṣāliḥ* is part of Allāh's command in the *Qur'ān* where He says, *"Surely, Allāh enjoins the doing of justice and the doing of good (to others)"* (al-Naḥl, 16:90). This respect (for law) encompasses the timely orders, which the supreme authority is legally

entitled to issue them as per the principle of *al-maṣāliḥ al-mursalah* mentioned before. In fact, our jurists of the Ḥanafī School have declared that if a general need and emerging circumstances such as economic or any other, call for a ruler to instruct people to fast one day for instance, and he instructs them to do so, it will then be compulsory for the people to fast that day as they fast in Ramaḍān as long as this is part of regulation of *maṣlaḥah* that the Law has empowered him.

Therefore, the religious attribute in *fiqh* does not deny the fact that it is established on pure civil principles that results into a developed *fiqh* capable of guaranteeing fulfillment of modern needs and solving problems arising along the way. In fact, this religious attribute is a pillar and warranty to ensure that the believers respect the *Sharīʿah* rulings so that they do not permit for themselves that which does not belong to them of individual or state rights in the absence of evidence or in the state of immunity against prosecution as mentioned before. Thus, the religious attribute is a merit in *fiqh* and not a defect. The respect for the legislative rulings emanating from it is something that the pure positive laws wish that they had as it does not come except through the creed.

21/3 The Second Challenge: Implementation of Penal Codes

In the view of the opponents, some of the corporal punishments specified legally such as the punishment of flogging or stoning for adultery, and the punishment of hand-cutting in theft have become impossible to implement in this modern time, in addition to the renewed ambiguities in it. The response to this challenge is that penal codes in the *Sharīʿah*, especially the punishment for adultery, is restricted with very stringent conditions that are difficult to prove and implement thus making it rarely implementable and hence either dropped or replaced with discretionary punishment (*taʿzīr*) determined by the *qāḍī* in the mere presence uncertainty (*shubhah*) in the offender because of the saying of the Prophet (s.a.w.): *"Drop the prescribed punishments in all cases of doubt."*

From another dimension, the *Sharīʿah* contains a wide subject known as the principle of necessities and what it justifies of temporary procedures that lead to abandoning what is compulsory and doing what is prohibited in the presence of necessities.

The penal codes of social crimes are only five: penalty for adultery, theft, slandering of chaste women, drinking wine, and armed robbery.[141] Other than these penalties, the discretionary punishments applied on all types of crime are all left to the ruler who has been empowered in the Islamic system according to the necessary circumstances.

When it is noted that the implementation of the five penal codes has become impossible at a certain time or place, then, another punishment is implemented, and this does not necessitate the abandonment of *Sharīʿah* altogether. Besides, we are not supposed to imagine that the punishment of a thief by hand-cutting would lead to cutting hands equivalent to the number of thieves, who continuously torture the human societies today. Rather, cutting one hand is enough to deter thousands [of others]. Indeed the implementation of this punishment in the Kingdom of Saudi Arabia in a few incidents has curbed the occurrence of theft and has produced an amazing internal security that is ideal for the world.

Our colleague, Dr. Subḥi al-Maḥmṣāni, who is originally a criminal judge, has a valuable research on this punishment in which he clarified considerable facts in his *Naẓariyyat al-ʿUqūd wal-Mūjibāt fī al-Sharīʿah al-Islāmiyyah* (*Theory of Contracts and Affirmatives in the Islamic Law*).

Indeed, a sinful hand that instills pain in the society, trade centers and houses by continuous stealing and robbery without any pressing need, and is not deterred by the punishments implemented today, is better for the society to lose it and assume that it vanished in a car accident for example, and be at peace with what is more worthy for the society.

21/4 With this relevance we say: Indeed, the *Sharīʿah* is a comprehensive, complete and coherent law for a righteous human life. The law is so interrelated and interdependent that if one of its parts is neglected, the other parts will be characterized by flaw and strangeness. For example, the punishment of theft is related to the duty of taking care of the poor and sustaining them by a just

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[141] We have explained in the first appendix of this section, aspects of punishment for adultery crime.

distribution of wealth, and by realizing social guarantee and insurance. The punishment of adultery is related to the duty of purifying the society from means of temptation and arousal of sexual drives, enlightening people through the religion, encouraging them to fear Allāh, and facilitating marriage. The punishment of drinking alcohol is related to the prevention of its production, trading, advertisement, and so on. Therefore, these relationships between deterrents and duties are necessary conditions for the implementation of penalties in *Sharīʿah.*

But if these necessary duties are neglected in the state and the society, or in fact, the real situation in the prevailing system is the opposite such that different forms of media are utilized to advertise and compare the different types of intoxicants; the unveiling of women and young girls' beauty is the sign of development and civilization; the prevailing economic system protects the extreme inequality of wealth and wages leaving a portion of the society deprived while other portions accumulate vast richness by unlawful means; in this case, how is the implementation of penalties alone considered as the implementation of *Sharīʿah*? Is this really an implementation or is it a distortion, camouflage and contradiction?!

21/5 The Third Challenge: *Ribā*-based Profit System

Islām forbids usury definitively and wages war against it without leniency. Most business and banking transactions are today based on profit which comes from the *ribā* that has been prohibited definitively. Thus, the implementation of *Sharīʿah* in these fields is certainly contradicting with the system of profit-making and it results – in the view of those who possess this doubt in their minds – into suspension of many commercial and banking activities, which are today the backbone of economic life.

Response: The *Sharīʿah*, in addition to its forbidding *ribā* (and the profit borne from it as aforementioned) has legalized most of the contracts of financial transactions as explained in *fiqh*. This field has resolved principles and rulings that permit the derivation of new contracts that conform to the principles of *Sharīʿah*, and fulfill the emerging needs. This way, it is possible to carry out the rest of the commercial and banking transactions that are suitable for modern economic life without resorting to the forbidden *ribā*. I refer particularly to the financing of projects, commercial and

manufacturing transactions, government projects and purchases, and consumer purchases. It is also possible to collect the public savings and invest them, and conduct international finance operations. All these can be attained through valid contracts that are free from *ribā*, and on commercial basis, rather than philanthropic or voluntary basis.

What we have just resolved is the general conclusion of hundreds of recent, specialized and detailed researches and books that have been written by economists, bankers and *fuqahā'*, and for which dozens of specialized seminars and conferences have been held within the last thirty years in what is today known as Islamic economics.[142]

As a result, it is possible for us at present to understand that doing away with the interest system, and operationalizing the banking sector without resorting to *ribā* (for those who aspire to achieve it), is something possible when full preparations are made. Any failure should not be taken as means for not implementing the *Sharīʿah*. In fact, some studies have commended the economic merits of Islamic financial techniques that are free from *ribā* and their role on reducing the economic crisis and preventing accumulation of wealth.

In different parts of the globe, Islamic financial institutions have been established to implement these techniques in dealing and financing.

We have set aside an appendix to this section that contains additional details on this topic.

21/6 The Fourth Challenge: Emerging Issues

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[142] For more information on this subject, the reader may refer to the following references, which are by no means comprehensive, the publications of the Islamic Economics Research Centre at King 'Abdul 'Azīz University in Jeddah, and the Islamic Research and Training Institute affiliated to Islamic Development Bank in Jeddah. See also Sāmi Hammūd, *Taṭwīr al-A'māl al-Maṣrafiyyah bimā Yattafiq wal-Sharī'ah al-Islāmiyyah* (Ammān, 1976); the report by the Council for Islamic Thought in Pakistan on the abolition of usurious profit from the economy (one of the research centre's publications); Muḥammad Umer Chapra, *Naḥwa Niẓām Naqdī 'Ādil (Towards a Just Monetary System)* (Washington: The International Institute of Islamic Thought, 1408/1987).

Today, some constitutional affairs are indeed based on the existence of modern economic situations that have no resemblance with the previous economic and jurisprudential era of Islām. These include for example, anonymous legal joint stock companies, assurance contracts and what they contain of important rulings, and many other affairs.

The answer to this is that the fundamental rights in *fiqh* possess broadness, flexibility and a remarkable ability to accommodate and break down into subdivisions. The original texts of these rulings and fundamentals found in the *Qur'ān* and *ḥadīth* can be compressed to few tens of pages. Throughout the early period of Islām, these pages were suitable and sufficient for the establishment of great ocean-like *fiqh*, schools of *ijtihād*, and significant theories that fill the *fiqh* library with thousands of volumes. Moreover, every law in it is accompanied by evidence from those texts in a comprehensive manner or by measuring new events with the events treated by the texts, or through a way of seeking approval or sanctioning (favorable judgment).

All the economic situations today, if they become necessarily beneficial as to realize general welfare of people, new laws can be issued for them on the basis of *fiqh* and its theories as did the early jurists. Those new laws, after their release and establishing them on the principles of Islamic Jurisprudence will be appended to it and it becomes part of it. Its theories will become a reference point for juridical analogy and exegetical law in it, in a way that Islamic jurisprudence itself would become rich with it.

One of the modern examples for this is the assurance agreements, which the general impression among the Muslim jurists until the sixties is that it is unlawful. Since then modern jurisprudential researches[143] have been initiated the result of which is as follow:

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143 I was among the researchers who first start doing a research on insurance in three general areas: The insurance of properties, the insurance of responsibility from error, and the life insurance (free from *ribā*). The research was presented in the Conference in conjunction with the Islamic Law Week organised by Damuscus University in 1961. It was later published as *'Aqd al-Ta'mīn 'al-Sukrah' wa-Mawqif al-Sharī^cah al-Islamiyyah*. Later on, I expanded the discussion and published it as *Niẓām al-Ta'mīn: Ḥaqāqatuhu wal-Ra'y al-Shar^cī fīhi*, published by Mu'assasat al-Risālah.

a. Emergence of consensus of view among the modern scholars and academies of jurisprudence on the fact that insurance of properties from dangers, and assurance of responsibility from error is jurisprudentially acceptable if it is cooperative assurance. Just as many scholars and jurisprudential organizations have affirmed the term *takāful* to replace the term *al-ta'mīn al-iddikhārī 'ala al-ḥayāt* (savings life insurance), which is technically known as *al-ta'mīn al-mukhtalit al-basīṭ* (the simple mixed insurance).

b. The rise of some insurance companies to re-establish insurance on Islamic basis under the supervision of *sharī'ah* boards.

APPENDIX ONE TO SECTION 21

THE PENALTY FOR THE CRIME OF *ZINĀ*

21/7 The penalty for the crime of *zinā* is that the fornicatress and the fornicator shall be flogged a hundred lashes. This is what is contained in the *Qur'ān*: *"As for the fornicatress and the fornicator, flog each of them, (giving) a hundred stripes"* (al-Nūr, 24:2).

It has been reported in the authentic *Sunnah* of the Prophet (s.a.w.) that this is the penalty for the unmarried person. As for the married persons, the punishment is stoning to death. This is one of the harshest penalties considering what adultery causes to the society in terms of social evil and intermingling, loss of lineage, and the financial and non-financial rights caused by blood relation. It involves stealing of honors, the families get disintegrated by it, and bloods are shed due to it, morals are destroyed, and friendship turns to enmity, reliance and trust is lost, and other crimes may follow. There is no doubt that all of these results caused by the adultery of an infidel married person are more serious than if it were in the case of an unmarried person. For that reason, it is reported in the noble *ḥadith* that the penalty of a married person should be more severe than that of an unmarried person. It is necessary in this respect to observe two significant matters:

21/8 **First:** That the meaning of a *muḥṣan* person has been interpreted by the earlier scholars to be one who is married aud has copulated practically in a legally valid marriage before committing the offence of adultery. They did not give a condition as to whether he has a wife at the time of adultery, which could have prevented him from committing this dirty crime. There is no interpretation for the meaning of the chaste in the *ḥadith*.

However, I see that this interpretation has neglected the aspect that justifies strictness of punishment on the *muḥṣan* person. At the same time, it is contrary to the meaning of *muḥṣan* found in the *Qur'ān* when it mentions the women prohibited to marry such as the daughter of a man and his sister. In mentioning the women prohibited to marry in Sūrat al-Nisā', Allāh says *"And all the muḥṣanāt among women..."* that is, it is unlawful for man to marry *a muḥṣanah*.

The Ummah's scholars of *tafsīr, ḥadith* and *fiqh* have unanimously agreed that *muḥṣanah* in the verse means a married woman. Hence, it is unlawful for a man, whatever the circumstance, to marry a married woman, as it is unlawful for two men to combine as husbands of a single woman at the same time!! In fact, it is even prohibited by consensus, based on another Qur'ānic text, to marry a woman during her waiting period of a former marriage discontinued by divorce or death of her husband.

It cannot be denied that *al-iḥṣān* linguistically has another meaning which refers to a protected person. This meaning is expressed in the *Qur'ān* when affirming the punishment for accusing a *muḥṣanah* of adultery. Allāh says, *"And those who accuse free women then do not bring four witnesses, flog them..."* (al-Nūr, 24:4), and His saying, *"Surely those who accuse chaste believing women, unaware (of the evil), are cursed..."* (al-Nūr, 24:23).

The word "*muḥṣanah*" has also been used in the *Qur'ān* to mean a free woman (as opposed to the slave woman).

It, therefore, appears to me that the more correct and appropriate way of defining *al-iḥṣān* in the punishment for adultery is that the *muḥṣan* person (reported in the Prophetic tradition using the term "*thayyib*") is the person who has a spouse who can prevent him/her from committing adultery and yet he/she still commits adultery. This is more crimeful and more deserving of a severer deterring punishment as long as it has no other interpretation in the *Sharīʿah*.

Nonetheless, some contemporary scholars hold that the punishment of stoning the married person is *taʿzīr* and not among the *ḥudūd*. Therefore, it is referred to the supreme leader when there are serious causes for it. The authentic prophetic tradition concerning the punishment of stoning should be understood from this basis. As for the original textual punishment for *zinā*, which is the prescribed penalty, it is the flogging for both the married and unmarried persons as mentioned in the *Qur'ān*.

21/9 Two: That it is not possible in reality to establish the crime of *zinā* except through confession by the person who committed the crime. This is because establishing the crime of *zinā* requires four reliable eye witnesses, and the seeing is almost impossible. Also, the confession by the offender, which makes the punishment compulsory, necessitates that he repeats the confession four times in four sittings.

If all these difficult conditions are not fulfilled to establish the crime of *zinā*, in order to apply the punishment of the penal code (be it flogging or stoning), the punishment will change to discretionary punishment *(ta'zīr)* by type and quantity which the judge finds appropriate according to the situations. That is so because of the existing doubt in establishing the crime, and "penalties are suspended in the presence of doubts" by the provision of the Prophet's tradition.

It is also observed that when the confessor of *zinā* retracts his confession after declaring it, the punishment is suspended and changed to discretionary punishment *(ta'zīr)* that is enough to act deterrence. In stoning when the adulterer is a married person, his running away from the venue of stoning will be considered as a retrieval of his confession. Hence, stoning shall be discontinued, and the punishment turns to discretionary punishment *(ta'zīr)*.

In the light of all the mentioned rulings in *Sunnah* and *fiqh*, it becomes clear that stoning of a married person in the *Sharī'ah* more of frightening than implementation so that the married adulterer who has his own wife realizes what he deserves of punishment. It may not be possible to apply the punishment of stoning on an adulterer except if he so wills by confessing against himself with insistence. All the stoning cases that were found in the Prophetic tradition fall within this category.

APPENDIX TWO TO SECTION 21

THE PROBLEM OF INTEREST BASED SYSTEM

21/10 Introduction

I have completely repeated the writing on this topic in this new issue so as to remove, firstly, the confusion caused in the minds of some readers by some expressions contained in the researcher editions. Secondly, to add some important economic and legal findings those are highlighted by scholarly researches which appeared forty years after writing the earlier version of this topic in the beginning of the fifties, and which, to some extent, were indicated by the activities of Islamic financial institutions since their inception in the middle of the seventies.

21/11 Earlier edition of this topic in the past editions of the *al-Madkhal al-Fiqhī*:

The third theme:

Islām has definitely forbidden usury definitively and wages war against its activities without leniency. Most business and banking transactions today are based on interest which comes from the *ribā* that has been prohibited definitively. Thus, the implementation of *Sharīʿah* in these fields is certainly contradicting with the system of profit-making. The answer to this is that this problem can possibly be solved through various ways within the context of fundamentals of Shariah either by relying on the principle of necessities or needs or timed exceptional procedures until a consistent economic system is established in the Islamic society that will discourage people from resorting to the interest system or by determining the usurious situation that was lived by the Arabs and which the *Sharīʿah* came to prohibit. During Arab time, the usurers dealt with the poor people who needed loan for sustenance as they wished. In light of this study, it will then be known what is legally permitted and what is forbidden within

the affairs of banking, and the banking services. We should not forget that prohibition of usury in Islām is beyond anyone's ability to prove that it is not viable for a modern economic life. We are currently seeing how an extreme economic system is threatening the entire world with its power, and is based on barring capitalism and usury.[144]

21/12 In 1953, I was invited to present a research paper in the conference on Islamic Culture at Princeton University in the U.S under the theme, "Islamic Law and its Family Rights".[145] I later preferred to make it the first chapter in *al-Madkhal al-Fiqhī* because it summarizes the bases upon which the constitutional system in Islamic law and all its branches rests. Such research covers a section on modern problems facing the *Sharīʿah*. One of them is the problem of usurious system, and it contains two more additional ideas which I presented for discussion among the potential solutions for the interest problem. However, I did not find it suitable to include the two points in *al-Madkhal al-Fiqhī* in its early editions. The two ideas are:

1. Nationalization of banks on behalf of the state, and this way, the meaning of *ribā* found in the partial profit obtained from loan would vanish as this profit would return to the state's treasury for the welfare of the public. Likewise, the illegality of the concentration of capital among a group of usurers would also disappear.

2. The view of the later jurists of the Ḥanafī School who mentioned that it is allowed for the ruler to determine a financial benefit on loans on an annexed contract due to the need. They said, people are then not legally allowed to exceed in the loan interest, a certain percentage specified by the ruler. They have termed this arrangement as *bayʿ al-muʿāmalah*. The scholars of the school have nnanimously agreed on this opinion (see 15/13 mentioned

144 *Al-Niẓām al-Istirākī al-Shuyūʿī al-Qā'im fi al-Ittiḥād al-Sūfiyītī*, year 1918.

145 The researche was part of the book entitled *al-Thaqāfah al-Islāmiyyah wal-Ḥayāt al-Muʿāṣirah*, edited by Muḥammad Khalf Allāh published by Franklin Foundation, New York, 1956 and 1962 (2nd ed.), pp. 138-160.

previously, and the *Radd al-Muḥtār* by Ibn 'Ābidīn, v. 4, *Kitāb al-Buyūʿ*, section on *Bayʿ al-Muʿāmalah*).

It results from what I wrote earlier in the beginning of fifties in this *al-Madkhal al-Fiqhī,* and in the research presented at the Princeton University, were all written at a time when five solutions (which are integral to the operation of the banks) for solving the problems of usurious profits were recurring in the minds of those concerned. They are:

i. The principle of necessity.
ii. Establishing an economic system that will suffice people from using interest.
iii. An in-depth study of the usurious circumstances which the Arab lived in the advent of Islām, In another words the usury of the ignorance period whereby some researchers think that the usury in it was on consumption loans, and not on investment loans like the interests of our modern banks.
iv. Nationalization of banks on behalf of the state.
v. Following the view of the later aforementioned Ḥanafī jurists.

Some readers have erroneously assumed from the above explanation that I am calling for legitimization of interest in investment loans and leaving out the consumption loaus. The fact is that I have never opined this view in any day but rather presented it as subject of discussiou.

21/13 My present view on the five solutions mentioned:

When I wrote my earlier book, I had a strong feeling for the need to clarify and test all of these imagined solutions, which some contemporary scholars are considering. I saw the need to review historical evidences on the situation of usury during the period of ignorance (*Jahiliyyah*), and the *Sharīʿah* evidences on the final judgment established by the *Qur'ān* and *Sunnah* on the issue of usury/interest, and whether bank interests fall within the purview of usury. I intended to arrive at a correct juristic view in avoiding what should be avoided among all of these couceived solutions, and to establish the final rulings in the banking iuterests. The judgment

would be such that its contraries cannot be conceived in the light of absolute textual evidences.

Following this, many writings and refutations have appeared from the reliable contemporary scholars, which have used evidence to prove beyond any doubt that the bank interest with which banks operate are the core of the prohibited *ribā* by the definitive texts of the *Qur'ān* and *Sunnah*.

Nonetheless, it is worthwhile to explain my present view towards the five solutions I have meutioned earlier, and around which the thought of researchers revolve:

21/14 The first solution, which is the principle of necessity, is likely to be needed at any time or place by an individual or group of people. It is this principle which legitimizes the payment of *ribā* once its legal conditions are met. However, it is very difficult to imagine that a situation that necessitates the receipt of *ribā*.

21/15 The second solution is the establishment of an economic system that will suffice people from adopting *ribā*. Despite our adamant belief in the possibility of this solution, our knowledge of how [it would be done] was not clear in the begiuning of 1950s. But, it has now become plain after what has been accomplished in researches, studies, and application in the field of Islamic economics.

21/16 The objective of mentioning the third solution was to call for scrutiny of the opinion which holds that the loans that were prevalent among the Arabs during the advent of Islām which prohibited *ribā*, were consumption loans for the needy to sustain their liviug. They were not loans for commercial and investment purposes. And that the collection of *ribā* on these loans is the intended meaning of *ribā al-jāhiliyyah* (interest during the time of ignorance) that has ben prohibited by Islām.

Some contemporary thinkers had emphasized this opinion, and they have sought an exit from it to say that loans meant for production and investment financing distant from prohibition. From this they ended up legitimizing the bank interests.

This opinion has been examined by a number of researchers, and they did not find it historically correct. In fact, they adduced numerous evidences which prove beyond doubt that investment loans were familiar and rampant in the Arabian society during the period

of prophethood,[146] and they were the ones that were used to finance the winter and summer commercial trips of the Quraysh.

21/17 Regarding the fourth solution, which involves the nationalization of banks to the state, the researches by the Muslim economists have explained that it is not anticipated from the nationalization itself to safeguard against the injustice arising from *ribā* or against the centralization of capitals. This is because the financial institutions are in reality intermediaries which operate with the wealth of the depositors by granting it to the investors. In doing so, the private financial institutions become equal to the state-owned banks except for the intermediation profit, which in the case of the latter, goes to the state's treasury. Thus, if the financial relationship that paves the way for the intermediation between depositors and investors is a usurious relationship, then the reality of *ribā* and its perils still persists if the mediator is the state.

The same thing is said about centralization of capitals as the economic researches indicate that usurious financing inclines spontaneously toward the rich in the society.[147] It thus increases their financial strength and wealth while depriving the poor of the financing. Therefore, the gap between the rich and the poor widens,[148] and it cannot be alleviated by mere nationalization of the banks on behalf of the state.

21/18 We are left with the fifth solution, which proposes following the latter scholars of the Ḥanafi school in their *fatwā* regarding the permissibility of a supreme ruler to determine a financial gain on a loan on the basis of what they termed as *bayʿ al-muʿāmalah*.

I thus say, the duty of a supreme ruler in determining the rate of the mentioned gain means a determination of the price of the

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146 For a detailed and summarized account of this topic, please refer to Rafīq al-Miṣri, *Ribā al-Qarḍ wa-Adillah Taḥrīmihi* (Jeddah: Islamic Economics Research Centre at King ʿAbdul ʿAzīz University, 1410 A.H.).

147 This is because they have enough wealth that guarantees the lender his most important target which is to call his debt along with the stipulated *ribā* regardless of profit or loss made by the debt-financed project.

148 See Dr. Muḥammad Nejatullah Siddiqi, *Limādha al-Maṣārif al-Islāmiyyah* (Jeddah: Islamic Economics Research Centre, 1402/1982); and Dr. Muḥammad Anas al-Zarqā, "Nuẓum al-Tawzīʿ al-Islāmiyyah", *Majjalah Abhath al-Iqtiṣād al-Islāmī,* v. 1, no. 2 (1404/1984), p. 38.

usurious profit regardless of the change in name. It thus does not change anything in the reality that it is *ribā*.

We have explained in this *al-Madkhal al-Fiqhī* (para15/13) that the transactional sale mentioned is "a deceitful way to *ribā* labeled as profit", and this was not unfamiliar to any of the *fuqahā'*. Their endorsement of this opinion was because of what they witnessed of the increasing general need of people to financing, and their lack of knowledge on how to establish an economic system that would fulfill the need of people and suffice them to this stratagem and its likes.

The need has become irrelevant today owing to what we have presented in the text of this book. Thus, there is no excuse left for the sale of transaction that is no more than a disguised *ribā* for which a *fatwā* has been issued to accommodate the people's need. But it has since been replaced by the establishment of Islamic financial and investment institutions which are free from *ribā*.

SECTION 22

CIVIL LAWS IN ISLAMIC COUNTRIES AND THE MERIT OF FOUNDING THEM ON *FIQH*[149]

22/1 Today, we are in need of a renewal in the establishment of *Majallah al-Aḥkām al-'Adliyyah al-Sharī'yyah* that will be drafted based on *fiqh* in its broad meaning, that is, from the sum of all its *ijitihād* opinions and not only from the Ḥanafi *ijtihād*.

By this way, it is possible to obtain an Islamic Civil Law that surpasses the best Civil Laws known today because of what is found in the variety of *ijtihād* of principles and rulings that can accommodate all the existing and the expected legislative needs. In addition, its sources are closely linked to us and easy for us to access.

At this point in time, the Syrian ruler's intention was directed towards issuing a new Civil law that will replace the *Majallah*. If this law is derived from the Islamic legislation while appending the emerging situational rights and extrapolating them on the basis of the said legislation, then this derivation, in addition to what it contains of the revival of our magnificent legacy, will also prevent falling into unlimited problems as a result of implementing laws derived from foreign legislations. Events of frequent occurrence that are not captured by explicit texts will have their rulings referred to the schools of *ijtihād* from which they were derived instead of referring them to foreign sources which are unknown within our region, and are distasteful to the understanding of our judges and the methods to which they are familiar.

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149 This section was written in the era of the *Majallah* (before the Syrian Civil Law) when we were anticipating a new law that is derived from the *fiqh* in the manner we have explained in the section. Its title then was "Our anticipated Civil Law and the merit of founding it on *Fiqh* that is open to the needs of an upright legislation". We had explained in the introduction to the third edition that during this third edition when the country underwent its first military coup in 1949, the *coup d'ètat* had adopted a Civil Law of foreign origin and sources, which is the New Egyptian Civil Law. By doing this, it discontinued our relation with the *fiqh*, which is the greatest preserved legacy of Arab origin! This happened in the hands of people who cooperated with the coup d`ètat from among nationalists who are enemies of Arabism and Islam.

Egypt which in the past derived its Civil Law from the French legislation for political reasons is today – after being alerted by guidance of knowledge – seeing an outcry of the men of law themselves calling for a new Civil Law derived from *fiqh*.

22/2 In order to make clear to ourselves, the extent of adaptability of *ijtihād* to fulfilling the modern legislative needs, we shall cite examples from the most important of what Laws has brought to our Syrian country, and then identify what corresponds to it from the previous *ijtihād*.

1. Article 64 of Ottoman's Civil Procedure of Ordinance has come up with a principle which the makers of this Law considered it a new opening[150] with which they would get closer to the modern European legislation. This is the principle of considering contractual conditions in enterprises and contracts, and revoking the iuvalidity of conditions that were considered as nullifiers of a coutract from the *fiqh* perspective resolved by the *Majallah*.

   From this perspective, the contents of the said article correspond to the Schools of Ibn Shubrumah, which the *Majallah* committee itself mentioned in its explanatory note as aforementioned. Other schools are also of the opinion that contractual conditions are to be respected, and contracts based on those conditions are valid while observing the saying of the Prophet (s.a.w.), "Muslims are bound by their conditions" (see para 1/17; para 10/2).

   This opinion conforms to the Arab custom before the advent of Islām and on its basis come the proverb: *"Condition is more possessive: for or against you"*.[151] This is the essence of the modern

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150 We draw reader's attention to the fact that the mentioned Article 64 has been repealed following the revocation of the Ottoman's Civil Law of Ordinance, and has been replaced by a new law in 1953. However, the fundamentals of law contained in the aforementioned Article have substituted with similar laws in the new Syrian Civil Law that we mentioned in the previous footnote.

151 Some people think that the proverb are words of Ibn Shubrumah when he was expressing about his school while others think they are words of Ibn Abī Laylā, and some said neither of them. It is an Arabic proverb that was first uttered by al-Afʿā al-Jurhumī in a case he brought forward to court. He was one of the wisemen as mentioned in *Majmaʿ al-Amthāl* by al-Maydānī. Perhaps, Ibn Shubrumah borrowed it from him. As for Ibn Abī Laylā, his school of thought in considering the condition is

theory of law that says, "A person's contract is his law". The theory was resolved by Article 148 of our new Civil Law where it stated that "Contract is the law of contractors". We shall see the details of this in the discussion on nullification of contracts (para 57/3 and 57/7).

2. The *Majallah* does not compel a usurper to bear liability of the usufruct of the usurped property, which he has received its benefit or deprived the property owner of benefitting from throughout the usurpation period, in line with the *ijtihād* of Ḥanafi based on the evidence that the usurper is already liable for the value of the usurped property if it perishes.

   Our Laws have amended this ruling. They have necessitated the usurper to be liable for the wage of what is similar to the usurped property in the event that he has received its benefit or deprived the property owner of benefitting from it without any [prior] contract. This adjustment contains *maṣlaḥah* and soundness as we shall clarify in the second part of this book. This is in line with the *ijtihād* of the Shāfiʿī and Ḥanbalī.

3. The *ijtihād* of Ḥanafi has necessitated the annulment of lease [contract] following the death of one two contracting parties. The *Majallah* is silent on this issue while lease laws have ruled out the annulment of lease [contract] by death of a contracting party. This ruling conforms to the *ijtihād* of the Shāfiʿī.

4. The Property Laws did not mention that *qabḍ* is a prerequisite in a mortgaged property as it was sufficient to point at mortgage in the real estate register.

   This agrees with the *ijtihād* of Mālikī which does not consider *qabḍ* as prerequisite for the making a mortgage contract valid or binding as mentioned before (para 16/8).

   As a result of this, a mortgagee has become non-liable for the damage of mortgaged property that he has not collected by the ruling of law. This is also in line with the *ijtihād* of the Shāfiʿī regarding the non-liability of mortgaged property.

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contrary to this as mentioned in the explanatory note found in the beginning of the *Majallah* and *Fatḥ al-Qadīr* by Kamāl ibn al-Hammām (76/6).

5. Our Law of Ownership in Real Property No. 3339[152] has annulled the pre-emption by neighborhood that has been resolved in the *Majallah*. This annulment is congruent to the *ijtihād* of the Shāfiʿī, who opposes the pre-emption right of a neighbor, and confines it to a co-owner.

   Likewise, the Law of Ownership in Real Property has also amended the periods for demanding the right of preemption specified by the *Majallah*. If the preemptor fails by neglects to demand his right of preemption within this period, his right is forsaken.

   These adjusted periods match with the opinions cited in the Mālikīs.

6. In most of its rulings, the Sentencing Law agrees with the jurisprudential principle of delegating other than the prescribed penalties to the discretion of the ruler, which is known as the punishment of *taʿzīr*. The law has determined in advance the punishment for each crime, and this determination is a legal jurisdiction of supreme rulers.

   These are but few examples. Tracing further examples in this topic does not end, and this leads us to a conclusive reality that has to be known: that the *ijtihād* do not collectively deviate from a wise principle of law or a reasonable theory.

22/3 Some Benefits of Codification of *Fiqh*

Since the issuance of the new Egyptian Civil Law in the 1940s, which is a law of foreign origin, a group of senior jurists and *fuqahā'* of *Sharīʿah* have called for the derivation of the law from *fiqh* with its different schools of law. They redrafted all the theories of contracts contained in it anew such that they included the very rulings of law derived from the schools of Islamic law while referring each article to the source from where the derivation was made. This way this proved the possibility of establishing the most recent contemporary laws from the *fiqh*. Such knowledge efforts and their likes had started in

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[152] Note: The contents of this Law have recently been merged with the new civil law, and have since become part of it. The mentioned Civil Law has repealed the right of pre-emption in Syrian completely while it is originally an Egyptian Law that has been reserved for its benefit.

other countries along with what accompanied them of strong demands from the common people. These efforts have started to produce their results in some Arab countries where the first Civil Law with a recent style and sequence derived from different schools of *fiqh* was issued in the Kingdom of Jordan in the hands of a committee comprising of the jurists *(fuqahā')*. It is accompanied by an explanatory note that elaborates each of its articles, and links them with their sources in the schools of Islamic law or supports them with *qiyās* or extrapolation on the principle of *istiṣlāḥ* and *maṣāliḥ mursalah*. This law was officially issued in 1976, and took the place of the *Majallah* that was implemented in Jordan until that date.

The issuance of this law has dismantled the barrier of difficulties that were hindering the realization of this idea in the middle of this century. The differences among the schools of Islamic law and the flexibility of the texts of *Sharīᶜah* have been the greatest aid in choosing the relevaut rulings that are congruent to the needs of the time.

The United Arab Emirates has hastened to adopt the law entirely, and to issue it as its Civil Law while the Republic of Sudan adopted it entirely in 1983.

The Jordanian Civil Law has come as a confuting evidence for those who call for the necessity of realizing this idea through the comprehensive explanatory note which has linked its articles with their bases in the maxims of *fiqh* and its fundamentals from different schhols.

In reality, the Law has borrowed aplenty from the new Egyptian Civil Law of foreign origin in terms of the sequence and formulation. Thematically, it contained all what it found of principles and rulings that are subject to extrapolation on the basis of the principles of *fiqh*, its legal objectives and the unrestricted *maṣāliḥ*. It is possible that another revision of the Law and its explanatory note would render it of more complete and sound formulation, and ensure a stronger link to the *fiqh* and its fundamentals.

22/4 This brave official step in Jordan has paved way to the second step: the Unified Arab Civil Law project derived from Islamic *fiqh*. The Arab League had it in the middle of 1970s assigned its legal section to set a project on unified Civil Law that would be adopted by any willing Arab state in an attempt to unify the Civil legislation in the Arab Nations. For this task, it formed a committee of law experts

who started the project in the 1970s derived from foreign codifications. Then, the committee realized that the citizens of the Arab states cannot accept laws of foreign origin that are far from their jurisprudential originality especially after the issuance of the Jordanian Civil Law. Thus, it changed its direction and formed a committee of experts in *fiqh al-sharī'ah* and Law to develop the project derived from the *fiqh* and its fundamentals without any restriction to a particular school while grounded with explanatory notes that links every article in it with its evidence from the sources of *fiqh* and texts of *fuqahā'* (and I was one of the members of this committee of experts).

The committee commenced its work by periodic meetings in the early 1980s. By 1984 it had completed formulating the preamble chapter of the law, and the complete texts of the general theory of obligations (which represent the backbone of the Law and the most difficult phase of formulation) with all its chapters and sections from the sources of obligations until the end of obligation. All this was entirely grounded on *fiqh* accompanied by explanatory notes for the articles.[153]

22/5 Among the valuable individual efforts that have recently emerged in this field is the book by Aḥmad ibn 'Abd Allāh al-Qārī, *Majallat al-Aḥkām al-Shar'iyyah alā Madhhab al-Imām Aḥmad ibn Ḥanbal* in which the author (may Allāh grant mercy on him) followed the style of *Majallah al-Aḥkām al-'Adliyyah* but he based it specifically on the *fiqh* of the Ḥanbalī and contained up to 2382 articles.[154]

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[153] I have appended the complete text of the general theory of obligation in my book *al-Fi'l al-Ḍār wal-Ḍamān fihi* (Dimashq: Dār al-Qalam, 1989), pp. 185-254.

[154] This book was written in 1343 A.H. but was not published until 1401 A.H. under the supervision of two praiseworthy researchers, Dr. 'Abd al-Wahhāb Ibrahīm Abū Sulaymān and Dr. Muḥammad Ibrāhīm Aḥmad 'Alī (Saudi Arabia: Maṭbū'āt Tihāmah).

APPENDIX ONE TO SECTION 22

SOME RESOLUTIONS OF INTERNATIONAL LAW CONFERENCES AND TESTIMONIES OF LAW LEADERS ON THE MERITS OF ISLAMIC LAW

22/6 The well-established scholars of the science of law among Europeans have today recognized that the Islamic legislation is considered among foremost sources that are suitable to fulfill the needs of a modern legislation.

This is uttered by the resolution from the conference on Comparative Law held in Hague city in Jumād al-ākhirah, 1356 A.H (April, 1938) to which al-Azhar was invited and represented by two delegates among its great scholars (on the criminal liability and civil liability in Islām, and on the refutation of alleged relation between the Roman law and the *Sharīʿah*).

Following its conclusion, the conference registered its important historical resolution as far as scholars of European legislation are concerned. It contained thus:

1. Consideration of the *Sharīʿah* as one of the sources of general legislation;
2. that it is alive and progressive; and
3. that it is an independent legislation that is not taken from any other legislation.[155]

22/7 When our third edition of this book was published, news of the resolution of the International Conference of Lawyers, held in Hague city in Europe, from 15-22 August 1948, was brought to us. Fifty three different states had participated in the conference each of them represented by professors and lawyers. Syria was represented by our colleague, who is a professor at the Syrian Faculty of Law, Dr. Ma'mūn al-Kuzbari who lectured on "Property Ownership in

[155] *Tārīkh al-Tashrīʿ al-Islāmī* by al-Sāyis, al-Subkī and al-Barbarī, pp. 322-323.

Sharīʿah". He proved in his lecture that the Islamic theory of ownership is the most just of all the ancient and modern theories as it considers the ownership a relative right. It neither considers ownership an absolute authority as in some positive legislation such as the ancient Roman legislation and the current English legislation nor restricted as desired by some modern social legislations today.

This last conference, based on a suggestion from the conference's committee of comparative legislation, combined with the resolution of the previous Conference on Comparative Law of 1937 in Hague on the Islamic legislation, has adopted the following resolution: "Because of the recognized flexibility and importance of Muslim law, the comparative study on the law by International Bar Association must be adopted and encouraged."

22/8 At this juncture it is recommended to accredit the words narrated from the great jurist 'Abd al-Razzāq al-Sanhūrī in an article published in *Majallat al-Qaḍā' al-'Irāqiyyah* (v. 1, 2nd year, 1936), and mentioned in volumes 6 and 7 of the first year of the *Majallat al-Naqābat al-Muḥāmīn* in Syria (Journal of Damascus Bar Association), where he said in the beginning of his discussion on the suitability of the *Sharīʿah* to remain in the field of civil application:

"I do not want to limit myself to the testimony of impartial jurists among the Western scholars such as the German Kohler, the Italian Professor Delvechie, and the American Dean Wigmore, and many others who witness that the *Sharīʿah* contains of flexibility and ability to progress; and they place it side by side with the Roman and English laws as one of the three fundamental legislations that are still dominating the world. At the International Conference of Comparative Law held in the Hague in 1932, Professor Lambert, the well-renown French jurist, has referred to this great merit of Islamic *Sharīʿah,* which has started to dominate among the jurists of Europe and America in the present time.

I would rather refer to the *Sharīʿah* itself to confirm the accuracy of what it has established: There exists in this *Sharīʿah* elements if the adept-hands formulated them [into laws] in an excellent manner, they would come up with theories aud principles of far-reaching effect in development, comprehensiveness, aud conformity with the progress against the most critical theories that we are receiving today from the modern Western jurisprudence.

In this respect, I am limited by space to cite only four examples. Everyone who is well conversant with the Western jurisprudence realizes that one of its most recent theories in the twentieth first century is the theory of "unfair use of the right"; the theory of "emerging circumstances"; the theory of "bearing consequences"; and the theory of "responsibility of inability to distinguish". For each of these four theories there is a basis in *Sharīʿah,* and only requires formulating and structuring".

The professor then elaborated in detail the fundamentals of these four modern theories in *Sharīʿah.*

22/9 In this relevance, regarding the duty of Syria towards the new awaited legislation, we are quoting a wonderful expression said by the great French Professor, Donnedieu de Vabres, who is one of the notable scholars of Criminal Law in the modern time, and a Professor at the Faculty of Law, University of Paris. He mentioned in his introduction he wrote to the thesis of our colleague Dr. Anwar Ibrāhīm Bāshā entitled: *"Criminal responsibility in Sharīʿah from the Ḥanafi Perspective"* for which he earned a doctorate degree in Law in 1944 from the aforementioned university. Professor De Vabres said what I translated as:

"When the war lays down its burdens in a nearing peaceful day, you shall find Syria itself in front of a necessary emergency of substituting the different dominant legislations in its country, especially the legal Ottoman compilation in 1858, with a unified legislation that is congruent with the time".

Like before, it shall undoubtedly resort to foreign models. Nevertheless, it must not neglect its glorious legislative past which is responsible for creating a high profile civilization that is made of its Islamic legacy.

The author of this dissertation is contributing towards portraying the image of this past in a highly elevated and clear manner.

This being the case, I find the words narrated from Ibn al-Qayyim the best conclusion for summing up this introduction, when he said:

"Indeed, Allāh has sent His Messengers and revealed His Books to people so that people may conduct themselves with equity, which is justice with which the heavens and the earth have been created".

Thus, when the signs of the truth appear and its evidences are established by any means, then that is part of Allāh's law, His religion, pleasure, and command.[156]

With these sound brains and clear understandings the Islamic *fiqh* rose to its high level, and all its concealed treasures of *Sharī'ah*. Perhaps, there shall be a quick return to this jurisprudential advancement.

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[156] This is mentioned in his last part of *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn,* where he discussed the Islamic legal policy, and what it requires of establishing rulings for people according to demands of need and *maṣlaḥah,* and what of these legal rulings is regarded as beneficial and congruent with the spirit of Islamic *Sharī'ah* or detrimental and opposing.

In this relevance, he (may Allah have mercy upon him) used extremely valuable words to explain the principle and causes of innovating what he termed as "political laws"- that is, the laws invented by the order of the rulers based on the demands of legal policy. He explained how a group of people, who attribute the knowledge of *Sharī'ah* to themselves, have, out of ignorance, narrowed its scope and blocked sound methods of legal policy for establishing justice and administering the welfare of the subjects and their rights, and made the *Sharī'ah* as if it is limited and incapable of fulfilling people's welfare. As a result, the rulers saw that it is not possible to streamline people's affairs except with something above what is understood by these narrow-minded people. The rulers invented for them political laws in order to organize the welfare of the people. It also happened that these laws contained what is good and what is bad. The negligence of the narrow-mined people combined with the invention of the rulers in their political affairs generated a long-lasting harm and widespread evil.

He (may Allah have mercy on him) said, "We do not say that just politics violates the complete *Sharī'ah,* rather; it is part of it, and naming it as politics is a technical issue, otherwise if it is just then it is coming from the legislation." He then cited several examples from actions of the Messenger of Allah (s.a.w.) and his companions, and their ruling between people using the legal policy, you may refer to that. He has repeated most of this discussion in his book, *al-Ṭuruq al-Ḥukmiyyah*", pp. 12-15.

Ibn Qayyim's use of the expression *al-Qawānīn as-Siyāsiyah* denotes that the use of the term "*al-Qawānīn*" to mean timely legislative systems was used in the terminology of *fuqahā'* before Ibn al-Qayyim who died in 751 A.H.

APPENDIX TWO TO SECTION 22

CODIFICATION OF ISLAMIC LAW AND CODIFYING FROM IT

22/10 Introduction

Codification in general is the compilation of rulings and legislative rules that are related to a section of social relations, classifying and arranging them, drafting them using clear and brief commanding phrases in form of clauses known as "articles" that are serially numbered, which are then issued as the legislation or the system imposed by the state, and to which judges are committed to implement them among the people.

By codification of *fiqh* we mean implementation of the codification method aforementioned on jurisprudential rulings that are derived from one *maẓhab*. If there are different opinions in a particular issue within the school of Islamic law, only one opinion is chosen. In other words, codification of *fiqh* is the codification of the rulings of one school in all transactions if a state in any part of Islamic world wishes that its judiciary should only one School.

By codifying from *fiqh* we mean that a state derives its codification from different topics of *fiqh* by its general understanding, that is, from all the reliable Schools, and from the opinions of the *fuqahā'* among the Companions, their successors and those who come after them whose opinions were narrated in books of the differences (of opinion) among *fuqahā'*, and whose schools were not compiled in a complete form in all the chapters of *fiqh* and its transactions, such as al-Layth ibn Sa'd, al-Awzāʿī, Ibn Shubrumah and Ibn Abī al-Laylā. Then if there is no prior opinion on the topic desired for codification from the entire *fiqh,* because the topic is either derived from contemporary issues or has a previous jurisprudential opinion, but the timely *maṣlaḥah* (from the *Sharīʿah* perspective) demands a new *ijtihād* opposing it. In that case, we resort to extrapolating the rulings that need to be codified in a certain topic on the basis of the general principles of Islamic *fiqh*, the fundamentals of *fiqh*, the objectives of the *Sharīʿah*, and the unregulated *maṣlaḥah.*

In codifying *fiqh* and codifying from it, when there are multiple jurisprudential opinions or statements for a particular issue, only one is chosen that is most beneficial according to the strength of the legal evidence, simplicity of implementation, and the closeness to the objectives of the *Sharīʿah* and its justice. This choice is an *ijtihād* exercise that requires, besides the knowledge of the *Sharīʿah*, timely clear-sightedness about people's activities and the types of challenges facing them, and the laws that they violate. In most cases, this *ijtihād* exercise is entrusted to a group of reliable experts, and is hardly left to the opinion of an individual. It is thus a collective *ijtihād* and not an individual one.

The end result of codification is that it establishes in every issue a single ruling with clear text that must be implemented by the *qāḍī* (judge) and the litigant. The *ijtihād* is therefore limited to the understanding of this text and implementing it on legal cases.

22/11 The Importance of Codification

Indeed among the obvious principles of the system in the world today is that the responsible (*mukallaf*) citizen, that is, an individual in a state, has all the right to know in advance the ruling of the system that applies to him in relation to deeds, behavior, contracts, and other events which may originate from him or done in his favor, so that he knows how to obey the system, and what would be the consequences if he violates it.

The origin of all this is an obvious principle of legislation that emanates either from the Divine source or the positive law, which is the principle of the publicity of the system (*ʿālamiyyat al-mīzān*). Thus, every system that is supposed to be implemented by the responsible citizens has to be made public with all its principles and rulings before it is enforced on them, because the *mukallaf's* knowledge of the system, which he is required to abide to, is a condition for soundness of the obligation, and that commanding someone to obey a non-publicized system that is concealed in ruler's conscience is equal to commanding what is unachievable, legally and logically prohibitive.

The publicity of the system is the way by which a *mukallaf* becomes aware of it such that it is then possible to hold the *mukallaf* responsible whether he is aware of it or not, because with the publicity, he is be able to know the rulings in general and in detail, either by himself or by asking those who know. It was from this that

the popular rule in the legislative realm was derived: "Ignorance of law is not an excuse that prevents the implementation of law on a *mukallaf*", because after the system is made public to the general folk, then the lack of awareness of it by some responsible people is considered as their negligence, and thus their ignorance would not remain as their excuse. The most important thing is that a *mukallaf* is not surprised by a system that he should obey without his prior knowledge, and which was not made public to all the folk.

The task of making laws public is found in the legislations since the ancient times where it was conducted through the then available means such as engraving on erected post (obelisks), or writing on slates which are displayed at public places, or by sending town criers to call people and announce to them the order from the authorities by explaining the commands and prohibitions and the sequential obligations.

Today, publicity is achieved through publication in the official gazette issued by the state, which is responsible for every letter published in it.

It is from this dimension that in the judiciary system, regardless of the number of law courts in one country, the court of cassation should not be plural, instead it is necessary to have only one so as to unify the binding *ijtihād* like the unity of the text before the *mukallaf*, in order to know beforehand the consequences of his deeds and dispositions.

This does not dismiss the possibility of altering the *ijtihād* of the cassation court as the alteration is exceptionally accepted when necessary. This leaves us with the interpretation of only one text or using *qiyās* on it or on events that do not contain texts because the new *ijtihād* opinion replaces the old one. But this does not happen in a continuous manner such that the multiple *ijtihād* opinions from which a *qāḍī* selects renders the *mukallaf* not knowing his fate regarding the ruling.

22/12 Opinion on the *ijtihād* of a *qāḍī*

In the early days of Islām, the *quḍāt* (sing. *qāḍī*) were *mujtahidūn* by virtue of necessity which is contrary to the norm, because the jurisprudential opinions and *madhāhib* in understanding the texts of *Sharīʿah* from the *Qur'ān* and the *Sunnah* had not yet been compiled to allow the *quḍāt* to select among them. This became an exceptional

case (like the changing of the *ijtihād* made by the cassation court today), which is acceptable but should not continuous in a permanent way in order to uphold the principle of publicity of the system.

If the *quḍāt* in the early days of Islām were *mujtahidūn*, then, that was an inevitable situation before the establishment of the principles of *fiqh*, its fundamentals because the Companions (of the Prophet (s.a.w.) and their students among the successors and their followers were scattered in different cities. Each one of them had knowledge of the *Sunnah* of the Messenger of Allāh (s.a.w.) and his exegesis of the *Qur'ān* that was not possessed by others as Imām Mālik (may Allāh be pleased with him) said to al-Rashīd, "As for what follows after that while the *fiqh* has been established on its principles and *madhāhib*, it is not allowed for a *qāḍī* to remain at liberty in selecting what he sees as for his judgment in every case even though he has attained the level of *ijtihād* by his knowledge and *fiqh*. Rather, it is necessary to restrict him to texts that are made public. In this case his *ijtihād* would be limited to understanding the text and interpreting it according to the principles of understanding and interpretation in *uṣūl al-fiqh* as explained earlier. In fact even the jurisprudential opinion of the *qāḍī* in understanding a unified text must also be known to the *mukallaf* in advance by all means possible. As a result of this, in today's world of law and judicial systems, the only binding law is the opinion of the cassation (appeal) court so that the judicial *ijtihād* (like the legal text) is a single interpretive opinion known to the *mukallaf*.

But the postulation that a *qāḍī* must legally be given freedom to judge according to his *ijtihād*, and that it is not allowed to restrict him to a single legal and biding opinion has no strong basis in *fiqh*. Instead the *maṣlaḥah* necessitates the contrary and calls for the adherence to publicity of the rulings as aforementioned.

The texts of *fuqahā'* in the book of judiciary state explicitly that a verdict may be particularized by time, place, the nature of judgment,[157] and the opinion of the school of Islamic law. Thus, if a *qāḍī* is appointed to judge according to the most accurate opinion of al-Shāfiʿī School, he is then not allowed to judge by any other opinion even if it is against his own school. This is because judgment

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[157] Prof. Dr. Muḥammad Zakī 'Abd al-Barr has mentioned a collection of statements from *fuqahā* of the four schools on this issue (*Taqnīn al-Fiqh al-Islāmī*. Qatar: Dār Ihyā' al-Turāth al-Islāmī, 1407 A.H., pp. 36-62).

is originally and by law the right of the supreme leader, which was previously the right of Messenger of Allāh (s.a.w.) during his life time.

The supreme leader can also appoint someone on his behalf to handle the judiciary if he is overburdened by general responsibilities. Thus, a *qāḍī* is legally the deputy of the supreme leader or his representative, and a representative is restricted by what restricts the represented because the original Will belongs to the person represented. Thus, when the holder of legal authority decides to choose a particular legal and reliable opinion, which he orders people to abide by and implement it, and orders a *qāḍī* who is his deputy to judge by it, it is legally appropriate and binding on the *qāḍī* who is not allowed to go beyond it and judge based on his *ijtihād.*

This problem had appeared during the early era of the Abbasid rule and attention was drawn to it when 'Abdullah bin al-Muqaffa' wrote a letter to Caliph al-Mansūr entitled *Risālaṭ al-Ṣaḥābah* in which he explained to him that, "A verdict is issued in Basrah that legalizes marriage and property in a particular case while in Kūfah, the same case is deemed illegal due to differences of the *ijtihād* of the *quḍāt.* He proposed to him that all judgments passed to people should be unified. This would be achieved by compiling the verdicts on previous cases together with the divergent opinions of the *fuqahā'* in one book which will contain the evidences of each proponent taken from the *Sunnah* or *qiyās.* The book would then be submitted to the Caliph, who will use what Allāh inspires him to decide the accurate or the most accurate of the opinions, and command people to abide by it and discard the rest. The compiled rulings which are a mixture of accurate and inaccurate will now become one single ruling which is accurate, and that way people will be brought together under the opinion of the supreme leader and his utterances (see *Risāat al-Ṣaḥābah* by Ibn al-Muqaffa' in *Jumhurat Rasā'il al-'Arab* by Aḥmad Zakī Ṣafwat, v. 3, Letter no. 26".

Every Islamic country is entitled to codify within the framework of the predominant school of Islamic law in the country in which the people have sincere affection to the school as was done by the Ottoman state when it codified the *Majallah* on the basis of the Ḥanafī School. The country also has an option of choosing a collection of jurisprudential and judicial rulings from different reliable schools according to what it sees as most suitable with the country's needs and its development at all times.

Whatever the case, the most important thing is the unification of judicial ruling from the vast and jurisprudential opinions in a way that becomes binding for the *quḍāt* and the litigants in one country, and fulfilling its publicity using the best and most reliable means as required by the principles of legislation in order to end the judges' disarray. The best thing however, is not to have a restriction to oue school because in every school there are some merits and better solutions as a result of the fact that none of the leaders of the schools and their followers was infallible, solely possessing the right opinion, and solely having the best possible interpretations of the *Qur'ān*, the Sunnah, and the principles derived from them. Each of them has what is preferred and what is not, and what may be narrowed by one school may be widened by another. Thus, the bigotry of schools of Islamic law is a calamity and a blurring shield that prevents from seeing [the truth], and must be completely discarded so that people can realize the implementation of comprehensive *fiqh* and *Sharī'ah* and their ability to fulfil the demands of all times in addition to the *maṣlaḥah* found in the unification of the judicial ruling and its publicity. There remains the absolute *ijtihād* for the qualified *mufti* rather than a *qāḍī* as the *ijtihād* of the latter is limited to the understanding of codified text only under the supervision of the Supreme Court in order to unify the binding *ijtihād*.

With this thorough examination from an appropriate dimension, the way of judiciary becomes upright, clear, secured, and congruent with the legal aud practical *maṣlaḥah*. From here, it becomes clear to us that if what historians of the emergence and spread of the schools of Islamic law say is true regarding Abū Yūsuf al-Qāḍī when al-Rashīd made him head of judiciary, that he was not appointing a *qāḍī* except from a follower of Abū Ḥanīfah, then his pervasive insight and deep rationality of the *maṣlaḥah* of the judiciary and the litigants, because that was the only method of unifying the judicial ruling, which is compulsory when the *fiqh* is not codified.

22/13 Some of the Merits of Codification of *Fiqh*

The majority of the *fuqahā'* and cotemporary scholars observe that the merits of codification [of *fiqh*] and its driving forces surpass what

others perceive as its demerits.[158] Professor Dr. Wahbah al-Zuḥaylī has mentioned a number of merits of codifying *fiqh* one of them being the easiness of referring to the rulings.

It is known that our *fiqh* books have been written in a style that is different from the present one, and is characterized by plenty of opinions in a single case. This puts the non-specialists (who are the majority) in a dilemma and confusion whenever they want to adopt a *fiqh* ruling. But when the *fiqh* rulings are codified in a simple and familiar phrase, and organized in a simple sequence, it then becomes easy for the *qāḍī*, *faqīh*, lawyer and a normal person to understand the *Sharīʿah* rulings on contracts and transactions... Perhaps it may also encourage more people to refer to the applied *fiqh* rulings due to the difficulties they face when referring to the books of *fuqahā'*, thereby preferring the adoption of Western positive laws, which have been made simple and easy to refer to.

Besides this facilitation, codification of the *fiqh* leads to a careful examination of the *Sharīʿah* rulings and endorsing an opinion that is most associated with *maṣlaḥah* from among the divergent opinions of the schools or even one school.

"What should a *qāḍī* do in front of these massive differences among the *fuqahā'*? Is it not necessary in this case, while we are in the age speed, complication of transactions, and increasing number of cases presented before the courts... is not of *maṣlaḥah* to facilitate the issuance of ruling? Indeed, the *ijtihād*, which is required from the *qāḍī* is the implementation of the codified *Sharīʿah* ruling on multiple cases... As for *ijtihād* in its wider meaning, we leave it to the one who selects the rulings during the codification process" (summerised from *Taqnīn al-Fiqh al-Islāmi*, Mu'assasat al-Risālah, 1987, pp. 27-28).

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[158] Dr. 'Abd al-Barr has cited numerous sayings of the *fuqahā'* regarding this issue in his *Taqnīn al-Fiqh*, pp. 56-59.

APPENDIX THREE TO SECTION 22

UNIFICATION OF CRIMINAL SYSTEM IN THE ARAB WORLD BASED ON *SHARĪʿAH*[159]

In my assessment, it is possible to derive the rulings of the criminal system (except a few of them) represented today by the penal laws in the Arab countries from the *Sharīʿah* and its *fiqh* represented by the opinions of scholars of the schools of Islamic law.

22/14 ***Taʿzīr:*** Apart from the penalties for the five offences: Adultery/fornication, theft, slandering, consumption of alcohol and armed robbery and some cases in *Qiṣāṣ* (retaliation), we may conclude that what is contained in the penal codes is legally acceptable based on the principle of *taʿzīr*, which is a punishment that is not predetermined or prescribed but rather left to the assessment of the prevalent *Sultān* to decide based on the offence, and circumstances of time and place.

In fact, it can also be said that indeed the rulings of penal codes may be considered as a regulation legally preferred for the implementation of the principle of *taʿzīr*. This is because the popular legal maxim, that there shall be no crime and no penalty except with a specific or general text publicized before the action intended to be condemned, is a legally acceptable maxim as it is based on the principle of the necessity of publicizing the legal system before its implementation. This is an acceptable principle in the Islamic *Sharīʿah* as it is acceptable in the positive [legal] systems, and thus there is no need to a in the man-made law in which there is no need for expatiation on it.

Thus, relating every penalty with a codified text before the crime is committed, and allocating for every punishment two penalties: minimum and maximum, between which the *qāḍī* would choose according to circumstances of the crime and availability or

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159 The Secretary of the Arab Organization for Social Defense against Crime has asked me in a letter dated 27/12/1977 an idea and vision on this issue, which he has mentioned here with slight changes.

unavailability of aggravating factors, is a way of elevating the *taizīr* penalty to a level that is more precise and less confusing in implementation. The *qāḍī*'s choice and assessment would be limited within the punishments prescribed by the law. This is better and more just for a *mukallaf* than leaving all his penalties entrusted to the assessment of a *qāḍī* without a predetermined punishment, and what may arise from this of chaos in rulings and judgments.

The *Sharīᶜah* did not allocate in *taᶜzīr* one specific punishment for every crime or two penalties between which a *qāḍī* chooses, because *taizīr* penalties vary according to the circumstances of time, place and people, and require modifications from time to time. At the same time, no individual or authority is entitled to modify the texts of Islamic *Sharīᶜah*, and because of this, the *Sharīᶜah* texts came with permanent legal foundations which express their essential objectives and general guidelines for organizing the human's life. All the means and matters that change with time, place and other circumstances have been entrusted by the *Sharīᶜah* to the ruling authorities. These include the *taizīr* penalties which are determined by a periodic law that allocates for every punishment a minimum and a maximum penalty, and disseminates them into different types such as corporal punishment, limitation of freedom, monetary punishment, execution, engagement, deprivation, etc... all these conform to the *Sharīᶜah*. In fact in my assessment, it is considered part of good organization for the implementation of the principle of *taᶜzīr*, which is legally entrusted to the supreme leader authority according to what he sees as realization of just restriction.

22/15 With regard to *Qiṣāṣ*: its issue is clear concerning life and body parts with its legal conditions stipulated in the schools of Islamic law. What we shall discuss in this book on *qiṣāṣ* will contain a convincing argument for everyone who has fair judgment that it is the best defense against self and body parts so as to protect them from unfairness. *Qiṣāṣ*, which protects the victims and restrains the aggressors, cannot be replaced by imprisonment no matter how lengthy it is or any other procedure. In fact all abstention from *qiṣāṣ* is an abetment to the revenge from which the human conscience has grumbled throughout the ages (see the second volume of this book, the theory of legal corroborators; discussion on disciplinary corroborators – *qiṣāṣ*).

The most important of what is a must in this regard is not to be carried away with the foreign theories that have been proven by long experiences to be non-beneficial, and specially the discrimination in the aggressive killing between that which is a result of aforethought and determination, and that which is by a sudden idea not premeditated. They do not judge by the execution in the second condition as did all of the penal code in the Islamic countries starting from the Ottoman Empire in its last era and ending with all the Arab countries. This discrimination is flawed after the presence of the killer's intent and his actual killing. Countries have considerably suffered the jeopardy of revenge because of this imported discrimination from the foreign authorities while the *Sharīʿah* of Allāh is the successful treatment.

22/16 As for the prescribed penalties (*ḥudūd*): The penal code cannot be empty of them and considered as being derived from the *Sharīʿah*. The prescribed penalties are almost the distinguishing emblem of the penal code that it is Islamic. All the penalties are physical penalties because all their crimes have a great effect on shaking the society pillars: individuals, families, manners, security, and economy. And if the prescribed penalties are applied in the society with their legal conditions in the society, its pillars settle to the maximum possible limit.

I suggest that tentatively the implementation of the prescribed penalties and *qiṣāṣ* is taken from the most flexible and considerable schools of Islamic law, that is, the ones that employ stricter rules in the application of the penalties and *qiṣāṣ*.

In my opinion, all of the prescribed penalties can be defended by force and irrefutable arguments in the face of the opponents of Islām from among its own followers who are liberals and Westernized, and the non-followers. And I have written in this book (under *qiṣāṣ*) in defense of the penalties, especially penalty for theft by cutting hand that which confutes the stubborn (see the second volume of *Naẓariyyat al-Mu'ayyadāt al-Tashrīʿiyyah)*.

Nonetheless, in my estimation, there is one punishment to which the non-believers cannot be persuaded, that is, stoning the married adulterer. Though there is no punishment mentioned in the *Qur'ān* for adultery except flogging without distinction between married and unmarried, the stoning of a married person has been affirmed in the

sound *Sunnah* beyond any doubt, and the schools of Islamic law are almost unanimous on it except the *Khawārij*.

It is however, observed that this punishment, which is absolutely one of the harshest punishments for a crime that is one of the greatest shakers of the entity of the Muslim family, has been surrounded by conditions for confirmation, which make its implementation extremely rare. In fact it can be asserted that the crime cannot be proved except by confession. Thus, its dread presence in the [legal] system is a mere formality. The same thing is said regarding the punishment of an unmarried person by flogging. Today, there are those who attempt to deny the existence of stoning during the lifetime of the Prophet (s.a.w.) and by his instruction, and this is stubbornness. There are also those who try to consider that the stoning instructed by the Prophet (s.a.w.) was a utilization of his authority in *taʿzīr*, and this is debatable.

Furthermore, there is a very important issue in the conditions of stoning that must be taken into account, that is, *iḥṣān*, which the Muslim jurists have translated in most of the schools of Islamic law that it is realized by mere copulation even once in a sound marriage such that the person whether man or woman becomes *muḥṣan* even if he is unmarried during his/her adultery.

In my opinion, this interpretation of *muḥṣan* is not convincing to the mind. Rather, the safe interpretation of *muḥṣan* is a man or woman who commits adultery while he has a spouse who suffices him/her from doing the unlawful especially after the word has been used in the *Qur'ān* with this meaning while talking about women prohibited to marry. Allāh the Almighty says: *"And all the muḥṣanāt among women..."* (al-Nisā', 4:24), and the Muslim jurists have unanimously agreed that *al-muḥṣanāt* in the verse refers to married women. Hence, it is unlawful for a man to marry a woman with a husband (see para 21/8).

22/17 Main Points

Finally, I will summarize my perceptions of the main points regarding the unification of criminal laws in the Arab world on the basis of *Sharīʿah* as follows:

1. Giving first priority to the codification of prescribed penalties with the highest degree of precision and clarity in encompassing

their conditions as they are the ones which portray the wisdom and justice in the penalties, which should be prevented by using the most flexible schools of Islamic law.

2. The should be no hesitation in adopting the rulings of *qiṣāṣ* on life and what is below it using the schools of Islamic law with most stringent conditions, that is, the ones that are more preventive to the rulings. Thus, as long as the conditions of the rulings on *qiṣāṣ* are not fulfilled in all the schools of Islamic law, then, the punishment is transformed to *ta'zīr*.

3. It is necessary to explain clearly that the impact of rescindment of *qiṣāṣ* by the victim's guardian is limited to waiving the ruling of execution, and does not mean waiving the responsibility of the killer. This is because *qiṣāṣ* entails a public right represented by the sultan who is entitled, after the pardon by the victim's guardian, to punish the offender by *ta'zīr* in a way that will suffice deterrence. I have mentioned the evidences for this in this book contrary to what most people think (see the beginning of the second volume of *Naẓariyyat al-Mu'ayyadāt al-Ta'dībiyyah*).

4. Observing the general principles when applying the legal *ta'zīr*, the most important of which is the congruence between punishment and crime. In addition, the guidelines resolved by the Muslim jurists on this matter should equally be observed.

   Of the classical references to be relied on in this matter is the book *al-Aḥkām al-Sulṭāniyyah* by al-Māwardī, and among the contemporary books and research articles is *al-Tashrī' al-Jinā'ī* by al-shahīd 'Abd al-Qādir 'Awdah (may Allāh have mercy on him).

5. Giving first priority, in the context of *ta'zīr*, to considering the prevalent crimes in the modern era as an outcome of the false materialistic civilization, and corruption of responsibilities and manners such as the crimes of drinking, dealing in drugs, and aggravating the punishment for secret drug trafficking, crimes of bribery that are prevalent in the Arab world overtly and covertly like the so-called commission on the dealings that are made by senior government employees and its ministers, embezzlement of public fund either by forgery and fraud or by misuse of employment powers, faking currencies, carelessness about the

etiquette, fraudulent bankruptcy, and cheating and criminal negligence that leads to the exposure of groups of people to danger.

PART
2

FUNDAMENTAL THEORIES OF *FIQH* IN ESSENTIAL RULINGS

PREFACE
TO THIS SECOND PART OF THE BOOK

23/1 We have finished discussing the historical introduction and explanation in which we presented an adequate picture of Islamic *fiqh*, its sources, and phases which it passed through since its inception until today, in the first part of this *al-Madkhal al-Fiqhī al-ʿĀm*.

We now proceed to the second part in which we will present the different fundamental *fiqh* theories in essential rulings. These are the theories on which the main body of *fiqh* rests, and are considered as the main architectural element of its colossal and eternal building.

23/2 The meaning of these theories

By fundamental *fiqh* theories we mean the constitutions and the great concepts which individually form an objective legal system that is spread all over the *fiqh* like how the nervous system is spread in the human body and controls the elements of that system iu everything that relates to the topic of the branches of rulings. These include the notion of ownership and its causes; the notiou of contract, its principles and outcomes; the notion of competence, its types, stages and nullifiers; the notion of proxy and its types; the notion of nullity, invalidity and suspense; the notion of *taʿlīq*, restriction and addition in the verbal disposition; the notion of guarantee, its causes and types; the notion of *'urf* and its authority on determining obligations; and several other main theories on whose foundation the entire body of *fiqh* rests. A person is encountered by the impact of their authority in dealing with all jurisprudential issues and incidents.

These theories are not the collective principles of which ninety nine of them are published in *Majallat al-Aḥkām al-Sharʿiyyah*, and which we shall discuss in the third and the last part of the book. These principles are guidelines and fundamentals of *fiqh* which are observed when extrapolating the rulings of cases within the boundaries of those great theories.

For example, the legal maxim of *al-ʿIbrah fī al-ʿUqūd lil-Maqāṣid wal-Maʿānī* (preference in contracts is given to objectives and meanings) is not but a guideline in a specific dimension under the

original field of the theory of contract. The rest of the principles are similar to this.

We will exert our effort to extract these fundamental theories, to strip them and to gather their scattered elements from different jurisprudential chapters which emanate from them so as to present each of them in its complete formal form, to illustrate its legal authority in branches of rulings, and to set a platform to drafting a general theory that combines the principles of civil rulings in the *fiqh* such as the theory of general obligation in the foreign legal jurisprudence.

Indeed, reading these fundamental theories after extracting them from the branches of rulings gives a student an instant proficiency in *fiqh* which qualifies him and helps him in understanding the dimensions of *fiqh*. Otherwise, he would have needed a long period of time to acquire them as mentioned in the introductory chapter of this book.

We shall allocate for each of these essential jurisprudential theories a chapter in which we shall present it and discuss it at length beginning with the theory of ownership and its causes.

CHAPTER FIVE

THEORY OF OWNERSHIP IN ISLAMIC LAW

Chapter Outline

1. Definition of *al-mulk* and an explanation on its causes.
2. Classification of *al-mulk* and its causes.
3. Distinct features of *al-mulk*.
4. Differences between *al-mulk* and permissibility, and the differences between ownership of usufruct and right of benefit.

In the following sections, we shall explain the above branches of ownership theory and those which emanates from them. We shall also explain their essential principles followed by an explanation of their practical outcomes that appear in the branches of rulings.

SECTION 23

DEFINITION OF *AL-MULK* AND EXPLANATION OF ITS CAUSES

THEME ONE: DEFINITION OF OWNERSHIP

23/3 *Al-Mulk*[160] in Arabic language means accumulating something and the ability to manipulate it *(Lisān al-'Arab)*.

According to the technical meaning, *al-mulk* is a legal impediment which lawfully blocks and entitles its owner to a disposition except in the presence of a barrier.

This is the most concise and comprehensive definition which we have summarized and combined from many definitions mentioned by the *fuqahā'*.[161] Each of their definitions contains a merit and a shortcoming whereas the previous definition combines the merits and rectifies the shortcomings in their definitions.

From the definition, legal imppediment means that it blocks anyone other than the owner from benefitting from and acting on [the owned property] without the consent of the owner.

The barrier that prevents the owner himself from acting on it includes two situations:

- Lack of legal capacity like in the case of a minor where his guardian acts on his behalf.
- Right of others as in a joint wealth and a collateral where the acts of the partners and those of the mortgagor are restricted despite their ownership.

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160 *Al-Mulk* can be pronounced as *al-malk*, *al-milk*, and *al-mulk*. The first and second refer to the acquisition of things whilst the third refers to the power of authority.

The adjective from the first is *mālik* which the plural is *mullāk*); and from the second is *malk* which the plural *mulūk, imlāk* (as described in *al-Miṣbāḥ*).

The word *al-Malakah* also gives the sense of *al-milk*. Hense, *al-milkiyyah* may either be derived from *al-milk* or *al-milkiyyah* (as described in *al-Lisān* and *al-Miṣbāḥ*).

161 These various definitions of *al-mulk* have been cited by Shaykh Muḥammad Abū Zahrah in his book *al-Mulkiyyah wa-Naẓariyyat al-'Aqd fi al-Sharī'ah al-Islāmiyyah*, para 15-16. While in *Kitāb al-Buyū'* of *Fatḥ al-Qadīr*, the definition of *al-mulk* is "an ability established initially by the legislation to perform a certain conduct".

Thus, the existence of such restriction does not violate the ownership as it is external.

This definition encompasses all types of ownership that shall be explained including ownership of essence, usufruct or debts.

From this definition, it is clear that *al-mulk* entails the relationship between human and *māl* (wealth) and whatever benefits derived from it. It is therefore the legislative representation of this relationship, its outcome and boundaries.

Also from this definition, it becomes clear that ownership is not something materialistic, rather; it is a right which is a form of legal consideration.

Therefore, whenever the *Sharīʿah* approves this specific relationship between the human being and *māl, al-mulk* is established. Conversely, whenever the *Sharīʿah* disapproves such a relationship *al-mulk* is dissolved.

This is unlike *māl* which has a material meaning that applies on physical objects containing usufruct. In fact, *māl* in the *ijtihād* of the Ḥanafī is specific to physical objects, and thus does not include usufruct in the opinion of the Ḥanafis as we shall see in the classification of *al-mulk* (para 24/5).

THEME TWO: CAUSES OF OWNERSHIP

23/4 Indeed, the causes of ownership approved by Islamic law are confined to four things:

1. Acquisition of permissible things
2. Contracts
3. Successiveness
4. Inceasing of owned property

There have been other causes of ownership among the Arabs before Islām and among other nations which have been denounced by the Islamic legislation some of which it considered as among the worst crimes while others were considered among the prohibited.

1. The examples of the former are the civil wars among the Arab tribes and others, and the enslavement of a debtor who fails to pay the debt among the Romans and the Arabs before Islām.

2. The example of the latter is the acquired *taqādum* (prescription)[162] that was prevalent during the end of the Roman legislation, and later inherited by the European laws until today.

The Islamic jurisprudence has accepted the principle of prescription, not because it is a cause of ownership, but because it is a barrier to hearing a lawsuit involving a right whose specific time has passed in order to administer and organize the judiciary, avoid the complications and problems of evidence after prescription, and because of the doubt involved in the right whose time has elapsed without being demanded. The original right, if there is any, remains under the obligation of a person and has to be fulfilled by the religious judgment. As a result, if a defendant admits to the right, the elapse of time is revoked as a result of the elimination of doubt and the emergence of the right through admittance. Thus the lawsuit is heard (see para 83/28).

This is part of the outcome of differentiating in Islamic law between the ruling of religion and the ruling of the judiciary as mentioned in the introduction (para 2/3).

In the following sections we shall proceed to explain the four causes of ownership that have been approved by Islamic law.

23/5 (First) Acquisition of permissible things

Permissible thing is the property that has not yet come under a protected ownership, and there is no legal restriction that prevents its ownership such as water in its sources, trees in the bush that are not owned, prey of land and water, etc.

Every human kind is entitled to be in command over what he can of these permissible things. What he will command over with the

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[162] *Al-Taqādum* (prescription), also known as passing of time, is the end of a particular period (like fifteen years or more or less) on a right that is under the protection of a person, or on a valuable for someone else in his hand without asking the owner and he is capable of asking. This prescription may either be considered an impediment for hearing a lawsuit in law courts, with consideration that ownership or right in reality is still remaining in their previous situation, and this type of *taqādum* is known as 'preventive prescription', because it prevents the lawsuit. Or it may be considered as a cause of ownership in the hand of the owner when the owner of the right neglects his right completely, and this type of *taqādum* is the acquired prescription because it provides ownership of something to someone that originally belongs to someone else.

intention of ownership will come under his ownership only, and this control with the intention of owning is known as acquisition.

The ownership of permissible things through acquisition is dependent on two conditions:

1. There should be no prior acquisition of the permissible thing by someone. Thus, if a person collects rain water in a container and leaves it somewhere no one else has the right to take it as it has gone out of permissibility with the acquisition of the first person and has come under his ownership. The legal maxim that is applicable in this case is "the one who has precedence over a permissible thing becomes its owner." Similarly, if a person collects firewood from the shrub and leaves it there, no other person is entitled to take it, and so on.

2. Intention to own something. If the permissible [thing] happens to be in the possession of a person without intention of owning it, he does not secure its ownership. Based on this, if a hunter spreads his trap and a prey falls into it: if he had spread it for the purpose of drying it, he cannot own the prey, rather it can be owned by anyone who sees it as it is the taker who is considered the acquirer and not the owner of the trap. But if the hunter had laid the trap for the purpose of hunting a prey, he is entitled to own the prey and no one else has the right to take it.

The same thing applies to a person who builds a castle in a wilderness and a bird nests in it, he can take it without hunting it. All this is possible if he had built the house for the said purpose, that is he owns whatever comes into it, otherwise he is not entitled as per the maxim that goes, "Actions are considered by their intentions" (*Majallah*, 3).

Also under the permissible acquisition which is part of the causes of legal ownership are the war booties because the wealth of the [non-believing] fighters is considered part of what is permissible since their ownership of the wealth is not honored.

What the Islamic legislation has condemned is the civil war; but the legitimate war with the defiant enemies is acceptable, and may in fact be obligatory as a protection to the existence of the Muslims and defense against hostility. It is also among the causes of ownership in the international custom and laws.

23/6 (Second) Contracts (*Al-'Uqūd*)

Al-'Uqūd is a plural of *'aqd,* and according to the Mnslim jnrists refers to the action of offer with acceptance in a legitimate way that its effect appears on the subject matter. The meaning of *ījāb* (acceptance) and the explanation of this definition will be discnssed under the theory of contracts (para 27/3).

According to civil law, *'aqd* refers to an agreement between two or more persons to establish, right to end. Examples of transactions are sale, hiring, gift, guarantee, rescission, and the like. Thus the one who provides guarantee on another person, he has created upon himself a right for which the creditor deserves right to claim. Likewise, the one who sells something, he has transferred the ownership of his commodity to the possession of the buyer, and similarly when two people mutually agree to end their contract, they have terminated its ruling, and so on.

All contracts are in the form of verbal dispositions. In order for them to be a cause of ownership, they have to meet certain conditions. The most important are legal capacity and free will. Therefore, coercion denies a contract its ruling while the lack of legal capacity such as contracts of minors affects its outcome. We shall see the details of this under ihe theory of contracts and the theory of legal capacity.

Contracts in general are among the leading causes of ownership, the most prevalent, and the most important in civil consideration and in the sight of the law. This is because through contracts the human consciousness and spirit emerges in the economic and legal fields. This is unlike the other three causes of ownership which are of little occurrence with respect to contracts that the humans need demands in most of their activities and daily life.

23/7 Compulsory Contracts and Compulsory Transfer of Ownership

There are two situations that are considered exemptions from the previous two conditions of legal capacity. This exemption is necessary for the public *maṣlaḥah.* The two situations are:

1. Compulsory contracts that are carried out directly and explicitly by the judicial authority on behalf of those upon whom the

contracts are compulsory when they refuse to fulfill the contract. For example, selling the debtor's property by coercion when he fails to settle his debt, either through a *qāḍī* based on the classic order of jurisprudence or through the administrative departments [of the courts] in our present time.

A similar example is the ruler's decision to sell the property of hoarders on their behalf when people are affected by hoarding of the property[163] (see *al-Durr al-Mukhtār, Kitāb al-Khaṭr wal-Ibāḥah*, 5/259).

2. Compulsory Transfer of Ownership which takes two types in the *Sharī*ᶜ*ah* and legal rulings:

   a. The first type is *al-shuf*ᶜ*ah* which is a right that is legally granted to a person to possess a property from its owner compellingly by the given price and cost involved, and the owner of this kind of right is called *shafi*ᶜ.[164]

      The right to *shuf*ᶜ*ah* is legally established on a partner who owns a share of property, a partner who owns a right in a property and an adjacent neighbour.

   b. The second type is the acquisition for public welfare as Islamic Law has permitted a coercive possession of the property adjacent to a *masjid* if the property owners refuse to sell it while the *masjid* is no longer enough for the worshippers. A similar thing is also permitted in the case of expanding a road when people are in need of the expansion, after the payment of an equivalent value of the property.

In fact, the *fuqahā* have even mentioned that it is permissible to take a section of the *masjid* for the purpose of expanding road when the need arises (see *Radd al-Muḥtār* 3/383-384).

Our Law of Acquisition for Public Benefit also permits forceful withdrawal of ownership from any property in which the supreme authority finds its possession for public use necessary

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[163] It is said that "the ruler bought over the forman forces the sale of the latter's property (see *al-Miṣbāḥ* in *Bay*ᶜ).

[164] The legal definition of *al-Shuf*ᶜ*ah* is derived from the word *al-shaf*ᶜ*u* which means to combine other's property with his own.

such as school, hospital, or garden against a value that is estimated by a committee of experts. Thus, in all these situations, the ownership is based jurisprudentially on the cause of the contract.

Thus, the ownership of *al-shafi*ᶜ of the property possessed through *al-shuf*ᶜ*ah*, and the ownership of acquiring party of the settlement through acquisition are considered to be based on a coercive contract of sale, which were presumed by necessity and requirements.[165] Thus, as a result of judges pronouncement to the *al-shafi*ᶜ to acquire or due to the process of acquiring on the part of the rightful person, a sale and purchase are assumed to have occurred, and that too in accordance with lawful means and procedures.

With regards to the coercive possession, this is what the jurisprudential deduction calls for.

Hence, from the aove, it is clear that in order to acquire the ownership, may at time be consensual and at other times be coercive. The coercive contract may sometimes be explicit and sometimes be implicit.

23/8 (Third) *Al-Khalafiyyah* (Succession)

Al-Khalafiyyah is the transfer of the rights of someone or something old by someone or something new. It is of two types:

- Succession of someone by someone else, which occurs in the form of inheritance.
- Succession of something by something else which occurs in the form of amercement or compensation.

a. *Al-Irth* (Inheritance)

Inheritance is a succession by which the heir takes the position of the deceased in the ownership of his various types of wealth known as *al-tarikah* (estate) and in all the financial obligations

[165] The Muslim jurist state that the acquisition of property through *shuf*ᶜ*ah* before it is delivered to the buyer is buying from the seller and acquiring it after it is delivered to the buyer by buying from the buyer.

pertaining to the estate. If the deceased has no estate or his estate is less than his debts, the heir has no responsibility over the debt that exceeds the estate because the inheritance was legitimized as a cause for ownership and not liability. It is not logical for someone to be liable for the dispositions of another person for what he was not a party or the one who issue any form of guarantee.

Inheritance is a method (of ownership) that has been endorsed by both the Divine Laws and civil laws. It contains a number of benefits and wisdom as it transfers the outcome of the predecessors' effort to the successors in the form of capital, production power and essential means of sustenance. Thus it makes production connected with the needs of the coming generation such that they do not have to seek for the source of life and production from the start.

As the heir takes over the inheritance from his predecessors, he in turn passes it on to the next heir when he dies and thus the economic backbone becomes strong and stable as every person works hard to increase the yield and productivity.

It is from this perspective that inheritance is considered a natural cause of ownership that has been established by the *Sharīʿah* without the need for prior agreement or will. It does not require the consent of the heir after the death of the deceased (inheritor), and it is not eligible for return if the heir returns or rejects it the way how the will may be returned by the receiving party. This is because inheritance is part of the legal system of *Sharīʿah*.

This is the meaning of the *fuqahā's* saying, "inheritance is compulsory", such that it does not require return by the heir nor does the legator's intention to deny an heir from inheriting affects the inheritance process. Thus, if a person declares and registers the deprivation of one of his heirs from his inheritance or makes preference of one heir over another in the division of inheritance, his deprivation or preference will have no effect. A person is only capable of disposing of his wealth through gift or any other means of outright dispositions during his lifetime, and to offer a will that does not exceed a third of his wealth for a non-

heir as there is no will for an heir so that the will is not used as means to preference in inheritance.[166]

From the previous discussion, it is understood that one of the conditions of ownership by inheritance is that the deceased must not have more debts than his estate. If so, then priority will be given to the payment of debts and the heirs are not to the estate. Even when any of the heirs sells anything from the estate the sale contract is not executable as they sold something that are not owned by them. If the heirs agree to pay the debts from their own wealth, they are then entitled to inherit the estate.

If the debts are more than the estate and the heirs decide to pay an equivalent of the estate only so as to possess it, they would not be allowed to do so unless with the consent of the creditors (see *al-Durr al-Mukhtār wa-Radd al-Muḥtār, Kitāb al-Qaḍā'*, 4/340).

b. *Al-Taḍmīn* (Amercement) or *al-Ta'wīḍ* (Compensation)

If a person destroys someone else's property or usurps it and it perishes or disappears, likewise, if a person inflicts harm upon another or causes the harm to happen, then in these and similar cases it is obliged on him to be liable for the damage and to compensate for the harm that he has inflicted or caused to happen.

When this happens, the victim is entitled to the compensation through *khalafiyyah* as this compensation is an outcome of the harm that has been inflicted upon his property, usufruct or body. Under this category also falls the *diyah* (blood money), and *arsh*[167] *al-jināyāt* (criminal indemnity), which are all happened through *al-khalafiyyah*.

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166 The earlier elucidation of the principle of *Sadd al-Dharā'i'* and examples thereof in Islamic legislation are under the discussion of *al-istiṣlāḥ* (see para 5/7). See also the earlier reference on the Prophetic tradition, *"There is no bequest to hiers"* along with its sources in the last paragraph of 10/2 (b).

167 *Al-Arsh* is the monetary compensation that becomes possible and obligatory on the perpetrator for the death and bodily injury of another. The compensation for loss of life or organ is known as *diyah*.

23/9 (Fourth): Increasing of Owned Property

Among the established principles is that whatever is produced or generated from the owned property is belonged to its owner. Thus, the original owner of the owned property reserves the ownership of its increase whether the production of the increase is through the effort of the owner, his cause or happens naturally. For instance, fruits, animal offspring, wool and milk of sheep, and the likes, are all under the ownership of the owner of the original property. For those things which are owned jointly by two [or more] persons, the resulting offspring is also jointly owned according to their respective shares of their ownership of the original property.

Similarly, the outcome of the usurped property such as the offspring of a usurped animal or fruits of usurped tree, are under the ownership of the original owner and not the usurper. However, would the ruling on usurped property be applicable on the increase of the usurped property while in the hands of the usurper such increase is destroyed and hence be held liable for it or it is not considered as usrped property unless with certain conditions?

Opinions of the *fuqahā'* differed on this issue as explained in the discussion of *ghaṣb* in the *fiqh* literature. [In summary], the usurper is not considered a usurper of the outcome of what he has usurped as he did not steal the outcome from the original owner, rather; it has fallen by chance in his hands. This is unlike when the usurper plants seeds on an usurped land in which the harvest belongs to him and not the land owner as the outcome is the growth of the seed which he possessed. He will however be held liable for any loss of land fertility as a result of the cultivation.[168]

23/10 In its Article 1248, the *Majallah* has limited the causes of ownership to only the first three causes and does not include the increase of owned subject property as one of them. Likewise, it

[168] This jurisprudential ruling has now been modified in our country [Syria] by Article 885 of the New Syrian Civil Law which states that if a piece of land is cultivated by non-owner of the land then the owner of the land has two options: (i) Either pay the farmer the value of the seeds planted and own the harvest by way of annexation or (ii) Leave the land yield to the farmer and collect from him the land rental for a whole year. These two options are valid when the period of harvest is over otherwise the land owner has a right instruct the farmer to uproot the seeds from his land without any compensation for the cost of planting or cultivating.

referred to *al-khalafiyyah* as inheritance only and translated it as the succession of one person by another following what is found in some *fiqh* literature[169] without returning to the connotations of minor rulings regarding the legal causes of ownership. Yet we have seen from the preceding discussion that it is important to include the fourth cause of ownership as not everything that is produced from an original property is owned by possession for it maybe in the hands of another person like an outcome of usurped property nor does it depend on a contract or succession.

As for the ownership of compensation in situations that involve amercement or compensation, it also remains excluded from the four causes of ownership mentioned if the succession is to be translated as inheritance as was done by the *Majallah* and other sources of *fiqh*. But since we did not want to extend the causes of ownership to include the fifth cause, we have divided the succession into two parts: by persons and by things so that it becomes consistent for all the four causes.

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169 Ibn Nujaym mentioned this in his book, *al-Ashbāh wal-Naẓā'ir* in the chapter *al-ṣayd wal-dhabā'iḥ* followed by *al-Majallah* (see *Mir'āt al-Majallah*, article 1248).

SECTION 24

DIVISION OF OWNERSHIP AND ITS CAUSES

THEME ONE: DIVISIONS OF THE CAUSES OF OWNERSHIP

24/1 From the preceding discussion on the causes of ownership, we note that these causes may be divided into two categories:

1. Based on the availability or absence of option
2. Based on its typical effect.

First: Based on the Availability or Absence of Option

Under this category, the causes of ownership are divided into two: optional and obligatory.

a. The optional cause of ownership (*al-asbāb al-ikhtiyāriyyah*) in which a person has a choice to acquire it and they are two: acquisition of permissible things and contracts.
b. The coercive ownership (*al-asbāb al-jabariyyah*) in which a person has no choice, and they are also two: inheritance and increasing of owned property.

Second: Based on the Typical Effect

Under this category, causes of ownership are also divided into two: causes that initiate ownership, and causes that transfer ownership.

a. Initiative causes (*al-asbāb al-munshi'ah*): They are causes that generate ownership of something that has not been previously acquired. They are acquisition of permissible and what is generated from possessed wealth.
b. Transmissive causes (*al-asbāb al-nāqilah*): They are causes that related to property owned by someone and then be transferred

from one possession to another. They are succession and contracts.[170]

THEME TWO:
DIVISION OF OWNERSHIP

24/2 The ownership itself is also divided into two categories:

1. Based on its subject matter (*maḥall*): that is, something that is related to the ownership
2. Based on its form (*ṣūrah*): that is the way it is related to the owned property.

24/3 First: Division based on Subject Matter

Under this category, ownership is divided into three types: ownership of the essence *(al-ʿayn)*, ownership of usurfruct *(al-manfaʿah)*, and ownership of debt *(al-dayn)*.

1. The ownership of *al-'ayn,* which is also known as the ownership of *al-raqabah,* is when the essence and substance of something is owned such as the ownership of movable items including

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[170] In the legal domain, a contract is defined as follows: The agreement of two desires (willing people) in establishing a right, transferring it or terminating it (see para 23/4).
This definition also means that a contract is a valid reason to create ownership or to transfer ownership. However, it should also be noted that a contract is not valid only for ownership, but for making commitments too, according to the aforementioned:
a) As the cause of the contract in ownership, it is always a transferring contract and not a creating contract. The contractor or the contracted, in this case for example the seller, must own the thing that they want to sell. That who does not own something cannot give it.
b) In the case of commitment contracts, it could be transferring or creating.
- In a selling contract, the ownership is transferred from the seller to the buyer. At the same time, the seller created a commitment that he or she will deliver the good or guarantee its quality.
- Guaranteeing someone in a contract also creates a new commitment on the person doing the guaranteeing to pay the money that he is guaranteeing. And it also preserves the original commitment of the person who loaned the money.
- Transferring of a debt contract transfers the commitment from the original debtor to a new debtor, making the later solely responsible for paying the money back.

property and animals, and the ownership of real estate, that is immovable items including land, buildings and shops.

2. The ownership of *manfaʿah* is when a person owns only the right to benefit from something while preserving its essence such as reading books, using tools and equipments, leaving in buildings and shops, etc., by way of rent, lending or other means of legitimate ownership of usufruct. Nonetheless, there is a correlation and dependence between the ownership of essence and ownership of usufruct in some cases as we shall see soon in the distinguishing features of ownership (para 25/2).

3. The ownership of *dayn* is when a certain amount is owed by another for a particular reason, such as the obligation to pay the price of a sold commodity by its buyer, the repayment of loan on the debtor, the cost of damaged property on who damaged it, and so on. It is not termed as debt unless it becomes an obligation upon the liability of someone.

As for deposits which are kept under the custody of a depositary, it falls under the category of ownership of essence as it is a trust that must be preserved by the depositary and returned upon demand. The depositary is not entitled to use it and return its equivalent. If he does that, he becomes a usurper, and the amount deposited becomes debt, which he will be obliged to pay its equivalent amount.

24/4 Complete Ownership versus Incomplete Ownership

With regard to the ownership of essence and ownership of usufruct, ownership is divided into two types:

1. Complete ownership (*milkiyyah tāmmah*): when a person owns both the essence of something and its usufruct.

2. Incomplete ownership (*milkiyyah nāqiṣah*) is of two types:

   i. Ownership of usufruct without the essence: This is the most common cases of incomplete ownership, and is achieved

through one of the following four ways: *ijārah,*[171] *i'ārah, waqf,* and *waṣiyyah* for someone to benefit from bequested property such as residing in a house and so on.[172]

ii. Ownership of essence without the usufruct: This type of incomplete ownership occurrless as it is contrary to the original principle of owning essence. As such this form of ownership where the essence does not follow the usufruct is rare and mostly temporary, after which it goes back to the original situation. This form is only possible through *waṣiyyah* under only two situations:

First: If an owner [of a property] bequeaths its usufruct to another person after his death for a stated period of time or for the period of life of the bequeathed, then in this case, the heirs of the deceased will own only the essence. Thus, the inheritance of such a property will be delayed and will be considered as tied to the benefit of the bequeathed.

Second: In the case where the owner of a property offers the property's usufruct to a person for a limited period or as long as he is alive, and simultaneously bequeaths another its essence to, then the person who was given the essence will only own the property while the other person to whom the usufruct was offered enjoys the usufruct, which in turn will come to end by the expiration of the period allocated to him or by his death.

In both situations, the ownership of the property will be detached from the ownership of the usufruct and that will be timed by the duration of the usufructant to the usufruct. Once it ends, the usufruct

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171 It is noted here that incorporated in lease contracts are the rights applicable on endowment properties in a special contract. Such as *taḥkīr* contract in endowment properties and the double-leasing contract in damaged endowment buildings that cannot be repaired immediately.

These two contracts are based on a long-lasting lease giving the tenant the unlimited right of benefit from the property in return of an accelerated fee close to the value of the property, and a small delayed annual fee. These will be discussed further in part 3 in this series.

172 The new civil law, and before that in the real estate law number 3339 both created a right of benefit on private properties. This contract facilitates the renting of a property to someone for the period of their entire life.

goes back to the consequent owner of the property. Thus, the owner of the essence now becomes the owner of the usufruct[173] (see *al-Badā'iʿ* 7/352-354; *al-Hidāyah* and *al-Durr al-Mukhtār* in the beginning of *Bāb al-Waṣiyyah bil-Khidmah wal-Sakani wal-Thamarah*).

24/5 The Ḥanafī jurists have considered the usufructs and debts are subject to ownership by they are *amwāl* (property). As a result, they have distinguished between the concept of *mulk* and the concept of *māl* as mentioned before (see para 23/3; *al-Majallah* 125, 126; *Radd al-Muḥtār,* the beginning of *al-Buyū'*; and *Fatḥ al-Qadīr,* the beginning of *al-Sharikah*).

Ownership which means owned property has a wider meaning than *māl* because according to the Ḥanafī jurists the latter is limited to the existing materials that have value among people. As for the owned property, it refers to all that is related to ownership or specificity, that includes actual property, usufruct, and debts as these usufructs and debts accept specificity just like objects of essence.

On the other hand, according to the Mālikis and Shāfi'īs, usufructs are considered as *amwāl* like the essence without distinction. This is the most well founded and compliant with the perspectives modern public laws.

We shall see in the third part of this jurisprudential series more explanation on the difference between *māl* and *mulk* from the jurisprudential perspective and the fruits of this distinction (see v. 3, para 69-73).

24/6 Second: Based on the Form

Under this category, ownership is also divided into two: *al-mulk al-mutamayyiz* and *al-mulk al-shā'iʿ*.

First: *al-Mulk al-Mutamayyiz:* This is the ownership that is related to a particular thing that had boundaries which make it distincts from

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173 The legal framework differentiated between benefiting and owning of the lands belonging to the government, as in the case of princely lands. The ownership of these lands belongs to the government, but all the people have the right to use and benefit from these lands in all aspects. This separation was imposed in a temporary way by limiting it to the period of the life span of the benefactor. This was accomplished in a special contract creating a right called *ḥaqq al-intifāʿ* (the right to benefit).

another. Examples are the ownership of a sheep, book, a house as a whole, or a particular floor in a building and so on.

Second: *al-Mulk al-Shā'iʿ* or *al-Mushāʿ* is the ownership that is associated with unspecified portion of a particular thing regardless of whether the share is small or big.

This includes for instance, the ownership of half of a house, quarter of a horse, one percent or more of land and so on. This type is known as combined share *(al-ḥiṣṣah al-shā'iʿah)* in a jointly owned property.

According to the theory of undivided ownership, every part of a jointly owned wealth is not specified for any share holder but is owned by all of them. Based on this, the scholars define *al-ḥiṣṣah al-shā'iʿah* as a share that runs through the entire wealth that is jointly owned (*al-Majallah* 139) which is also close to the jurists definition. It is also obvious that once the wealth is divided among the share holders, the undivided ownership of the wealth disappears.

24/7 Joint Ownership of Debts

Joint ownership is not limited to the ownership of property only, but it includes the ownership of debts as well, where its liability is shared and divided. In such situation, the debt is known as *al-dayn al-mushtarak* (joint debt) as numerous people are obligated for the liability of others for one reason. For instance, if two persons sold their joint owned property to a person, or, if a person destroyed this joint owned property, the price in the sale transaction and the value[174] will be a shared debt because a joint owned debt is on the liability of other. In other words, the rights which belong to both of them are arguably upon his liability is mixed, as in the case where different lots are owned by several persons in one property.

If the reason for the debt is not the one like when each of the joint owners sells his share in a jointly owned property in a separate contract or a person destroys the property of each of them separately,

[174] The jurists differentiate between value (*al-qīmah*) and price (*al-thaman*).
Value (*al-qīmah*) refers to the actual conpensation equal to the subject matter that is generally accepted among the people.
Price (*al-thaman*) refers to the consideration agreed by the contracting parties, irrespective of being more or less than actual value. We will discuss it in ʿaqd al-bayʿ, the forth part related to *al-ʿuqūd al-musammah*.

then in that case the debt is no longer jointly owned bur rather owned separately from each other.

We shall soon see the practical importance of considering a debt as jointly owned or separately owned (see para 25/10).

24/8 Elimination of Joint Ownership

The previous discussion revealed that joint ownership always exists in something that is jointly owned.

If this partnership is found only in the property itself without an agreement to invest it through a joint effort, it is known as *sharikah mulk* (proprietory partnership).

The opposite of this is *sharikat al-'aqd* (contractual partnership) that refers to an agreement of two persons or more for the investment of property or work and sharing of profit as commercial or industrial partnership.

This form of partnership is beneficial because it strengthens and expands the economic activity, and encourages the cooperation between capital and effort in creating the necessary workforce needed in most productive projects which cannot be accomplished by an individual.

As for *sharikat al-mulk,* it is a stumbling block for disposition as the partner is not able to dispose of on his undivided share from the jointly owned property in a way that may harm his partnership such as destroying the property or changing its appearance and so on.

From this perspective, the division of property in *sharikat al-mulk* has legitimized the ability to eliminate the undivided ownership of shares of jointly owned property.[175]

If one of the partners refuses to divide, the court would order for the division upon application of one of the partner as long as the property is subject to division regardless of whether the property is movable or immovable as per Articles 1123, 1130 and 1152 of the *Majallah.*

If the jointly owned property is incapable of division, according to our jurists, it is not obligatory to compel the coercive sale of the

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[175] As for joint debts, the commonalty of a property is not removed, but the debt can be collected from what the property yields. Whatever money collected is distributed among the debtors, and the ownership of each of them is then independent. Refer to the 6th property of the properties of a property (para 25/20).

property, instead the partnership continues as they use the jointly owned property on rotation basis. This ruling is based on *qiyās* due to the fact that a person is not allowed to sell wheat that he does not own while rotation is in actual sense a division of usufruct.

The *Majallah* has explained the mechanism of legal rotation, its types, that is, whether time-based or location-based, consent- and judicial-based or optional- and coercive-based, and has explained its rulings in details under Articles 1174 to 1191.[176]

24/9 Nonetheless, our law of elimination of undivided ownership is originated from the Ottoman era and known as "the Law of Division of Immovable Properties" that obliged the elimination of undivided ownership of joint owned property by way of judicial proceedings based on the application of one of the partners, irrespective of whether the property is subject to division or not. If it is subject to division, the property is then divided in accordance with the jurisprudential ruling explained in Article 1147 to 1152 of the *Majallah.* If not, it is sold by auction, the proceeds of sale collected is divided among the partners. Under the same Law, for movable joint owned property that are still under the original legal ruling, there is no compulsion on elimination of undivided ownership for items which are incapable for division.[177]

In Syria, the jurisdiction to eliminate undivided ownership of immovable lies with the courts of reconciliation. At last in 1366 A.H. (corresponding to 1947) Article 3 of the Law of Reconciliation was repealed by Law No. 353 issued on 3rd June 1947 which generalized the ruling on elimination of undivided ownership by court of law to include the movable items too by dividing it if it is dividable, and if not then by auctioning it.

In this [ruling] there is an apparent *maṣlaḥah* by eliminating the problems found in *sharikat al-mulk* and all that is produced by its natural causes like inheritance and others. Such kind of *maṣlaḥah* is supported by *istiḥsān* if not by *qiyās.*

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[176] We will mention in para 10/24 that a prepared contract is no longer legal in agricultural properties law.

[177] Conciliation courts, according to the Syrian law, are the ones that look into small or simple cases and their processes and procedures are brief to make it fast. It is known as District courts in Egypt and some other Arabic countries.

24/10 Among the things that must be noted at this juncture is that after the laws have established the method of forceful elimination of undivided ownership by court in real estates, there is no longer the need for coercive rotation in utilizing the usufruct of jointly owned property except when one of the associates claims to requesting rotation while his partner does not request the elimination of undivided owuership. This is because all jointly owned ownership has become subject to elimination of undivided ownership by court of law in all ways, if not by division then by sale and dividing the price.[178]

The importance of rotation is seen in the right to renting an undivided share of real estate or movable item. The rentals of such items is possible by *Sharīʿah* and law (see para 25/8), and there is no other possible way of achieving that in an undivided property except by time-based or location-based rotation.

The time-based rotation is where each associate alternatively benefits from the jointly owned item for a specific period according to the share of each of them. For instance, two people owning a land at a ratio 2:1 may agree that the first associate cultivates for two years and the second for one year.

The located-based rotation is when each of the associates is allocated a portion of jointly owned property, and they all benefit at the same time. For example, two associates owning a house may each of them leave in it according to his share or two shopping lots which each of them take one (see *Majallah* 1176-1177). But it is obvious that in such items like animals it is only possible to have time-based rotation, and as a result, Muslim jurists have divided rotation of usufructs into the two mentioned categories.

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[178] It is worth noting here that *al-muhāya'ah al-jabariyyah* (periodical division or time-sharing) has become illegal in the agricultural properties law according to the first section from the law no. 171 issued by the French commissioner in March 1926. The text of the law is as follows:

The periodical division between people who will work in farming lands, gardens and etc...that are owned in a common way are illegal, unless they are owned according to the instruction on the ownership bonds. The periodical division in here refers to *Muhāya'ah* .It was banned because it weakens the fertile land. It does so because every partner wants to make sure to get all the benefit he can from the land before it is assigned to someone else. Therefore, the farmer blows the land too hard and uses too much fertilizer.

It is clear that this banning is applicable only to agricultural properties and not making the concept of *Muhāya'ah* illegal. Making it illegal on agricultural lands was to improve agriculture.

SECTION 25

DISTINCT FEATURES OF OWNERSHIP

25/1 Different types and forms of ownership contain some distinct features which distinguish certain types of ownership from others. These features are legal considerations which render some types of ownership acceptable depending on the nature of each type and the objective of the legislation in it.

These features have not been collected by the Muslim jurists in an independent study, rather; they appear to the researching *faqīh* within the jurisprudential rulings that have been established by *fiqh* in different studies and relevant topics related to ownership and its causes.

In following sections we shall discuss these features as evidenced by the texts and branches of jurisprudential rulings.

25/2 First Feature

Ownership of property itself necessitates the ownership of usufruct and not *vice versa*.

This means that the ownership of property itself necessitates the ownership of usufruct instantly or after sometime. But the opposite is not necessary as a person may own usufruct but not the propert itself as in the case of *ijārah* and *iʿārah*.

This is because the purpose of ownership is not the objects themselves but rather the usufruct obtained from these objects.

The Islamic Law has however permitted the ownership of essence so that it becomes a support for the complete benefit of a free person and his legal disposition even through consumption.[179]

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[179] Based on the philosophy of ownership, some Mālikī scholars opine that ownership cannot occur on the essence of objects and materials because the dealing with objects' essence is beyond human capacity. It only occurs on the usufructs of objects based on certain conditions upon which the names of contracts differ from each other. For instance, in the contract of selling, the ownership is absolute, while in leasing contract it is limited and temporary, and so on. But majority of scholars including the Ḥanafīs oppose this theory, and hold that the ownership includes the essence things and

If we imagine the detachment of the ownership of essence from its usufruct permanently it will then be a form of inconsistency which the *Sharīʿah* does not permit. It permits the detachment in only two exceptional cases of *waṣiyyah* which end with the reattachment of usufruct to its original essence as explained before (see para 24/4):

- If the owner offers *waṣiyyah* for the usufruct of his property to a person within a specified time or thoughout the person's life, e.g. the *waṣiyyah* on accommodation (in his house) or fruits of his garden.
- If somebody bequeaths ownership of an asset to a person, and bequeaths its benefit to another, for a specific period.

The heirs in the first condition and legatee of property in the second condition will own only property, but not its usufruct until the right to benefit from the usufruct expires, in which case the right to benefit from the usufruct then returns to owner of the property (inheritor or the lagatee). If they are not alive, the right is transferred to their inheritors as mentioned previously in the division of *al-mulk*.

The jurisprudential perspective in validating this type of *waṣiyyah* is that the temporary detachment of the ownership of essence has been overlooked in honor of the *waṣiyyah* because it is built on forgiveness and on what is contrary to *qiyās* in most of its rulings in order to encourage people to do good at the end of their lives.

Based on this, a permanent *waṣiyyah* on usufruct to a specific group of people instead of a particular person is excluded from the meaning of *waṣiyyah*, and is considered permanent *waqf* in which private ownership is forsaken. The returns are then allocated to the permanent welfare community specified by the endower.

Thus, if a person bequeathes the produce of his vineyard or returns of his house to poor people permanently, or to a particular person, and after his death to poor people, it would be regarded as *waqf* based on the necessity of permanence. This is because, even though the *waqf* contains the word *waṣiyyah*, the ownership of the property by the heirs does not carry any meaning as long as the

objects as well as its usufruct. We however, do not see any practical implication of this theoretical difference (see *al-Mulkiyyah wa-Naẓariyyat al-ʿAqd* by Abū Zahrah, p. 17).

usufruct is allocated to other people (see *Fatḥ al-Qadīr*, the beginning of *al-Waqf*, 5/419, and *Radd al-Muhtār*, 3/359).

25/3 Second Feature

First ownership of something that has never been owned before is always a complete ownership.

In other words, this form of ownership comprises of both property itself and usufruct, and not on either of them.

The first ownership is the one that is confirmed for the property by reason of initiation that is, through acquisition of lawful things, or something generated from the property owned.

Whenever, the first ownership is established by the initiation, it can not be imagined later that it relates to that property a new possession except by the transfer of the ownership. This is because every possession confirmed for something owned before is considered exchange by the owner, and this is what is meant by transfer of ownership.

Furthermore, the complete ownership of property itself and usufruct may be transferred to a second owner as in the contracts of sale and *hibah*. However, if it is partial transfer of either property or usufruct, the third party has incomplete ownership as explained before in the discussion on division of *mulk*.

From this, it is concluded that complete ownership is related to both initiation and transfer causes. Hence, it starts with acquisition or increasing of the things owned, then, transfers through contracts or succession.

While incomplete ownership is related only to transfer causes because ownership of the usufruct alone is preceded by the complete ownership therein.

25/4 Third Feature

Ownership of the property itself does not accept timing, while the ownership of usufruct is originally subject to timing.

The ownership of the property itself whenever confirmed by one of its causes becomes permanent. Unless a transfer of ownership emerges, the ownership remains for life.

Based on that, the Prophet (s.a.w.) affirmed the permanent possession of gift for life (*ʿumrā*)[180] when he said: *"Whoever is given a gift for life, it is for him and his heirs"*.[181]

The jurists had ramified this foundation by saying that one of the conditions for the validity of sale is that it is not subject to time limitation. If not, the contract of sale becomes invalid (see *Radd al-Muḥtār*, 4/6).

However, the ownership of usurfruct without the ownership of property itself is originally subject to time limitation as in borrowing, lease, and will with a property benefit for someone for a speicified period of time. Whenever, this time elapses, the benefitial right to will also elapse.

This limitation period for beneficial ownership becomes binding in the bilateral contracts such as leasing and settlement because the owner is not allowed to repudiate it due to the fact that it is the sale of usufruct for a specific period. The jurists have considered leasing in actual which is one type of sale that is sale of usufruct. It is similar to sale of properties as discussed before (see para 24/3; *Radd al-Muḥtār*, 5/2 and 29).

If the limitation period is for the beneficial ownership of the gratitious contract such as borrowing, the owner is allowed to repudiate it. The lender is allowed to shorten the allocated limitation period, as it is allowed to return from the origin of borrowing and return the item borrowed when he (lender) wants it.[182]

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[180] *Al-ʿUmrā* refers to the donation of a person to another subject to the lifetime of the latter, i.e. if the done dies, the donated item reverts back to the doner. It can be said as follows: I give a lifetime gift or I give it to you during your lifespan, and that is some of the expressions.

[181] Reported by Muslim (1625), al-Tirmidhī (1350), and he said, *ḥasan ṣaḥīḥ*, and Aḥmad in *al-Musnad*, 3/399.

[182] A contract of benefit in ones will, even if it was a donation, cannot be revoked by the heirs of the deceased or the period of benefit altered. This is because the right to revoke a contract of benefit belongs only to the owner, and in this case, he is dead. The will becomes binding of the benefit with its predetermined period. The heirs, however, keep the ownership of the property for as long as the benefit contract is valid. Therefore, scholars declare that the benefit here is legal based on the ownership of the deceased not the heirs. The property belongs to the heirs, and the benefit to the person in the benefit contract until the period is over and the benefit is transferred to the heirs afterwards (see para 24/4; *al-Durr al-Mukhtār wa-Radd al-Muḥtār*, 5/442).

25/5 The jurists do not neglect to look into the possibilities that repudiation of borrowing period would cause harm to the borrower. For example, if borrowed property is a land that its owner lends to another person for cultivation or plantation or building for a specific period and the borrower has carried out his right at cultivation or plantation or building, the lender wants to recover it before the stipulated time elapses, the jurists have explained the issue as follows:

First: In case of cultivation, it is not allowed for the lender to recover the land before yield is harvested, because the cultivation has an expiry seasonal period.

There is no difference between borrowing of land for cultivation temporarily or absolutely. The cultivation will remain until it is harvested. The payment of rental needs to be paid if there is gap between the returning time and the harvested time. That is to protect the right of the lender and to prevent the harm from the borrower.

Second: In cases of plantation and building, the lender has absolute of repossession right to return to the borrowed land for plantation and building in any time he wishes whether the borrowing is absolute or temporary. Therefore, the borrower will be asked to remove the trees planted or building, and to deliver the land to the lender freed from them. As to plantation or building, there is expiry of time as the harvesting time for cultivation.

But if the borrowing is for a limited period, the lender has asked for the return before the time that he gave to the borrower, the planter or the builder is considered that he has deceived the borrower or causing harm to him. So, the right of the borrower is to hold the lender's responsible for the value of the building or trees planted between the time to remove and the end time that is laid down for the borrowing.

If the building or the trees are removed, its value will then be returned with twelve Dīnār for uproot, and its value in that time is based upon the origin of its remaining to the time it finishes for borrowing twenty Dīnār, the lender will be responsible to pay the borrower eight Dīnār (see *al-Majallah,* 831-832; and *al-Durr al-Mukhtār,* 4/505).

25/6 The Fourth Feature

Ownership of properties is not subject to relinguishment but it is subject to transfer.

If a person relinguishes ownership of his property, it does not relinguishes the ownership, the ownership of the property still belongs to him.

Based on this, Islām prohibits act of leaving of property unatteneded that refers to a thing leaving from ownership of its owner without getting to the new owner. The Arabs before Islām were accustomed to leave the camels in special situations, then, the *Qur'ān* abolished this with the clear text. Even if the animal is hunted then left, it still remains with ownership of the first hunter. If it falls in someone's hand and he knows, the first person is entitled.

The jurists are of the view that it is not valid to release ownership on the property as release of ownership, means leaving which mixes up with the meaning of owning. If someone appreciate wrongfully something belongs to other or keeping propertyat others, then he releases himself from it, his action is not valid and the property remains with its owner.

If the wrongful appropriated property is destroyed while in the hand of the appropriater, he will be liable to pay its value. If the owner releases him from the liability, the release of liability is valid due to the transfer of right to the liability as rights pertaining to liabilities are subject to relinguishment.

25/7 Exception of *Waqf* and Emancipation

Two things are exempted from the property ownership:

1. ***Al-Waqf*** (endowment) according to the person who sees that the endowment could be left for the endowment ownership not voluntarily; the endowed property could be out of the endower ownership / without being to the new owner.

   This is not considered among the act of leaving of property unattended, indeed, it voluntarily contains leaving the ownership for life with the benefit for a charitable organiaztion endowed to which will bring the thing endowed out of the individual ownership. That is why the jurists define the endowment as: "Retaining the property based on the ruling of Allāh's ownership, and giving out the benefit as charity".

The best definition to give the endowment is the ownership of the endowed property to the philanthropic organizations that is endowed to,[183] according to that organization as a ruling person. That is why it is allowed to exchange an endowment estate with other if there is a need and benefit to the exchange. This property disposal is an exchange of the endowment will be the effects of ownership of the organization whose exchange on its account.

2. ***I'tināq al-Raqīq*** (slave emaucipation): This is to leave the ownership of his master and he the slave becomes free. Slavery is an accident restriction for the person's freedom which removes with reasons that are: freeing. a clear difference can be observed here between freeing that is related to the society that is a productive power, thought and work, and leaving things that brings them out of exchange and to deprive them of their creatiou and subject them to the benefit of human being.

   That is why, Islām, urges to libration and considers sacrifices, and it prohibits abandonment of things.

25/8 The Fifth Feature

The common ownership of the properties is initially, like the specific distinctive ownership that is subject to disposition unless there is prohibition.

The existence of prohibition is an exceptional situation from the beginning. This prohibition arises due to the active disposition such as consumption.

a. In actual disposition, it is prohibited for the owner of common share of property to tamper with other partner's rights. He does not have the right to damage his share, because it will damage to the share of his partner without differentiation. He has to

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183 An endowment must have a charity aspect to it. It either starts on a charity basis such as for the poor, a school, a mosque and the like. This is called charity endowment. The other type is endowment for some specific people or heirs as long as they live, and when they die, the endowment becomes a charity endowment. This type is called Family endowment.

exchange the benefit with joint property on the representation of his share.

b. However, in verbal disposition, it is in the common share and the distinct share. It is good to sell the common share, and to settle it, and to endow it and to will it, either the seller or the contractor is an owner of that agreed upon share, or owner of the property completely, as the disposal of some owned property is allowed as the disposal of all.

Only that, three contracts are exempted from that, which the jurists consider in their nature and their stipulations what prohibit their process on the common share, either absolute prohibition, or in a situation without other. These exceptional contracts are: mortgage, gift, and rent.

25/9 This prohibition according to the mortgage is good, the mortgage contradicts with common property mortgaged according to the jurists view; because – according to its goal it is a document to fulfill the debt- which needs receiving the property mortgaged, then, that requires continuation of its detainment with the mortgagee. This prohibits the soundness of mortgage in the common share, if someone mortgages a common share, like one quarter of a horse or half of a house: if the mortgagee permanently withholds all the property, he has transgressed upon the right of the partner who does not mortgage, for withholding his share because of common property; if the mortgagee represents with the owner of share not mortgaged while withholding and using, regarding withholding based on the mortgage for a time, and delivers it a time for use, it then exceeds the continuation of withholding the mortgaged, the mortgage will lose its documental power and lacks its goal.

This meaning requires that the estate mortgage nowadays becomes the common share of the country estate whose records and estate systems were established to obligate to register all estate contracts in that records. This is what our civil law decided and the Article 1058 mentioned that "every estate that can be sold can be

mortgaged". The common share does not exempt the estate in this allowance.[184]

If the estate record system is rich than receiving the mortgaged estate just for indicating the mortgage in its journal of the estate record for prohibiting the mortgagor from disposing for sale while the mortgaged estate remains in the hand or it mortgagor as in Syria.[185]

This is related to the common share mortgage according to the *Sharīʿah*, and in the civil law.[186]

It is clear from the previous explanation that there is no prohibition for the common property for some disposals to be the right of other (the partner). As the active disposal to damage, it can be nature of disposal as in the mortgage.

5/10 The Sixth Feature

The common property in the joint debts is related to custodies that can not be divided.

a. If the joint debt is received, the ownership will be then relate to the property received, it then becomes property ownership not

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[184] The law number 3339 in the real estate law excludes the common share. On the other hand, it says in sections 23 and 104 that they cannot be mortgaged.

[185] The Cassation court in Syria has decided that recording of a real estate contract in the Land Registry is considered a legal delivering of the property.

[186] Regarding the commons attribution in contracts of gifting or lease, Hanafi scholars say the following:

a. *Hibah* (Gift): If the gift was in a common share from divisible money, such as the share of half a big house that can be divided into two separate houses, or a quarter of a pack of animals or the likes of divisible money. Then the gift is invalid in these common shares. The reason for its invalidity is that a gift contract is not complete unless two things are there, paying and collecting. Collecting is only complete when the collected thing is distinguishable from others. In a common share, distinguishable collecting is not possible is common properties. In addition, since the money can be divided equally, then partial collection is not accepted.

If the gift was undividable or damaged by dividing like a pearl, a book or a horse, then it is acceptable to give away a common share in the property. Because when complete collection is not possihle then partial collection is accepted. And the person who takes the gift becomes a partner in the common property.

b. *Ijārah* (Leasing): The scholars prohibit leasing in common shares. As is the case of leasing half a house or animal.

debt; the property received will be shared among the common property shareholders as the other divisible joint properties.

Based on this, if one partner wants the fulfillment of the joint debt which his share equals the debtor , he will not only receive it, his other partners will share with him what he received, everyone of them will take his share from it; if one of the partners is allowed to dependently receives his share, it will be compulsory that the debt be considered shared in the custody, which the share of the creditors will be different, it has to be joint as it is joint debt among them.

Even if one the creditors sells something of the joint debts from his debtor and makes it a price of commodity, the debt received will be considered a price of the joint debt. The other partner in the debt is given the option: to fulfill his debt of the debt considered a price of commodity; or to leave the commodity for his partner the buyer, his share will be for debt that originally remains from the debt.

If he is unable to obtain the remaining debt from the debtor by being him bankrupt, his right will remain to return to his companion with his share with the price of commodity. His absence of allowance before can not prevent him to return.

And he can not choose to share with his friend in the real commodity that he bought except with his contentment, in contrary to if his associate receives part of the debt or its like, the other will share in what is received (see *al-Majallah,* 103 onwards).

b. The non-joint debts all the debts in them are independently distinguished from other, every creditor is independent from what he receives from the debtor of his debt, which other creditors have no relationship with it except if he decides the bankruptcy of the debtor or dies as insolvent, then his properties will be shared amongst his creditors according to their debts, everyone will take half of his debt for example or one quarter or less or more based on the property he has. Nobody can take more than other relatively, this is what is called: creditors' share.

   We had explained it in the paragraph 24/7 when does the debt be considered joint debt, independent non joint debt

SECTION 26

THE DIFFERENCES BETWEEN OWNERSHIP AND PERMISSION AND BETWEEN OWNERSHIP AND RIGHT TO BENEFIT

FIRST SUBJECT
DIFFERENCE BETWEEN OWNERSHIP AND PERMISSION

26/1 Jurists differentiated between ownership and permission

Ibāḥah: It is a permission to consume or use anything but it does not make a permissible thing a possession. It is lower than ownership.

If anyone permitted other person to eat his food or fruit from his garden, he will not own the food or fruit, and will not have any right to sale and give it to other, he can only eat, and nobody has the ownership to permit except its owner. The person given permission is not owner.

Likewise, if any person permitted other to use is tools and his cloths, the person is given permission would allow to use only, not lending or permitting other.

By this it can be infer that permission from owner to other cannot be gift as well as cannot loan. But it is permission (see *al-Majallah*, 139).

Unless, evidences prove that the intended is *hibah* or *iʿārah*. At that time ownership of object can be substantiate. For example, someone asked another person gift or asked loan. He accepted with the word: I permitted you take it. The permission expresses here meaning of gift or loan figuratively. The permanent rules say (consideration in contracts is objects meanings, not words and structure).

It becomes clear by what is explained before regarding to achievement of permission from ownership, that the word *mubāḥ* has two meanings in terminology of jurisprudence.

1. First meaning contains everything did not enter in any particular ownership, and *Sharīʿah* does have any objection to own it, like

hunting, firewood's of jungles. These are common permissible things. Source of permission is Shareah that allowed people to have it after fulfilling *Sharīʿah's* requirement as we explained before. When they earned it, it will be allow them to use in all meaning of ownership.

2. Second meaning of *mubāḥ* is permission to use owned thing when his owner permits to consume or to use, that is particular *mubāḥ* its source is permission of his owner. His permission does not mean ownership as we explained here.

SECOND SUBJECT DIFFERENCE BETWEEN OWNERSHIP OF BENEFIT AND RIGHT TO BENEFIT

26/2 The difference between ownership and permission leads to another difference that jurists mention it as ownership of benefits and right to benefit.

Lawyers do not differentiate between ownership of benefit and right to benefit. Both of them have one meaning in their terminology.

But jurists of schools in Islamic law differentiate between them. Their texts prove difference in three aspects: (1) As meaning and its limitation; (2) As source; (3) As its impact.

First, as meaning: the ownership of benefit is differ from right to benefit because of a particular hindrance in ownership of benefit that we have already explained in the definition of ownership, like leaseholder's right to benefit of leasing, right of the person for whom property donated to benefit of *waqf*. All of them contain on ownership and its power.

Only right to benefit is like permission to get personal benefit without ownership, like sitting in markets and mosque, use of ways and river that do not harm people, spending night in common restrooms, entering in places that their owners permit him to enter, eating what they allow to eat and others.

Ownership of benefit is more powerful and special because it contains on right to benefit and more.

Second, as source: both of them are different because ownership is achieved by contract.

This ownership is achieved by four contract, these are *ijārah* (leasing) *iʿārah* (lending) *waṣiyyah* (bequest of benefit) *waqf* (donation), as it is mentioned earlier (see para 24/4).

Only right to benefit is very general reason, it will be proved under the ownership of benefit due to these contracts, as well as would be proved by two other reasons that do not substantiate ownership those are:

1. The things are benefited should be allotted to whole public, or to a group nobody of them own them like rivers, common ways, hospitals for patients, and schools for students. Related rights to this thing are only to benefit, not to ownership of benefit.

2. Permission to benefit from owner, as it is explained, gives only permission and does not prove ownership.

   As we mentioned earlier, permission only subjects to consume object like permission of food and drink, and use and benefit from it (see para 26/1).

   Second type permits only to have benefits of thing rather than object, from here the term of usufruct coins out.

Third: As impact, both of them differ from each other. Ownership of benefit allows to beneficiary to use for his purpose as owner with in the limitation of contract. He is also allowed to give ownership to other to benefit.

Based on the abovementioned, our *fuqahā'* established that a tenant may rent what he/she has rented to someone else or re-lend it. Also, a borrower may lawfully in *sharīʿah* lend what he has borrowed[187] to someone else as long as the object under question is not normally changed/ruined if exposed to different users; hence, it is not lawful to do so with animals or clothes.

However, a borrower is not allowed in any case to rent what he has borrowed because the act of lending is a nonbinding contract, which means that the lender can at any point deem it invalid and repossess what he/she had lent; whereas the act of renting, on the

[187] This legislation was modified in our laws governing real estate rentals, as all the consecutive laws with regard to leases of real estate forbid the tenant from renting the estate he rented to another, except with the permission of the landlord: a prevention which carries an obvious advantage.

other hand, represents a binding contract. Thus, if a borrower is allowed to rent what he borrowed, the lender would not be able to recover what he lent, undermining his/her right to do so (see the *Majallah*, 586, 587, 819 and 823).

In fact, one who is given permission to a certain benefit (e.g. of using something) is not allowed to rent the object to someone, lend it, or grant access to another its benefit.[188] Al-Qarāfī al-Mālikī in his book, *al-Furūq* has named that right *tamlīk al-intifāʿ* (giving permission to benefit) and differentiated between that and *tamlīk al-manfaʿah* (giving ownership to benefit), since the former means that the permission given only allows the beneficiary himself to own the benefit, so that he/she is not allowed, as we pointed out earlier, to grant ownership (of the said benefit) to another.

Based on the above concept, the *waqf* of an estate for the purpose of residence exclusively by those to whom it was endowed is considered as a form of *tamlīk al-intifāʿ*; in the sense that one is allowed but only personal residence in the estate without having freedom to rent it or profit from it. However, *waqf* of an estate for the purpose of both profit and residence falls under *tamlīk al-manfaʿah* not only *al-intifāʿ*.

We find that the names we chose for the two previous matters, *mulk* (ownership of) *al-manfaʿah* and *ḥaqq* (right to) *al-intifāʿ*, are better and more expressive than the terms al-Qarāfī used to differentiate between the two, *tamlīk al-manfaʿah* and *tamlīk al-intifāʿ*, because *al-intifāʿ* means the exploitation of benefit, but *tamlīk* can connote both that and ownership, hence the two meanings cannot be distinctly differentiated.

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188 See the book, *al-Furūq* by al-Qarāfī al-Mālikī in *al-firaq*, 30; *al-Mulkiyyah wa-Naẓarāt al-ʿAqd* by Professor Muḥammad Abū Zahrah, para 22-23; and *al-Ḥaqq wal-Dhimmah* by Professor Muḥammad ʿAlī al-Khafīf, p. 75.

CHAPTER SIX

THEORY OF CONTRACTS AND ITS DECLARACY IN ISLAMIC LAW

The theory of contracts is the most important theories in this introduction. The chapter comprises of numerous sections:

1. Section on general introduction (27 and 28)
2. Section on the formation of contracts and its related issues (29-37)
3. Sections on the impacts of contracts and its related issues (38-44)
4. Section on the terminations of contracts (45)
5. Sections on types of the contracts (46 - 47)

The following outline will make it easier to better understand the relationship among the divisions above because to understand these relationships is very important to understanding the theory of contracts.

Chapter Outline

Division 1	**General Overview and Introduction.**
Section 27:	Overview and Special general knowledge
Section 28:	The Five Important Terms in Use in agreements and Dealings.
Division 2	**Formation of Agreement**
Section 29:	Required Conditions in Agreements.
Section 30:	Language to Solidify Agreements.
Section 31:	General Conditions Specially Used in Agreements.
Section 32:	The implications and derived intents in conditions of Agreements: The Parts, Hidden, Not Inclusive.
Section 33:	Forms of Agreements and Dealings (valid and invalid - jokingly forms) Problems associated with improper Agreements between the parties
Section 34:	Forcing or Coercion act

Section 35: Cheating or Deceit
Section 36: Mistakes
Section 37: Non-fulfilment of the conditions of agreement by the parties

Division 3 Implications of Contractual Agreements and Other Related Issues

Section 38: Fulfilment of the conditions of Agreement
Section 39: Ensuring Compliance with the conditions
Section 40: Issues that surround the compulsory components
Section 41: Implications of Intent in the conditions; general opinions.
Section 42: Islamic Scholars' views on the Implications of the Agreement Conditions
Section 43: Conditions of Agreements
Section 44: Agreement systems in other world views

Division 4 Valid Agreement

Section 45: Condition that can make an Agreement valid and Reasons to continue or discontinue an Agreement

Division 5 Formalising and Declaring an Agreement

Section 46: General Overview of Common types of Agreements
Section 47: General Classifications of Agreements.

SECTION 27

GENERAL INTRODUCTORY AND HISTORICAL INFORMATION

GENERAL OVERVIEW OF CONTRACTS

27/1 ***Al-ʿAqd*:** Contract is one kind of dispositions which, according to the jurist, means everything that comes from a person with his own wishes. It has two parts: actual (*fiʿlī*) and verbal (*qawlī*).

- Actual dispositions means every deed/action which does not involve utterances, for example, making property available to beneficiary, seizing a material or property, damaging or destroying a property, accepting bought items, collecting debit and so on.
- But in utterances, there are two types: Contractual and non-contractual.

Dealings with utterances that are based on contract: this is as a result of conversation between two parties which gives meaning of an agreement, for example, buying and selling, rent, partnership and so on.

Dealings with Utterances that are based on non-contract: there are two types.

1. The first type has intent and decision from the owner of the property or material that indicates some right or to cancel a right, for example, endowment (*waqf*), divorce (*ṭalāq*), freeing of slave (*iʿtāq*), freeing oneself from a compulsory commitment (*ibrāʾ*), and to exclude oneself from collective ownership (*tanāzul*).

   According to some scholars, this type is also called a contract because it can create or void rights. In their opinion, they are single party contract that resemble two-party contracts for which they were both made on predetermined desires.[189]

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[189] The Ḥanafīs preserve the word *ʿaqd* (contract) for any contract that binds two parties. They sometimes name the *waqf* as a contract.

2. Another type is the one where there is no desire to create rights or remove them, but it is among the different types with rights. For example, filing a case before a judge is a right. Or denying an opposition's case.

   This type is only verbal and does not resemble any contract.[190]

   This is what we are observing in looking at the difference between Agreement of mouth and actualization in through pictures, which is against how it was established. In the light of this, it means using mouth to an agreement but when the material is released, it signifies the actual authenticity of an agreement in the form of trading. This is how it looks like in the true picture of an agreement.

   In all the above mentioned issues, the meaning of *taṣarruf* is explained in details than *'aqd*. *'Aqd* is just a part of the areas of *taṣarruf* because it is the act of doing things as you like with mouth that is make special.

   Out of the legitimate talk of reasoning is that if something is special, it makes it compulsory. Not all *taṣarruf* is *'aqd* and not all property released is turn to Agreement in trading.

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[190] Shaykh Muḥammad Abū Zahrah says: Scholars have two meaning when referring to the word *ʿaqd* (contract):

i. Some use the word when a contract is binding two parties together, such as selling and leasing and such.

ii. The others expand the meaning of the word to include everything that a person is determined to do, such as, divorce and releasing a slave. The word contract in the second meaning, or the more broad meaning, is a synonym for the word *taṣarruf* because it includes everything that the person says legally (see *al-Mulkiyyah wa-Naẓariyyat al-ʿAqd*, para 101-102).

The aforementioned opinion belongs to Abū Zahrah, but we see that *taṣarruf* is a more general term than *ʿaqd* even in its broad meaning. That is for the following reasons:

i. *Taṣarruf* is not only about what the person says, but what he does too. *Taṣarruf* has two types, verbal and actual. Scholars use the term *taṣarruf* to indicate what a person does to his property weather it was a selling or leasing contract, or direct benefiting from the property (see *al-Majallah*, 1660-1661; *Tanqīḥ al-Fatāwā al-Ḥāmidiyyah*, 2/3-4).

ii. *Taṣarruf* itself encompasses the sayings that do not fit the concept of a contract, not even when considering its widest meaning. The examples include actions of allegations, attestations, etc; all of which are considered verbal actions which lead to obligations, but are not considered as contracts, as we have previously explained, in any way, shape, or form.

Therefore, what is most proper is what we have shown that *taṣarruf* is utterly a more comprehensive in meaning than *'aqd*.

Al-ʿUmūm wa'l-Khuṣūṣ al-Muṭlaqah is a collective gathering of something or special thing in the areas of two sets or things that have relation with two things.

27/2 Definition of *al-'Aqd*?

Upon examining the root of the Arabic word, *'aqd* which stands for 'contract', it appears to be derived from an Arabic verb which means 'to tie': to gather the two ends of a rope or a similar object and tighten one end with the other until they connect to resemble one whole unit, so that the knot is the connector which holds and binds them together.

Using that logic, the Arabs extended the meaning of *'aqd* to encompass oaths, pledges, and agreements of exchange, like selling or other forms of exchange (see *al-Miṣbāḥ al-Munīr*).

According to Articles 103-104 of the *Majallah*, the jurisprudential (*fiqh*) meaning of a contract is:

"The matching of offer with acceptance, through a legally valid manner, whose conclusion is completed on location".

According to the legal terminology in law, a contract, as previously mentioned (para 23/6) is:

"A voluntary agreement between two parties with a desire to the creation, transferral, or termination of a right" (see *Naẓariyyat al-ʿAqd* by Prof. al-Sunhūrī, para 77-80)

What is meant by the definition of a contract in both *fiqh* and law is similar; however, the first definition, in *fiqh*, is logically sharper and comes from a more precise perspective, whereas the second definition, in law, presents a clearer depiction and expression.

An explanation of the definition of 'contract' in law had been mentioned previously (para 23/6).

As for the definition of a contract according to Islamic *fiqh*, here we clarify:

27/3 Analyzing and clarifying the definition of a contract in *fiqh*

A contract, in au Islamic perspective, is a form of nominal commitment betweeu two parties as a result of concordance of their free will. Since the two desires here are iuvisible, the way to show them is through expressiug them; which is normally done through statements that indicate them in a corresponding manner by each of

the two parties of the contract. Those corresponding statements are called: offer (*ījāb*) and acceptance (*qabūl*).

Offer represents the first statement by any of the parties, regardless of who starts expressing his/her positive will to form the contract.

However, acceptance represents what is said by the other party, after the offer, to express his acceptance of it.

Therefore, the one who starts the formation of a contract is always considered to be the offeror, while the other is called the offerree; whether the one who starts a contract of selling is the seller by saying: *"I sold..."*, or the buyer by saying: *"I bought..."*; or whether the one who starts a lease is the landlord by saying: *"I rented..."*, or the tenant by first saying: *"I rented..."*; and so is the case with other kinds of contracts.

The first statement in the establishment of the agreement is referred to as the *ījāb* and the response is what is called *al-qābūl (al-Majallah,* 169*)*.

Every time there is both *ījāb* and *qābūl* in accordance with the *Sharīʿah*, the agreement is recognised as valid and to be upheld by the parties (the material upon which the two made the agreement is the reason for the agreement and the point that makes the agreement valid, which *Sharīʿah* based all judgement upon). This makes it compulsory on both parties to ensure that they fulfil all the obligations of the agreement.

Ījāb wal-Qabūl in the agreement of trade is the two statements "I sell and I buy" or what connotes these two. If one of these comes from one of the parties who are recognised in *Sharīʿah* as capable of engaging in trade, the two of them will join under the Sharīʿah on the material that they agreed to trade between themselves, the implication that follows is that the buyer collects the good and the seller collects money in return.

But in agreement of **collateral security,** it will establish some implication of the agreement which will join form the basis for the agreement between the parties, this is the right of the person who gives the loan to withhold the material until the loan is paid, and taken care of the material exactly the way he takes care of his own properties until the loan is paid or selling the property as a replacement in case of defaulter.

The property giving as replacement is the point of agreement and accepting the material is the major difference between these types of agreement among the other types of agreement. Sharīʿah

judgement comes to play when this agreement is sealed and this will be the *Sharīʿah* judgement for this agreement. This will be the foundation upon which Sharīʿah laid down and established on the material used as replacement. This is how they will be using it in the contract to be established.[191]

27/4 Comparison of the Definitions of *'Aqd* in Islamic and Conventional Views

'Aqd according to *fuqahā* is not ordinary contract of intentions between two parties but it is the way the two contracts were established. This is because there could be agreement between parties while what the *Sharīʿah* emphasises may not be present, that is, the *'aqd* is not according to *Sharīʿah* and thus not valid. The conventional view also is of the position that based on their own laws, if the agreement is not according to the laid down rules, it is also not valid.

The convectional jurists' definition, on the other hand, includes utterances not recognized in the *Sharīʿah* definition. There is no joining and there is no outcome or result. This is because the conventional view regards agreement as any decisions on dealings that is geared towards a particular outcome or benefit. The *fuqahā'* looked at the agreement based on the Sharīʿah; this is the better one that is more beneficial and clear. This is because outcome should not be the goal except to consider all right according to Sharīʿah.

The Muslim jurists are clearly different because it evidently laid down the conditions that must be present in the agreement to make it valid. These are *al-ījāb wal-qābūl*. The agreement cannot be established unless these two are firmly established between the two parties because they are the clear conditions from the parties that they used to establish the agreement.

This agreement and firmly established on the contract not on mere intention or wish but if they do not exchange the verbal interest and concretise the intention it is mere wishful thinking and an

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[191] The author of *al-Durar* said: "The intention behind an agreement (*al-'aqd*) is to join together parts *of al-taṣarruf al-sharʿī*, for example, if someone say, *'I give my daugther'* and the other part said *'I accept to marry her'*, we have seen the meaning of *nikāḥ* (marriage) in the Sharīʿah in these statements. Then, the judgement of Sharīʿah is then established that the suitor should take his wife. This is also applicable to a seller who says, *'I sell it'* and the buyer who says, *'I bought it'*, we have then seen the meaning of Sharīʿah that is trading (*bayʿ*) and the right over the material becomes that of the buyer. See *al-Durar Sharḥ al-Ghurar, kitāb al-nikkāḥ*, 1/326).

agreement is not established, just as in promise to selling that is not met by the other party, so also is the promise to exchange a material to collect loan, or promise to loan. These are not agreement until the other party responds and the agreement is concretise. The definition of the conventional includes promise in the agreement and looking at it critically it is clear that it cannot be regarded as an appropriate definition of agreement.

The definition of agreement in the conventional view is open and allows inclusion of bases that may be ambiguous.[192] This is why the definition of *'aqd* in Sharīʿah is all-encompassing and balanced in understanding in its meaning. Though, the definition of the conventional view seems clearer or easier to understand for learning purposes.

27/5 Historical Background

The foundation of *'aqd* is well known in history, especially when it comes to the issue of claim right over a property or material that is allowed for general usage.

This means that contract has existed among human beings since time immemorial. The actual time that marks the beginning of agreement can not be clearly established. It started through wish which came into being among men as result of their dealings.

Some historian said the first form of agreements, contracts or dealings is trade by barter. However, the understanding of what makes an agreement valid and compulsory in dealings as it is known today was not available in then. Later it developed into

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[192] A definition must compulsorily include all what it encompasses and exclude all that are not part, clearly. The meaning of the requirement for a definition to be complete and encompassing is that the definition should include each and every item associated with the term(s) defined and should clearly exclude all that are not relevant or not intended by the definition. The meaning of the requirement of a definition to exclude what are not part of it is that to clearly demarcates every limit not to be included in the definition, so as not to make room for ambiguity. If the definition does not include every item it intends, then it is not complete. For example, the definition of school that person defined as "as a building that the government established for people to learn". Looking at this definition, it is incomplete. It excludes schools established by private individuals and groups. If definition includes what is not part of it, it is still not correct meaning. For example, the definition of a person for school that "the house of knowledge", this definition is ambiguous as it could include library etc. If the definition includes what is not part and excludes some meaning that should he included, then the definition is incomplete and ambiguous. These are regarded as inadequacies in definitions.

compensation, for example in the case of murder because infringement on another person's right, such as killing usually led to war in those days. The compensation was established as a replacement or alternative to war. In a situation where the cnlprit was not able capable of paying the compensation, the family were given time to pay back. They also used to allow a form of replacement until the actual compensation is paid.

From this history, the agreement that made this compensation compulsory is their collective agreement on this payment of compensation.

Some other historian said the origin of agreement is the call for peace or truce among two parties requesting for intervention and reconciliation. However, religions are the most important factor that firmly established agreement as an important way of resolving dealings among human beings (see *Naẓariyyat al-'Aqd* by Professor 'Abd al-Razzāq Aḥmad al-Sanhūrī in his research on *Sulṭān al-Irādah* para 89).

'Aqd is very clear in the dealings among human beings and making decisions or intentions for an agreement firmly and establishing freedom in dealings. It has been existing among mankind prior to Islām in different forms:

a. In the Roman law, there had been some forms of agreement in buying and selling or marriage, which does not permit any agreement apart from following the their laid down rule of agreement. Some of popular forms of buying and selling in Roman law is mancipation, also refered to as the use of measure in silver scale. This is because it is compulsory to have scale and place silver on it. They also include the condition of bringing the item or good to be sold to the point of trading. This is why it is not allowed to trade except goods that can be brought to the presence of the parties. To the extent that when it was allowed to sell land, they included in the condition of mancipation that some of the sand of the land should be brought to the place of agreement. They liken it to what could be carried around. This is the way in which agreements are contracted among the Romans in history.[193]

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193 In *Deroit Romain* by Professor Munih and Professor Jīfār, both Frenchmen. Dr. Muḥsin al-Barāzī said in his hook, *al-Ḥuqūq al-Rūmāniyyah*, 2/154, "the forms of trading is a fundamental concept in Rome that is differentiated by the way they laid it down,

b. Before the advent of Islām among the Arabs, some of their trading involves cheating or oppressing of a party in the agreement. For example if any of the following happens then they conclude the agreement: making compulsory for whoever touches an item to buy it, opening the good, or throw a stone as much as you effort can take you to measure the span of land to be given to you.

27/6 The Prophet (s.a.w.) prohibited all these forms of trading. The *Sharī*ʿ*ah* of Islām came with the intention to emancipate man from all these injustice in agreement and placing the agreement on the *al-ījāb wal-qabūl*, that the two parties, both the seller and the buyer are not coaxed or against their wish. In fact, it is the satisfaction of the parties that established validity of the agreement.

In the *Sharī*ʿ*ah*, the dealing is only validated by *al-ījāb wal qabūl* showing that they agree and are happy with the agreement. This balance and justice on the parts of the two, is the foundation of the agreement. This makes it valid for the exchange of goods.[194] It is agreed that the agreement is valid.

It is agreed that using the material or product is allowed now and valid based on the following explanation. Islamic *fiqh* does not differentiate based on the availability of the item or good at the point of agreement or whether it can brought or is movable to the location or not.

Islamic law does not bind any of the parties with any condition that are not in the agreed conditions under the Islamic fiqhu except what is so important to be included in the agreement as in contribution to an societal project, or when it has to do with replacement pending the time of payment, the item must be brought in this situation or except there is an important benefit from a

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though some of these agreements include parties been satisfied and happy with the dealings, as in buying and selling, rent and partnership. They so differentiated these forms from the rest as a result of societal requirement regarding transactions.

194 *Bay*ʿ *al-Ta*ʿ*āṭī* concludes with the possession of the sold item after the price is known. For instance, somebody sees an item in a shop with a price written on it, or the price is already known and he takes it and pays the price. Hence, possession and delivery is done based on mutual consent without verbal offer and acceptance and accordingly the sale contract is concluded (see para 30/9-10).

particular condition as in seeing the witnesses in marriage contracts.[195]

Islām allows matured children and slaves to make contractual agreement once their guardian agrees and they are wise enough to understand the implication of the contracts.

In the same vein, Islām allows both male and female to engage in contractual agreement and there is no difference between these two sexes in regards to contracts agreement, especially in trading, marriage and gift.

There is no law before Islām that made this possible by removing all injustice and hindrance in contractual agreement.

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195 The benefit in seeing the witness in marriage contract and having multitude of men and women is to ensure that the marriage is made openly to ensure that it is clear that the marriage known. If it had been allowed to conduct marriage in private or hidden place, there would not have been any difference between marriage and fornication.

According to Shaykh al-Islām Ibn Taymiyyah in his *Fatāwā*, "as it is required in *Sharīʿah* that there should be witnesses and announce or popularize a marriage, this is the differentiation from fornication and this is the protection and differentiation of pious women from adulteress, and this is Islam why it recommended to beat drum and making feasts in celebrating the marriage" (*Fatāwā Ibn Taymiyyah*, 3/270-271). Futher discussion shall be discuss in para 30/10.

SECTION 28

FIVE TERMINOLOGIES OF THE CONCEPT OF CONTRACT

28/1 In order to understand the formation of contract perfectly and to distinguish within the component that made it up, it will be good to first introduce some of it terminologies as regards to the principles of jurisprudence. It is important that the terms are known here and its different interpretations are known, as it shall be referred to, under various topics in the future. The words are: Pillar – Reason – Stipulation – Restriction

28/2 (a) *Al-Rukn* (pillar)

Al-Rukn linguistically means a formidable part of a thing that holds it together. The pillars are those parts of the house that hold it building together.

Pillar, in jurisprudential term are what the existence of a thing depends on, while it is also seen as a component part of such thing (see *al-Miṣbāḥ al-Munīr* and *al-Taʿrīfāt al-Sayyid Al-Jurjānī*).

For Example, the pillar of analogical deduction, that is on which it is based, is unification and resemblance in the *ratio-decidendi* of a precedent and a current ruling. This is because, based on this instance, analogical deduction is in the resemblance of a house which is composed of four pillars. Thus, if any of these pillar is missing, it shall no more be termed as analogy. It shall be seen as a new ruling (see *al-Kashf Sharḥ Uṣūl al-Bazdawī, Bāb Rukn al-Qiyās*, 3/443).

The pillars of a contract is the communication of unanimous intentions of both the offer and acceptance or through any other thing that may stands fro the communication, as we shall see. Both intentions are fundamental to the essence of a contract. Thus, with the lawful meetings of these intentions a contract shall be accomplished and be formed just as water get formed from its elements which are hydrogen and oxygen.

In the issues of worships, *rukūʿ*, *sujūd* and the recitation of the *Qur'ān* are seen as its pillars of *ṣalāt*. This is because the essence and reality of *ṣalāt* depends on these actions.

Therefore, an executor of act is not a pillar of such act based on the terminological meaning of a pillar because, he/she is not a fundamental part of such act in its essence, although to every act there must be an actor.

Thus, a party to a contract cannot be termed as a component of the contract. However, some scholars like Imām al-Ghazālī sees him as a component of such contract because he/she is one of the two fundamental parts of the contract (see *Taʿrīfāt al-Sayyid al-Jurjānī* and *al-Miṣbāḥ al-Munīr, 'Rukn'*).

Likewise, al-Shihāb al-Qarāfī, the Mālikīs, in his *al-Furūq,* sees the consideration in a contract and the parties to such contract as component of the contract (see *al-Furūq*, v. 2; *al-Farq*, 70).

The opinion of these scholars is too loose. The reality is what we have explained. The parties to contract and the consideration are part of the contract, but based on the terminological explanation of component they are not components of the contract. Parts of contract are looser in meaning than the components of contract, because it comprises any thing that a contract cannot be formed without it, be it the parties, components or subject matter of the contract, as we shall explain (see para 29/1).

28/3 (b) *Al-Sabab* (Reason/Means/Bases)

Al-Sabab literally means rope that is hold tight by a person for the purpose of elevatation and ascendance. A method is named *sabab* because it resembles the rope.

Thus, the word *sabab* is used terminologically for any thing that is used to achieve something else or obtain it. In the Qur'ān, Allāh the Almighty said: *"And we give him every thing as a sabab (means of achievement)"* (al-Kahf, 18:84). That is, 'we taught him the means that leads to fruitful result in every thing (see *Mufradāt al-Rāghib*).

Al-Sabab as a jurisprudential terminology is, 'every occurrence or issue or thing that is connected by the law to other occurrence or issue or thing, in the sense that if it exists the other occurrence also shall exists but if it extinct the other occurrence shall no more exists'.

Example of *al-sabab* in civil and tortuous matters is that; if someone maliciously destroys the property of other person, his action will constitute *al-sabab* (cause) for him to replace such property. Another example is that, the commission of intentional murder is a *sabab* for revenge. A further example is that, blood relation is *al-sabab* (cause) for inheritance among people.

In addition, any joint ownership of an immovable property shall be *sabab* for the partners to possess right of *shuf'ah* (*actio amptio*) in the property of the other partner whenever he sells his share. Any contract that is consummated or disposed is the *al-sabab* for its legality and any rule attached to it by the law.

Al-Sabab is identified by its linguistic qnalification (adjective). Example of these are, obligation of contract, the guarantee of replacement of damaged property, the punishment of a crime, morning prayer (*ṣalāt al-ṣubḥ*) and Ramadan fasting. The word; contract, damaged property, crime, time of *subhi* prayer and the month of Ramadan are the *sabab* for the words they qualified.

28/4 (c) *Al-'Illah (Ratio Decidendi)*

'Illah (Ratio Decidendi) is the applicable exterior side of a *sabab* on which a ruling is based. Fro example, intoxication is the *'illah (Ratio Decidendi)* for the prohibition of alcohol. Cruelty is the *'illah (Ratio Decidendi)* that placed obligation of whoever damages the property of other person to replace it. The cruelty on other life by bringing it to end is the *'illah (Ratio Decidendi)* that compels vengeance on his own life. Lack of psychological stability is the *'illah (Ratio Decidendi)* that lead to prohibition of jndges to give jndgment when they are in anger, by the holy prophet (s.a.w.). In the same sense *'Ilah* may also be referred to as *Sabab.*

Al-Hikmah al-tashrī'iyyah (judicial artifice) in the rule of legality may also be referred to as *'illah.* This *al-maṣāliḥ* and *al-mafāsid* (good and wrongs) that are attached to legal orders and prohibitions. However, it will imply reward, then. Thus, force, warning and protection of life are the *'illah* (*ratio decidendi*) of punishment in this regard (*al-Muwāfaqāt,* 1/265).

28/5 (d) *Al-Sharṭ* (Condition)

Al-Sharṭ is the singular of *shurūṭ.* It is what it is referred to in a contract and obligation as stipulation of the either parties. It is like an indicator or sign that distinguishes between types of contract by spelling out the term of contracts. The word is very popular in the midst of Arab that it is use as an adage. The adage say *al-sharṭ* is binding will bind on you or for you'.

Sharṭ is jurisprudentially defined as any term that bind when term is not fulfilled but does not bind when it is fulfilled, and so it is not part of the contract.

Example of this is 'capacity to contract' it is a condition in every contract. Any party, who does not have this condition like an insane person, cannot be a party to contract.

Another example is that, it is a condition that the ownership of any sale property must be transferable. Thus, when the township of such property cannot be transferred it cannot be soled. For instance, the sale of a *waqf* or property of trust contract (endowment) is invalid because its ownership cannot be transferred.

Another condition is that a sale property must be deliverable, i.e. if someone sells an absconded animal, such contract of sale is invalid.

Based on these explanations, the absence of any of the conditions will invalidate the contracts. However, the presence of the condition does not necessitate the contract.

All the conditions are not part of the sale contract. For example, 'capacity to contract' and 'transferability of the ownership' is not integral part of the contract, because the essence of a contract is offer and acceptance. Thus, the property is just a subject matter while the parties are the actors.

Sharṭ and *Sabab* are resembled to each other based on this attribute. But they are different in the sense that the relationship between *Sharṭ* with it subject matter is in the absinthial while the relationship between *sabab* and its subject matter is both in the absinthial and in the presence.

Sharṭ is generally a supplement to the issues attached to it in the eyes of the lawmaker, i.e. the qualification of a modifier to its subject. The absence of such qualification shall adversely impact on the intention of the legal rules (*al-Muwāfaqāt* by al-Shāṭibī, 1/262-264).

The ability to deliver a sale object is an integral part of the sale contract. The delivery of the subject matter of the contract is the *sabab* for the transfer of the ownership. It is also the intention of the sale which will lead to the benefit of the other party from the contract. This is the expectation of the law in any stipulations that it must be fulfilled as such.

28/6 The scholars divide *Sharṭ* as regards to its origin into two types:

- A condition that is stipulated by the law, in which its existence will lead to the existence of other issue and otherwise will invalidate it. This is what was explained above.
- A *Sharṭ* that is stipulated by a person by his intention and his disposition. The *Sharṭ* will be attached to some of his contracts and obligations, in which if the *Sharṭ* is not fulfilled the contracts and obligation will not come to existence.

For example, if a person attached his grantorship to an issue that pleases him and said to his creditor, 'if your debtor travels today or if he did not return from his journey today I will pay the loan you have on him.' Thus, if the debtor travels or he did not return from the journey it shall be compulsory for the guarantor to pay the debt based on his *Sharṭ* / stipulation.

Another example is that if some attached the divorce of his wife with the commission or omission of an action and said to her 'if you do so-and-so thing or if you did uot do so-aud-so thing, you are divorced'. If she does such thing or she did not do thing, his stipulation shall lead to the divorce. However, the divorce shall not occur so far the *Sharṭ* is not actualized.[196]

The first type of *Sharṭ* which has it origiu from the law is called; *al-Sharṭ al-Sharʿī* (statutory stipulation). It is the subject matter of this our research.

The second type of *Sharṭ* is the one that have it origin form the iutentiou and the disposition of a person, and it is known as *al-Sharṭ al-Juʿlī* (contractual stipulation). This is because the stipulation or term is not made by the law per say. It is only inserted in a contract iu other to realize his goal and benefit.

This type of *Sharṭ* has resemblance with *sabab* because of the attachment of its subject matter to it both in existence and in extinction. In the example of the Guarantorship which is attached to

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[196] It is worth to note here that according to section 90 from the law of personal affairs year 1373 A.H. (1953 A.D.) has restricted the validity of suspending a divorce due to a condition. And it also made it illegal to suspend any divorce if the reason of the suspension is to force an action or prevent an action. With this restriction a lot of family tragedies resulting from suspending a divorce were avoided (see para 18/3).

the journey of a debtor, it will be observed that if the journey does not occur the Guarantorship will not take effect. However, if the journey takes place the guardianship will imminently occur. This is what is observed in all *al-Sharṭ al-Juʿlī* (contractual condition).

This *al-Sharṭ al-Juʿlī* (contractual condition) is not the part of this our research. It shall be discussed separately in detail in the research about consent to contract in Islamic jurisprudence.

28/7 (h) *Al-Mānīʿ* (Restriction)

Al-Mānīʿ is literally defined as, any thing that constitutes prevention of other thing to happen. As a jurisprudential terminology, it is defined as 'whatever it existence leads to the lack of occurrence of other things'.

With this definition, *al-Mānīʿ* shall be observed as an opposite to *Sharṭ*. As already discussed in the above, when its lack of existence will constitute the lack of existence of other thing, but the existence of *al-Mānīʿ* leads to lack of existence of other thing.

The example of this are; a preexisting default in a sale object, and the debt that is owed by deceased, the killing of hire to inheritance of the deceased, and the spent of time on a right or entitlement.

The emergence of preexisting default in a sale object which is not known to the purchaser at the time of the contract is a *al-Mānīʿ* that void the contract in other to save the purchaser from the emerging harm. The contract shall not be binding on him though the contract will give the option of ratifying the agreement or rescinding it.

This is because the emergence of the default necessitated the consent of the party. Thus, the binding of the contract is based on the option of choice from the purchasing party.

Likewise, the existence of debt on a deceased is *al-Mānīʿ* to the sharing of his inheritance between his hires if his property is equal in size to the debts he owes.

In addition, if a hire to inheritance kills a testator such action will create *al-Mānīʿ* from receiving his own share from the estate of the deceased.

The *sabab* for receiving a share from the estate of the deceased is his relation to him. However, if the person that murdered received a share from the estate of the deceased that means that he has benefited from the crime committed by him which should not happen.

But, the passage of time, in the legal term, is the obstacle to the listening of a court to the claim of the claimant. This is because the negligence of a person in seeking his right with any impediment, at the appropriate time will lead to a doubt that will prevent the court to listen to him.

It is a law principle that, the rule of *al-Māniᶜ*, when there is *sabab* with the presence of *al-Māniᶜ*, the *sabab* shall remain valid pending the time of the presence of *al-Māniᶜ*. However, it be enforced at the extinction of *al-Māniᶜ*. This is the basis of the legal maxim that say, *idhā zāla al-māniᶜ ʿāda al-mamnūᶜ*. That is, when the obstacle is removed the obstructed shall return to its position.

Example of this is like when an obstacle is removed from the sight, whatever is behind such obstacle will appear.

In litigation, if a defendant affirms the claim of a plaintiff, the there be no more doubt and the litigation will seized to be, then the claim of the plaintiff which is attached to the passage of time will be adopted, this is because the obstacle is removed.

In the option of default, if the default is removed before the contract is dissolved by the purchaser, like if a donkey that appeared to be sick gains it health before the sale contract is dissolved, the contract shall remain binding on the purchaser.

However, it is not all obstacles that can be removed. For example, if a hire to estate commits murder against the deceased. Such crime is an obstacle to him against receiving his own share of the estate. Thus, this type of obstacle cannot be removed, unlike debt that was owed by the deceased which is also an obstacle to the sharing of the estate. However, if the obstacle (debt) which is removable is removed by its payment, the hires shall still have their shares from the estate, because *al-Māniᶜ* has been removed.

This is a brief presentation about the concept of *al-rukn* (pillar), *al-sabab* (reason), *al-sharṭ* (condition) and *al-māniᶜ* (restriction). Knowledge of the concept are very important in jurisprudence because it is the legal road signs in judicial matter, and a student of jurisprudence needs them in his steps towards acquiring knowledge.[197]

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[197] The reseacher discovered a lot of wide scope and different jurisprudential concepts and rules in different places of the authoritative references of the jurisprudential books. Examples of this is *Sharḥ al-Taḥrīr* by Kamāl ibn al-Hammām; *Kashf al-Asrār* by Shaykh ʿAbd al-ʿAzīz al-Bukhārī, Sharḥ Uṣūl by Fakhr al-Islām al-Bazdawī, both are

OUR TERMINOLOGY WHICH DIFFERENTIATES BETWEEN *AL-SHARĀ'IṬ* AND *AL-SHURŪṬ*

28/8 We have seen in our research about *sharṭ* that *sharṭ* and sharitat are the same word in meaning. This also is the issue in the termiuology of the law jurists. Both shurut and sharitat are interchangeably used on the same meaning.

However, we have decided in this research to use *al-Sharā'iṭ* which is the plural for *sharīṭah* as a terminology for those stipulations which origin is the law or statute. This is like the 'capacity to coutract' as a condition for the validity of contract. We also use the word *shurūṭ* which is the plural of *sharṭ* for those stipulations which have their origin from the intention of the contracting parties (see para 28/6). This is like the attachment of guardianship and divorce and obligations that are made by them to the contract.

We also prefer to distinguish between legal stipulation *al-sharā'iṭ al-sharʿiyyah* and contractual stipulations *al-sharā'iṭ al-'aqdiyyah* in their understanding and impacts, because the first one is the want of the law maker while the second one is the consent of the contracting party. The first one is a law while the second one is a disposition. They should be differentiating in their nomenclature.

Our future discussion on this research shall be based on these terminologies.

28/9 What is let from the general concept of contract in our discussion is the subject of 'formation of contract'. We have decided to discuss it in the rear part of the research in other to finish discussion on some of those aspects that will lead to its formation.

Thus, we shall now switch to the discussion of the subject matter of the research since the fundamental had been discussed in the introduction.

The subject of discussion in the concept of contract is symbolically divided to three types. (1) The formation of contract and related issues; (2) The obligation of the contract and related issues; (3) Defaulted contracts. This subject shall be addressed one after the other in the following arraignment. The readers are admonished to review the concept of contract that we discussed prior to chapter 27.

Ḥanafīs. Other books are al-Muwāfaqāt by al-Shāṭibī; *Anwār al-Furūq* by Shihāb al-Dīn al-Qarāfī. Both of them are Mālikīs.

SECTION 29

COMPONENT OF CONTRACT[198]

29/1 Contract is one of the *Sharī'ah* issues that are govern with certain rules. This is meant by saying that 'contract is an origin of obligation'.

This is defined as a 'collective administrative work which is based on mutual consent and binds the parties to it with its *Sharī'ah* rules, which the rule of obligations that contract applies in certain issues'.

Contract depends on four rules which must be available in any contract. The components are:

- The contracting parties, which is called 'parties to contract.
- The snbject matter of a contract
- The type of the contract
- The pillars of the contract

ONE: THE PARTIES TO CONTRACT

29/2 The parties to contract might two separate individuals or more. For instance, in the case of *takhāruj* (in Islamic Law of inheritance), whereby a group of the hire will enter into contract with one of them, that they will pay him certain amount of money if he can release his own share of the estate to them. Then, each of the

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[198] The pillar of a thing in language is such thing stands or lean upon *(al-Miṣbāḥ al-Munīr)*. We prefer its usage here as the fundamental component in which no contract can exist without it. The component might be technical in the formation of contract such as offer and acceptance, or rational to the contract such as the parties to the contract and the subject matter of the contract. These pillars are not legal conditions *(al-sharā'iṭ al-shar'iyyah)*, they are only complementary attribute they are not conditions, because *sharā'iṭ* (conditions) are attribute that are mandated by the law maker in the contract as fundament issues to the contract. Examples of these are special capacity in a contract, and special requirement in the subject matter of a contract. The legal condition, are those issues that is possible for a contract to occur without them should they not be mandated by the law maker. The law maker makes them mandatory in a contracts based reason best known to Him. I contrast, this is not the issue in what we named as the component of contract, such as the parties to contract, and the subject matter of a contract, a contract cannot occur without them.

group will receive a share of such estate in according to the ratio of his contribution in the money that was paid.

The parties to contract might be the real owners on the contract or their preventatives, agents or their will administrators. One of the parties might represent himself while the other party is represented by an agent or so.

TWO: THE SUBJECT MATTER OF A CONTRACT

29/3 The subject matte of a contract is the object or thing or which the contract based and it rules depends. Example of this is the sale property in a sale contract, gift object in the contract of gift, the guaranteed debt in the contract of guarantee, and the mutual cohabitation in marriage contract, and etc.

Subject matter of a contract is governed by certain rules in which we shall discuss in the rule of validity of contract.

THREE: TYPE OF CONTRACT

29/4 What is meant with types of contract are the aim and objective of such contract. This is the intention on which the contract is based.

This aim is only one in contracts it never deviates; it only differs with the types of contracts. For example, the aim of contract in any sale contract is the transfer of ownership of the sale object to the purchaser on a certain consideration. The aim in any contract of gift is also the transfer of the ownership but without consideration. Likewise, the aim of all contract of usufruct is the transfer of the usufruct (services) on consideration of certain wages. In addition, the aim of the contract of *iʿārah* (unilateral loan) is the transfer of the benefit without consideration, and etc.

This why we said: "The type of a contract is the aim and objective of such contract".[199]

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[199] In certain contracts the subject matter of the contract might be intermingling between the type, the subject matter, and the parties to the contract. Example of this is the contract of marriage. It subject matter is the mutual cohabitation between the couple whit the aim of subsistence. The type of the contract is the transfer of the ownership of this cohabitation, which is the right of enjoying the conjugal relationship. That is why scholars defined it as the contract of ownership of cohabitation *(al-durar al-nikāḥ).*

However, since the aim of the cohabitation is the subject matter of the subsistence, they also say, 'the subject matter of the marriage contract is the woman based on this argument. However, its actual subject matter is the mutual sexual cohabitation, it is

It is with this that the typical aim of the contract is distinguished from the individual aims of the contracting parties.

The reason or rationale behind the sale of certain property by some people might be in other to received a money to finance other project, or because he did not need the object any more, or because he is looking for profit, or because he wanted to dispose off the property so the a creditor or the hire to his estate will not benefit from it, and etc.

The rationale behind the contract might differ from one contracting party to other but the aim of the contract can only defer based on the type of the contract, as it was already explained.[200]

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not the woman per say. Otherwise, marriage contract will contain a subject matter of the contract and only one party to contract.

200 The validity or non-validity of the aim of contract or disposition is very important in most contracts and their rules in the eyes of the scolars. This contemporary judicial reasoning affirmed (see *Naẓariyyat al-'Aqd* by al-Sanhūrī, para 544-548).

However, Professor Dr. Shafīq Shaḥātah says in his book, *al-Naẓariyyat al-'Āmmah lil-Iltizāmāt fī al-Sharī'ah al-Islāmiyyah* (para 48): "Actually, the jurists did not consider motive or incentive anytime; even they said selling will be valid, even though, the purpose of selled product is not valid".

Although, it is very obvious that this rule is not valid in general, even according to the *fiqh* of the Ḥanafī which is made base of research by the Professor?

The Ḥanafī jurists stated on issues that allude they approve validity of motive and invalidity of it in some contracts.

As they stated in *Ijārah*, if anyone hires a servant to demolish building, than he changed his intention to not demolish, in this case he can repeal Ijārah with this excuse. In contrary, he repeals *Ijārah* because he got another cheaper servant than him or wanted to demolish himself, in this case *Ijārah* will not consider repealed.

As well as, they stated in the chapter of cnltivation – this is kind of share in cultivation in which one person has land, second one provide labor – in this case, who will sow seed can repeal *Muzāra'ah* contract before sowing otherwise there is waste of wealth in terms of sowing, therefore, he has right to repeal contract. We will pass from this in chapter of non-compulsory contracts (see para 40/7 (2)).

But he wants to repeal *Muzāra'ah* because he got someone is willing to cultivate on less portion, or wants to work himself, so he does not have right to repeal (see *Radd al-Muḥtār*, 5/177)

These are some examples of jurisprudence - as you realize obviously - concern about motive and its legal and illegal impact on contracts according to our jurist.

Even illegality of motive in contract invalidate contract in some schools of jurisprudence if origin of contract is valid. This is very famous and controversial topic in the Science of principal of Islamic jurisprudence. It is exactly like marrying three times divorced woman, his motive is not to live with her as being married couple. But it is to legalize her for his first husband, like selling weapon to aggrasorsan and disobedient or selling juice for making alcohol and other controversial issues. Imām al-Shāṭibī explained this principal and differences of the scholars and its impacts and limit, more than one time in his book, *al-Muwāfaqāt* (see *al-Muwāfaqāt,* the seventh issue in second kind of conditions, 1/274-280 and third issue in chapter of *Maqāṣid al-Mukallaf,* 2/333-337).

29/5 It shall be understood from the above that the aim of a contract based on the property, is the same thing with what scholars call' the rule of contract', that is it reward. Thus, the type, aim and rule are all the same thing. It is only the nomenclature that defers because of the angle from which it is viewed.

The aim of contract of sale is the transfer of the ownership for consideration. If it is the viewed from the angle of the contracting parties, the aim shall be achieving the goals of the contract. Then if it is viewed from the side of the law maker, it shall be seen that it is the rule and the based on which the law is based as the outcome of the contact after it occurrence (see para 27/3).

FOUR: COMPONENTS OF CONTRACT

29/6 The components of contract, that is the parts that made up a contract is two things: The offer and the acceptance, and both are the factors that lead the formation of contract are earlier discussed.

Thus, offer and acceptance are both legal factors of which are attached to the parties to the contract and through it their intentions will become bind on them as an obligation which must be fulfilled under law.

Offer and acceptance are also referred to as the term of the contract', that is the statesmen that meet and indicates the agreement of the parties (see para 28/3).

This statement is attached to very important jurisprudential rules that shall be discussed latter in the next chapter.

This point links to the code of *Sharīʿah* "deeds are by objective" this code is inferred by the saying of the Prophet (s.a.w.): *"Deeds are by intentions, for everyone is what he intended"* (see footnote para 2/10).

Yes, scholars have different opinions in the concept of motive and its impact. Sale of debtor his all property to go away from creditors is right according to the Ḥanafī *fiqh* when he is not declared to bankruptcy, because debt relates to his security. His assets are free. If every buyer knows about his debt, he will be in trouble that *Sharīʿah* refused it.

However, modern Ḥanafīs gave opinion in *waqf* to not validity of debtor's waqf that is equal to his debt, unless creditors permit him. It is, therefore, debtor cannot go to donate his property with the motive of hidden from creditor (see footnote para 15/6 and 38/5, 65/5; *Radd al-Muḥtār*, 3/395-396).

SECTION 30

TEXT OF THE CONTRACT AND RELATED MATTERS

What should be fulfilled in the wording form of the Agreement/Contract - holding the agreement in writing, with symbol and signification - two kinds of significations: dealing and situational language - real estate contracts.

FIRST ISSUE: THE TEXT OF THE CONTRACT

30/1 The origin of the meaning of contract is agreement of two wishes, that is mutual consent, and the wordings are nothing but translation and expression of the two concordant desires.

And since wish is among the hidden matters, and contracts have results of great interest in finances and works, Islamic Jurisprudence compels manifestation of the two desires in an indubitable clear form; that is, it should be completely stated in the wording form expressing both the affirmation and acceptance, and three fundamental matters:

- Clarity of meaning
- Agreement of affirmation and acceptance
- Deciding/Asserting the two desires

Here is explanation of these aspects:

30/2 First: Clarity of meaning in the text of the agreement

What is intended by clarity of meaning in the text of the agreement is for elements of used words for affirmation and acceptance in every agreement, to indicate clearly familiarity with the kind of intended agreement for the contractors. Because agreements differ from one another in subject and laws, if it is not certainly known that the two stakeholders have intended a particular agreement, then it is not possible to abide by its particular principles.

In the event of exchanging money with money, it is compulsory to use the word "sale" or what connotes its meaning in giving possession of cash with a replacement.

In the event of exchanging a benefit, it is compulsory to use the word "renting/leasing" or what connotes its meaning in giving possession of a benefit with a replacement; and so on and so forth.

There is no difference after this between if the connotation of the word on the intended agreement is real or figurative, clarity and understanding will be achieved through the two ways of reality and figurative.

When the used word in affirmation possibly connotes one of the agreements/contracts where one of both is stronger and more binding on one of the stakeholders, and the other is less strong and less binding, certainly it will be applied on the less strong so as to follow certainty, as it is not easy to compel one with conditions of agreement that is not intended for a binding contract (see *al-Durr al-Mukhtār*, v. 5, *Kitāb al-Īdāʿ*).

Based on this, the words of *al-kināyāt* (metaphors) is one of the agreements need in contracting it, a context indicating that the holder of the agreement has intended with that contract, because the metaphorical word connotes it, just as it may signify something else. Hence, there is a need for a weighty proof, which in this case, is the context.

Thus, sale becomes valid with the word *al-hibah*[201] (gift) accompanied by price, whereas one of the two (seller and buyer) will say: "I gave you this for so and so price, and the other would accept" (see *Fatḥ al-Qadīr*, 5/458).

In the same manner, it is marriage contracted with the word of gift or its equivalent that will connote permanent possession when it is accompanied with dowry, such that the woman for example would say to the man: I surrender myself to you for a dowry of so and so amount, and the man would accept (see *al-Hidāyah* and it's commentary, 3/105-108).

That is because mentioning the price or the dowry is a context that makes the word gift clearly indicating the intention of sale in the first instance, or the intention of marriage contract in the second instance, since consideration in contracts/agreements is given to intentions and meanings not to words and structures, just as that

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[201] The word gift is considered as a clear/straight signification that needs no auxiliary context when is used to imply giving free possession without a replacement. However, when it is used in the instances of sale or marriage contract, it is considered as a metaphor indicating the two, hence, it will require a supporting context to indicate that they mean with it an intended contract in sale or marriage.

popular golden principle stipulates in Islamic jurisprudence (*al-Majallah*, 3).

If a person says to the othesee I carry you on this animal, I allow you to leave in this house, or I assist you with this amount, take it. This is not considered a gift except there is a context that indicates intention of gift, such like if the person says I gave you the possession. Otherwise, it will be baseless in the example of house and animal, and it will be a loan in the example of a sum of money, if we apply it on the simplest possible connotation of the word, as said earlier.

Also, if he says to the othesee take this thing from me, if the purpose of gift shows, then it is a gift, and if not, it is a trust that must be safeguarded for its owner.

30/3 Second: Correspondence of Affirmation with Acceptance

It is compulsory that acceptance should correspond with affirmation from all perspectives; if it disagrees with it, then it is not regarded as acceptance, hence the contract shall not be binding.

If for instance, the seller affirms sale of an item for a price of 100, and the buyer agrees to pay 90;or if the lease giver affirms 50 pounds, and the leaseholder agrees to pay 50 pounds but at a postponed date, contract/agreement is not valid with this acceptance.

It would be considered also as a breach of contract, breaking down the transaction (deal) with acceptance, even with safeguarding the percentage of the replacement. If the seller affirms sale of a sheet of cloth, or a quantity of wheat for a particular price, and the buyer now agrees to take half of the item for half price, the sale is not valid for violation of the principle of acceptance and affirmation, because the seller may likely not agree with the buyer on purchasing part of the goods and leaving the other part (see *al-Majallah*, 1777).

However, a disagreeing acceptance does not render the sale null and void, rather it is good to build upon it, and the other party may likely approve of it. Thus, a disagreeing acceptance is considered as a new affirmation that requires, in contracting the agreement on its basis, an acceptance from the other party, who is the affirmer. The recipient now becomes the affirmer, while the affirmer becomes the recipient.

On the condition that if the acceptance does not correspond the affirmation, it is certainly a disagreement for good in all aspect in relation to the affirming person, no impediment should stand against

contracting the agreement, because it is really not a disagreement. It is rather an improvement in agreement, and consideration should not be given to pictorial form but to the essential intentions.

If the buyer affirms purchasing with ten pounds and the seller agrees with less than that, or the seller affirms with ten pounds and the buyer accepts to purchase with much than that, that in reality, would be an acceptance with the sum contained in affirmation and abiding by reduction in it or addition in it for interest of the affirming part. The sale will thus be valid with the price determined by the affirmation, and abiding with decrease or increase will be based on consent of the affirming part. Because the principle: that reducing from the replacement and increasing it for interest of the other party, will both be based on his consent (see *Radd al-Mukhtār,* 4/19).

However, if the disagreement does not bring about any better improvement from all aspects, as to say it brings a merit in aspect and not in the other, the contract shall not hold except with the consent of the other party, like when there is disagreement from every aspect. Such like say if the seller affirms selling for 20 pounds and the buyer accepts with 40 pounds as credit for one month for example, the contract will not hold, rather the differing acceptance would be considered as an affirmation requiring an acceptance. That is because if the accepted price is increased in value, the need of the seller or his desire may be for the urgent money. That is in the area upon which there is disagreement, such that his purpose will be defeated.

30/4 Third: Sealing the two Wishes

This means that the text of affirmation and acceptance should be useful for decision in contract in a form that has neither hesitation nor delaying. Otherwise, the intention of interconnectivity becomes disproved because there is indecision in the case of rejection.

It is clear that if the signification of the text on occurrence of connection and contract is nonexistent, then there is neither contract nor commitment. On this, the jurists affirm that promise of sale does not make sale binding and does not make any payment compulsory for its holder.[202]

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[202] It is observed here that the items 220-227 among the real estate laws of Mālikī school earlier with us of number 3339 has ruled that promise of selling a real estate is binding on the one making the promise as it occurs with provisions and regulations

Moreover, part of the form of promise is for the expression of affirmation and acceptance to be accompanied with an article of delayment and postponement, such as letter "siin" or letter "*sawfa*". If the seller says to the one asking the price of a commodity: I will sell it to you for so and so amount, or if the customer says: I will buy it later, the sale is not valid with that even if the other party completely agrees[203] (*al-Majallah*, 171).

30/5 The general form which the jurists favor in affirmation and acceptance for indicating decided intention is the form of past tense, such as: *"I sold and I bought, and I mortgaged or I leave for mortgage, or I give out in marriage and I marry…"*.

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specified by the mentioned law which necessitates compulsory registration in the real estate in the name of the person promised if it claims this on the owner who is abstaining from his promise. Juristical law that a promise of contract is not binding has become in our country modified with this constitution in the case of real estate. The reality is that promise of real estate sale as stipulated by the mentioned constitution is in reality is a pledge from the owner to sell when he seeks an interested buyer within a particular period, this pledge would be agreed upon by the two parties, and it is not a mere promise. Then, came the Syrian civilian constitution which appeared within the third edition of this approach, hence, it generalized this law on every promise of contract, and he considers it binding for the promise maker if all the conditions set by the mentioned constitution is met whatever be the kind of promised contract. It is clear that marriage contract does not fall under this generalization, because it follows the constitution of personal situations which does not make promise of marriage binding.

203 It will be observed in this situation that contract may existence of a contract may occur suspended in the presence of a condition, just as a guarantor leaves his guarantee in suspense on the journey of a debtor by saying: if he travels, I have guaranteed him. The contract may be additionally held to the beginning of its law in the future, just like say a person renting out his house, for the rent to start from the beginning of next month. The contract can also be binded with a choice for either of the parties, like say if they both make oath of allegiance that the buyer should be given choice for three days within which he would have the right to reject the sale and return the commodity, this is called: the choice of condition (see para 3/7, the ninth). Suspension or addition are in contracts in contracts that allow the two, also there is choice of condition in contracts that fall under it does not negate compulsorily existing decision in the expression of the contract, as it is not hidden. Desires of the stakeholders in the suspended contract or the added or the one in which choice is given is finalized and is not like the wish of the one promising sale or saying: I will soon sell. But the suspended contract is decided on the part of the contract holder not in the present situation, but rather in the existence of external condition upon which it is suspended; the added contract is decided for the present situation, except for the fact that the beginning of its law is delayed to a particular time. And contract with choice is also finalized at the beginning of its holding. The choice is nothing but a given right to one of the stakeholders in breaching a standing contract/agreement. All of that does not negate decision of the intended meaning here in the expression of the contract/agreement.

In addition, the word, *"I accepted or I consented"* or whatever connotes their meaning, after mentioning the affirmation, suffices and makes unnecessary repeating what had earlier been said in affirmation.

Even as the form of the past tense is not a condition, but it is better than others for the fact that it indicates decided composition in the instance of contracts/agreements.

If the two parties express their intention with present tense intending the present situation with it, the contract holds; like if he says: *"I will sell it to you now"*, and other says: *"I will buy now"* (*al-Majallah,* 170).

Example of that in conciliations is every expression clearly revealing the determined intention of the stakeholders in composing the agreements according to subjects of every contract.

In contracting a sale, if the buyer affirms a purchase with his words: this is upon me with a thousand, and the seller says: I accept, or the seller affirms sale with his word: it is for you at a price of 1000 if it fascinates you or if you want it, and the buyer says: I like it, or it fascinates me or I want it, the sale will be valid with all these expressions (see *Fatḥ al-Qadīr* by Kamāl ibn al-Hammām, 5/458-459).

To the extent that the jurists consider the command form and other expressions as sufficient if they informs about affirmation or estimated acceptance connoted by the meaning, like if he says: *"I purchase this from you with so and so"*, and the owner says: *"take it"* or he says *"may Allāh bless it for you"*, that is because it carries the strength of his statement: *"I sold it to you, take it"*. They have based the agreement on the estimate/value signification (*al-Majallah,* 172).

But affirmation or acceptance itself will never be in the form of commandment. If he says: *"sell for me or rent it to me for so and so price"*, and he says: *"I sold it or I rented it to you"*, the agreement does not hold with that until the order giver accepts, because order here is just ordinary request and charging (see al-*Majallah,* 172).

They have particularly exempted marriage contract, and they affirmed in it validity of the marriage contract if the man says to the woman: *"marry yourself to me"*, or he says to her guardian or caretakesee: *"marry so and so lady to me"*, and he is answered: *"I married her to you"*.

There is among them who consider the commandment here as affirmative in a way of exemption from the principle. There is among them who consider it as authorization, so the second party, by his

answer would be responsible for both sides of the contract by principle of this warrant.

Even if this principle is generalized today, and the commandment form is considered as affirmation in all the contracts as found in marriage contract, it would have been good, in view of the fact that peoples' custom is focused on it, and custom in that is legally recognized.

THE SECOND ISSUE: WRITING, SYMBOL, AND SIGNIFICATION

30/6 This being so, pronouncement with the tongue is not a necessary way of showing contract intention in a decided form in the view of jurisprudence. Rather, pronouncement is the basis for eloquence, but other necessary or chosen means could replace it among those means that can possibly express a decided intention, in a useful, sufficient expression.

On this, the Jurists affirmed that one of three other means will stand in place of pronouncement in affirmation and acceptance, they are: writing, the sign of a deaf/dump, and deal/engagement (*al-Majallah,* 173-175).

30/7 First: Writing *(al-Kitābah)*

Writing between two absent people is like making speech between two present people, on this consideration, the juristic principle is laid down saying: *"writing is like speech"* (*al-Majallah,* 69).[204]

It is conditional in writing for it to be considered that it should be clearly stated/stipulated.

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[204] What is meant by book/writing in this situation is the speech in which is written the expression of affirmation or acceptance, directed from one of both parties to the other. For example, he can write to the othesee I bought from you so and so with so and so amount and the other party will write: I have accepted, or I have sold for you what you requested with the amount you mentioned, and etcetera; this would does serve as if though both have verbalized the agreement in speech (see *al-Ashbāh,* v. 2, *al-fann* 3, p. 196, and *Fatḥ al-Qadīr,* 5/461-462). What is meant here is writing of cheque in which both parties will write the agreement/contract and they will sign it, certainly, the writing of cheque is not what we are treating here. This is because cheque is not among ways of holding agreement by writing. Rather, it is a marked confirmation of occurrence of agreement/contract. That is cheque is an established bond, and not a composed expression.

- The meaning of its being explicit is that it should be written on something that will reflect and confirm it. Thus, writing in the air would not be considered; or writing on the surface of water.
- Moreover, the meaning of its being stated is that it should be written in the familiar way of the script of their time and its traditions. That is the writing should be released in the name of the sender and the recipient,[205] or stamped from the speaking sender, and it should during our time on a paper not on items like bone slates, and animal hides and skins, or tree leaves among other things used for writing in the ancient time.

The juristic view on affirmation and acceptance with writing is that its application would not commence from the time of writing the expression, but rather after delivery of the document and reading it. Only then will the expression take effect, and the affirmer would be considered affirmer and the consenter be considered consenter.

This is in contracts and agreements, not in dealings that do not depend on knowledge of the other party and his consent i.e. divorce and setting a slave free. Certainly, such dealings, if they are written with conditions duly fulfilled or clearly stated and documented, like if someone writes to his wife a letter saying in it that: you have been divorced, she must take the writing into effect immediately the letter is being written and divorce shall instantly take effect. It will not be delayed until arrival of the letter and reading it.[206]

30/8 Second: Symbols or Sign *(al-Isharah)*

The sign language of the dumb will stand in place of speech with the tongue by consensus of the jurists. If he does not know how to write, in all his verbal relations in which he may have understandable, familiar sign being accustomed to by the people, be it that which has to do with contract like sale, purchase, and marriage, or it be sole

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205 It should be noted that at present times, it is enough to release the latter on the name of the recipient only with the name and signatures of the sender at the end of the latter as it is the customary practice nowadays.

206 Nevertheless, if in the writing, divorce has been suspended till the letter arrives like say if the man writes to his wife: if this letter reaches you, then you are divorced. Divorce thus, will not be effected until the letter reaches the wife, as it is provided in the laws of contracts. In addition, check the laws and conditions for writing (see *Radd al-Mukhtār*, 2/428, and the *Ashbāh* of Ibn Nujaym and the footnotes of al-Ḥamawī, v. 2. *al-fann* 3, pp. 196-197).

composition on giving possessions such as will to a philanthropic and endowment department, or in omissions and cancellations like divorce, and discharging and acquitting a person of obligation, and cancelling interceding, or other matters different from all these such as claims, confession and swearing to an oath. Based on this, the following principle was laid down: *"Accustomed sign of a dumb is like explanation with the tongue"* (*al-Majallah,* 70).

However, if the dumb can write, the overwhelming view juristically is that his dealings are can be fair except by writing, because in signification, it is like speaking. But sign is less than writing in meaning, hence using sign will not be allowed in the presence of ability to write.

If the dumbness is not original but temporal, that is in the case of a tongue-tied, the prevailing view among the jurists is that if he does not know writing and he has a familiar accustomed signs for expressing his intention, his signs would be acceptable in his dealings and relations if the fetters on his tongue remains till death.

Based on this, his dealings by using familiar signs will remain until his death. If he dies, with his fettered tongue, his relations will stand relying on the date of its appearance, meaning that it will have a retrogressive impact.

There are among the jurists who see that consideration should be given to the lasting of the tongue shackles for a whole year such that he would now be after that like an original dumb. Hence, his familiar signs would now be accepted, and would be spontaneously effective.

This is more direct and more preventive of sin. The first view contains a great offence; the life of a person whose tongue is fettered may extend for decades after his predicament. Thus, it is not right to stop his relations/interactions all through that time whereas he has formed a familiar sign to which people have been accustomed (see *Radd al-Muḥtār,* 2/425).

Explanation of the juristic view on the sign language of a dumb and a tongue-fettered person will come in our discussion about the earlier mentioned principle in the section three of this part.

30/9 Third: Signification *(al-Dilalah)*

However, by signification, is meant that the tying of the contract should be implied from an action that suggests agreement, and which would express its execution or it would be implied from a situation that calls for the holding of the contract.

There two forms under the tying/sealing of the contract by signification: they are engagement and situational language.

30/10 (a) Reciprocity/Interchange *(al-Taʿāṭī)*

Nevertheless, commitment is taking and giving, or practical exchange indicating exchanging of two desires and mutual consent without pronouncing out affirmation or acceptance (*al-Majallah,* 175).

That is like say, a person sees a commodity in a shop and the price is written on it, or that the price is already known, or that he asks the owner about its price and he explained to him. Therefore, he takes it and gives the seller the money, and he takes the commodity from him contented without uttering the two words of affirmation and acceptance. Certainly, the sale is valid between the two with this give and take, as both have stood in the positions of affirmation and acceptance in signifying exchange of decided desires in tying the replacement.

In sealing contract with engagement, it suffices that giving should occur from one side. That is taking should only occur on one of the two replacements in sealing exchange as it is provided in the juristic views. Such as when a buyer asks about the price of a commodity and then pays the price to the owner and takes this item from him and then promises to surrender the sold commodity after that. Surely, the sale has been transacted, and each of both has been bonded even if the price changes after then (see *al-Majallah,* 175 and *Radd al-Mukhtār,* 4/11).

It is considered as engagement the taking of the seller from the buyer a change without uttering the word of affirmation and acceptance, sale will be validly transacted with it, and none of the two can withdraw after that. This is because the change is considered as part of the price.

It is also possible to be considered as a kind of commitment today the accustomed way in contracts that are termed as **compliance agreements** in the modern law language such as partnership iu electricity, water, gas, telephone and etcetera. A writteu application and establishmeut of a specialized organization shall complete all,

from a company or a city or a governmental circle, with necessary supports and providing required benefits.

An example of that today is the riding of people in buses, and issuing tickets for riding the train or for entering cinema etc. Other examples are delivering magazine or newspaper to their customers.

Engagement shall apply on token and substantial amount of money. That is on commodity of cheap and expensive prices. Just as it's is allowed in bread, charcoal, and firewood, and stone and other commodities among the cheap irrelevant commodities, it also will apply to diamonds, and precious stones of expensive price.

If a person sees a necklace of diamond with a jeweler and he knows the price, and pays it, and the jeweler now surrender the necklace to him, sale has been transacted between the two without talking.[207]

Engagement is applied among our jurists on sale contract and related matters among replacements such as rent, and exchange and dismissal from service. Example of that is also contract of reconciliation on money and distribution. All fall within the meaning of replacement.

It is applied also on other than replacement such as lending and gift (*al-Majallah* 804 and 839) apart from the fact that no Islamic analogical deductions are based on following the process of commitment in marriage contract. Because marriage has, a religious consideration connected to faith in a way legalizing marital enjoyment that nothing can enrich away from talking. Just as the law has a view in distinguishing legal marriage between a man and a woman from illicit affair in a way that nothing can clear away

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[207] Analogical deduction of al-Shāfiʿī originally states that sale cannot be transacted without talking, but their successors legalize it due to its widespread and the need for it in token amount of money, or in cheap commodities as against the expensive ones. The Mālikī and the Ḥanbalī schools of thought are just like the Ḥanafī school in the issue of engagement/commitment. It has been reported of Mālikī that he said: "Sale will be validly transacted with what people intend in their minds of sale". Muwaffaq al-Dīn ibn Qudāmah al-Ḥanbalī in legal reasoning about engagement/commitment said in his book, *al-Mughnī* what reads thus: "For us: certainly Allāh has made buying and selling lawful but He did not explain how. Therefore, is is compulsory to return in it to custom as they return to it in the case of collection and earning. The Muslims are on that in their markets and sales. The use of the term affirmation and acceptance was not taken from the Prophet (s.a.w.) nor from his companions despite the occurrence of many sales among them. If they used it, it would have been widely transmitted, and if it was conditional, its transmission would have been necessary". Ibn Qudāmah has brought in this situation a precious speech and understanding, check it out in *al-Mughnī* and *Sharḥ al-Kabīr*, v. 4, the beginning of *kitab al-buyūʿ*.

ambiguity from its path except verbal contract. Because if engagement has to hold in marriage without verbal pronouncement, the kind of intended relationship in it may not be clear; is it a marriage or mere friendship as has been pointed out earlier (see para 27/6).

Writing will fall under verhal talking and it would be considered as valid in contract between two absent persons. However, pronouncement in affirming and accepting marriage contract could be real or figurative: marriage therefore, will be contracted for example with the word gift, and with every other word signifying the meaning of giving a lifetime possession. Like when the woman says to the man: I gave myself to you on a dowry of so and so amount, and the man accepts in the presence of witnesses. The marriage contract would be considered valid as earlier pointed out (see *Radd al-Muḥtār,* 2/271).[208]

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[208] The sage Shihāb al-Dīn al-Qarāfī al-Mālikī has documented in his book, *al-Furūq,* a supporting research on the difference between sale and marriage in terms of contracting with engagement in the first (sale) and not on the second (marriage) and he gave explanation about schools of jurisprudence and their evidences on that. He said: "These varying texts of the scholars, no one talked in it about engagement or commitment in marriage as they discussed it in matters of sale". Al-Qarāfī has spoken at length in his book, *al-Furūq,* so did the author of the book, *Tahdhīb al-Furūq* printed on its footnote in finding reasons for this difference (see *al-Farq,* 157 from the book, *al-Furūq,* 3/143-145 and 180-182).

I say: The essence of legal wisdom in refusal to apply "engagement" in marriage contract will appear in returning to the principle established by the jurists, it goes thus: "Permission and spending are both applicable on money/properties and not on sexual enjoyment" (see *Kitāb al-Daʿwah fī Radd al-Muḥtār,* 2/334 and *al-Badāʾiʿ,* 6/2227). That is because the legal condition in making money of the other person lawful is the pleasure of its owner to spend it freely or with a replacement. If someone makes his money lawful for a person, this money becomes the right of the person.

In contrast to say when a woman makes herself lawful to a man, this does not make enjoyment lawful between the two. Rather it is forbidden incest. On this basis, engagement suffices in contract of money exchange; because consent on spending out of it is the distinction hetween the two situations of taking the money rightfully or falsely. Engagement signifies this consent in a form no less indicative of the word affirmation and acceptance, so that legal intention will occur with it.

Nevertheless, sexual enjoyment relation between the two sexes of man and woman has two situations: one is legal, and it is by marriage, the other is a forbidden sin, and it is through mere friendship and incest.

All the dangerous products of marriage in money, relations, and other rights of the family would all stand valid in legal situations, and would be condemned in forbidden situation.

It is clear that the two situations, that is marriage and taking woman for friendship, one resembles the other outwardly; and consent is not the distinguishing factor between the two situations. Because it is available each of the two and it is not

30/11 (b) Situational Language

However, sealing contract by situational language is just like say when a man leaves his commodity in the hands of another person and now goes away, and this other person keeps silent and does not deny him watching over the commodity. Surely, the contract of entrustment will occur between the two by indication of the situation. Such that the person to whom the commodity is given would become charged with the responsibility of keeping the item and would be held responsible if he fall short of this responsibility.

If a man leaves his property in front a congregation, they also all become entrusted. If they now stand up and leaves the place one after the other, watching over the property becomes the sole responsibility of the last person at the place. If he rises up and leaves the place, and leaves the property behind until it gets lost, he shall guarantee the property for the owner.

Likewise, if for example a man enters a caravansary and asks his ownesee where will I tie my ride and the owner shows him a place and he ties down the animal there and goes away, entrustment has occurred by evidence. The owner of the caravansary thus becomes charged with the responsibility of watching over the animal, and will be held responsible if he falls short in this responsibility (see *al-Majallah*, 773).[209]

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sufficient in this relationship between the two sexes. Mutual consent is enough in money exchange because spending and permission occur in it as mentioned earlier.

If commitment is right in contracting marriage – for a man to give a woman a certain amount of money as dowry with intention of marriage, and for the woman to now follow him without both of them pronouncing the word of marriage contract, for both to now live together as husband and wife – there would not have been found in this in this engagement a clear indication better than mutual agreement to live together. But the intention of marriage cannot appear to onlooker with this engagement. Mere mutual consent to live together is not enough to differentiate marriage from incest as earlier explained. Rather, mutual consent has to reflect the purpose of legal marriage and bearing its legal consequences. However, this purpose cannot appear in a clear form except through verbal expression.

As a result, Islamic analogical deductions unanimously agreed that marriage contract with engagement is not valid without verbal affirmation and acceptance, since marriage contract is the only contract in which Islamic law compels a kind of formal documentation for its validity by making witnessing conditional. It recommends publicizing it to broadcast its news and to allay doubt about the living together of the man and the woman for a shared life whose basis is not known as earlier explained.

209 We have termed this kind of signification as *"situational language"* taking from the essence of their speech. Thence, we classified contract by indication into two: sealing contract by commitment and by situational language as you have seen; because

30/12 The summary is that contract in Islamic Jurisprudence is an intentional attachment, its instrument is nature, and its original way is through clear statement.

Nevertheless, the verbal expression in it is not what is intended in itself on the pattern of formality in contracts. Rather, because it is a better interpreter of the intention is a clear form.

When the jurists are searching for one of the contracts and they are mentioning words that are suitable for composing it, you see them being point blank most time saying that those words are only being mentioned merely for example. They say that those holding contract may use other expressions that can connote the intended meaning if they so wish.

Even if agreement of the two desires manifests through a way other than that of words, the contract is binding by indication as obtained in engagement and situational language, among what has been pointed out earlier.[210]

THE THIRD ISSUE: REAL CONTRACTS

30/13 It is clear from above that contract in Islamic law shall complete and its laws will be binding with mere affirmation and acceptance.

However, there are a group of contracts that would not be considered complete except the real property is surrendered which is the subject of the contract, and in which affirmation and acceptance cannot be enough. In the human rights (law) today, this is termed: real contracts *(al-ʿuqūd al-ʿayniyyah)*. That is in which total commitment depends on surrendering the real property.

This is classified into five types of contracts namely: gift *(hibah)*, lending *(iʿārah)*, entrustment *(īdāʿ)*, loaning *(qarḍ)*, and mortgage *(rahn)*.

The *fuqahā'* say that the conditionality of getting hold of the property for its completion is a kind of volunteering. On this basis, the following principle is laid down: *"volunteering cannot be completed except with receipt of the property"* (*Majallah*, 57).

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engagement which is mentioned by the jurists is also a kind of signification through a way of practical exchange (see *al-Majallah*, 175).

210 In the appendix of this section, we will discuss the stand of Dr. Shāfiq Shahātah on what is known as *al-lafẓiyyah* in Islamic jurisprudence.

Thus, verbal contract in these situations before receiving would be considered ineffective:

For example, in mortgage, the mortgagee creditor is not capable of compelling the debtor on surrendering the mortgage by virtue of the contract if he does not surrender it willingly. However, if he surrenders it, the commitment is complete. If the mortgager tries to retrieve it after then without the consent of the mortgagee, this one has the right to compel him on returning it. It goes for the one given a gift. He does not have the capability to force the giver on releasing the gift.

Implementation in these real contracts is the causer of contract impacts; and intention is not considered manifest with words alone without this implementation.

Eventhough the contract of will *(ʿaqd al-waṣiyyah)* shall be exempted from this theory of real contracts. It is a postponed gift until after death. With mere death of the *waṣiyyah* giver and acceptance of the *waṣiyyah* inheritor, or non-refusal of it after death, the will shall be complete and the property shall become his property without having a need for surrendering it to him. Because the composer of the *waṣiyyah* could not have been expected to hand over the property after his death, will is based on pardon and exemption from the analogical principles in most of its laws, to ease the tasks of doing good and righteousness.

APPENDIX TO SECTION 30

30/14 Is "oral" formalism available in Islamic Jurisprudence?

Professor Shafīq Shaḥātah said in his *al-Naẓariyyah al-ʿĀmmah lil-Iltizāmāt fī al-Sharīʿah al-Islāmiyyah*, under the topic of *naẓariyyat al-lafẓiyyah*", a text that reads thus:

"Originally, there is no formalism in Islamic Jurisprudence. Contract shall hold and commitment shall occur without a need for special rituals such as movements, or regulations, or ceremonies. This would be considered as part of fundamental distinctions of Islamic Jurisprudence. However, does this mean that it is only the intention that brings about obligation in Islamic Jurisprudence?".

The author himself has provided answer to this question by saying that the jurists are not bonded by particular wordings in tying the contracts. Rather, they allow using any word that can serve the meaning of the intended contract. Then he said:

"A particular kind of formalism is found in Islamic Jurisprudence. We term it, *al-lafẓiyyah*, it is one of the impacts of what is peculiar to word in terms of sanctity during the early periods, whereby people assume that there is magical implication for every uttered word." For this reason, we find that the jurists are seriously divided on issues that have something to do with commitment" (see the mentioned work, para 123-127, pp. 130-132).

I say: Certainly, this judgment by verbalism of contract Islamic Jurisprudence, and the saying that it is part of the remaining belief in the magical impact of words in the early period, is more of illusions!!.

We that know Dr. Shafīq Shaḥātah for qualitative research, critical thinking and analysis, and we value in this epistle of his, a new effort that deserves appreciation anyway, we are further amazed by this idea that must have slipped to him through a foreign source. He did not study Islamic jurisprudence from its source, and did not know the structure of its laws. He is rather looking at it from a distance as a person would look at a blurred structure far away in the desert, such that he would now think it is a tree or a cow before he finally gets there and discover its true shape!

Where is verbal formality found in the theory of Islamic Faith? We have seen that, Islamic jurisprudence affirmed the holding of contracts with commitments, except in marriage contract in which

pronouncement is conditional for legislative purpose, which cannot be fulfilled except with a clear wording that will explain the purpose of the meeting of the two sexes - man and woman, so as to differentiate between the legal and the illicit purpose, which we have earlier explained (see para 30/9).

Disagreement caused by independent judgment in the issue of commitment was not that serious – as assumed Professor Shafeeq Shahaatah - rather, it is one of the mildest juristic disagreements. The Shāfiʿī School had initially disagreed with it because of their doubt in the clear manifestation of intention in it. Later, their jurists of later period ended up approving it for a need.

When we pass a judgment against Islamic Jurisprudence, it is better for us to look at its broader schools in the particular subject of discussion, as the wider schools also rightly represent the theory of Sharīʿah from one of its established perspectives. Thus, one school of independent judgment is but an understanding for its follower not a judgment against the Sharīʿah as a whole.

Rather, our jurists have stipulated on the holding of contract without commitment taking from the situational language as earlier explained (para 30/11).

Thus, where is this free doctrinal theory in the belief in "the magic of words in the early periods?

However, tbe statement that Islamic Jurisprudence originally considers word in tying contracts; and that other things such as writing, symbol, or commitment are considered as substitute for word. It is because the reality that word is the natural way of showing decided intention, and it will never cease to be the natural way in that. This does not prevent from accepting other ways as substitute for word whether as necessity or by way of choice such as engagement.

Even the jurists have unequivocally explained that sale cannot be completely transacted except through two ways: it is either by word, which is affirmation and acceptance, or by action without talking, which is commitment (see *al-Durr al-Mukhtār*, the beginning of *kitāb al-buyūʿ*).

We have seen that Islamic Jurisprudence does not make talking or particular form of expression conditional in tying contracts. Rather, it makes every expression literal or figurative, appropriate for tying the contract in as much as it can connote the kind of intended meaning. It is only that the jurists prefer using the past tense form in establishing a contract but it is not as a way of

compulsion. This is beacuse it is more indicative of decision and confirmation. All of that gives clear information that what are considered juristically in the process of contract sealing is the manifestation of decisive intention, and the clarity of the type of intended contract without ambiguity. Therefore, it can affirm the bindiug of its laws and obligations among the contract holders. Word in itself is not what is being considered.

It is not a hidden fact that mere concealed intention cannot incite action, while it is still hidden in the mind, even when it is a decisive determination. One that determines a divorce or a sale cannot definitely be considered a seller. Rather, there must be a physical means showing the intention in a form that judgment can uphold and base judgment. This is part of the improvisations of Jurisprudence and constitution (see *Radd al-Muḥtār*, 4/13).

Word/Talking in every legislation, is that original means of revealing intention to the realm of physical existence. However, some legislation may add to it formal pictorial ceremonies featuring movements, or symbols or specialized traditional actions of which contract/agreement cannot be considered valid without them even with inclusion of words, as can be found among the Romans.

Writing is the sister of oral communication; it supersedes verbal communication by constancy, permanence and documentation. However, writing a times falls short of oral communication in indicating the determine intention. This is beacuse a person may write something due to experience or due to precaution and readiness. Later, he may be hesitant in implementing and applying what he wrote down (see al-Zaylaʿī, 6/218).

Nevertheless, affirming writing in matters of contracts generally could be a great offence or embarrassment, especially in ordinary daily activities. Rather, it may be difficult in some environment or at a time where and when illiteracy predominates. Therefore, it is not supposed to be the original way of holding contracts in permanent general legislation that is supposed to be based on definite/constant possibilities. Hence, writing remains an exceptional way, in the view of Islamic jurisprudence, which adequately replaces oral communication. Moreover, it leaves its case for times and places to determine conditions of its consideration.

Nonetheless, writing, in some laws, may be considered as the basis for establishing some contracts. We however, should realize the fact that affirmation does not mean the contract has been sealed.

Some human rights theories and some civilian constitutions today may compel writing down some kinds of contracts in a document or a bill so that they can uphold its regulations and make adherence to it compulsory. This is also an exceptional formal affirmation, whereas document is not in reality the contract. It is just a written confirmation of occurrence it (i.e. the contract).

Realizing the fact that if voice is not the original means of sealing contracts, aud since other explanatory means are substitutes, which other means aside from it such as symbol/sign, or commitment or other means can eloquently better express decided intention as to best deserve this originality in talking?

Which ancient or modern legislation until date, sees writing or sign language or any other means, apart from talking, as the original natural way of sealing contracts generally and that talking is just a substitute or branch in it, such that it would not accept from a person his purchase of bread, meat, dress and other daily needs from markets using his tongne except rarely.

The natural situation in expressing about decided intention is the caller of attention to consider talkiug as basis in contract holding. It is not the belief in magical impact of words!!

SECTION 31

GENERAL CONDITION FOR SEALING CONTRACTS

Conclusion. Execution

This section focuses on differentiating between general and particular conditions – the general seven conditions and their explanation – as a result of non-fulfillment of one of the conditions of holding contract.

31/1 We saw in the first two sections the basic factors of sealing contract: they are the two contracting parties, the object for contract, where situated and the basic elements; we have dwelled on general issues/things related to these elements.

Each of those elements has its set of legal conditions that must be completed in it in order that the contract can be formed and concluded. These conditions for sealing contracts are of two kinds:

- General conditions, which must be met in every contract.
- Particular conditions, which must be found/met in some of the contracts.

Some contracts have been specialized by the law for additional conditions that must be met in addition to the general conditions, i.e. making attendance of witness compulsory in marriage contracts, but not in other contracts.

Also, like submission in real contracts, as mentioned earlier, and refusal to hang a contract on a condition in replacements, and giving possessions such as in sales and gifts. Certainly, hanging these items on a condition would spoil their meaning, as we shall later see in a research on conditions for tying contract (see para 46/26-27).

Those special conditions for some contracts will be mentioned in their chapters. However, the general conditions, which is the subject of our research here are seven, they are:

1. Competence or capability of the two contracting parties.
2. Susceptibility of the object of contract to its law.
3. That the contract must not be forbidden by a particular legal text as falling within the list of non-allowed.

4. The contract must fulfill all its peculiar conditions of hold issues ing it.
5. The contract must be useful.
6. Affirmation must remain perfect until the time of acceptance.
7. Unity of sitting for holding the contract.

These conditions are explained in the following passages:

31/2 First: Competency of the Contractors

By this, is meant that the two contractors should enjoy qualities that will allow them to legally tie contract.

Whomever that is not originally competent to definitely practice the holding of contracts, such as the psychiatrically unbalanced and the yonng immature, cannot hold contracts cannot enter into any contract agreement.

The competency of holding contract may reduce but will not be permanently lost. Then, the impacts of its reduction will vary according to types of contracts.

We shall see the explanation of that in a particular chapter on the theories of qualifications.

31/3 Second: Susceptibility of the object of contract to its law

The sale of that which is not money shall not hold legally such as corpse. The money granted for charitable purpose will not be sold. Because, the resnlt of sale is giving possession of the sold property to the buyer, and endowed money is forbidden from being possessed or giving out its possession except in particnlar situations by way of exchange. Therefore, its sale in other thing shall not hold due to non-susceptibility of the object in contrast to rent. Surely, the endowed money shall accept it (rent) and it shall tie contract on it.

Likewise, mortgage of punishable items that quickly get spoilt, such as fresh greenery and ice,[211] will not be contracted. Because, the law of mortgage is that the mortgaged be seized in order to retrieve the money from the debtor if he fails to pay up at appointed time. These monies do not allow for preserving and seizure when they are still useful.

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[211] The word *al-jamd* refers to water that freezes due to the cold.

31/4 Third: That the contract must not be forbidden by a particular legal text as falling within the list of non-allowed.

That is because a contract legally forbidden falling within the list of the disallowed is considered in the view of jurists as originally unlawful, contradicting the general legal system.

As a result, gift shall not occur from the money of an underage, nor shall his property be sold through a fraudulent means, same is the case whether the giver and the seller is the minor child or his guardian or trustee or the judge himself by virtue of his general authority in the absence of a particular guardian/caretaker.

That is so because, donating voluntarily from the money of the underage no one has the authority to do so. Moreover, sale through fraudulent means is just like voluntary donation. Hence, this contract is one of the things that no one has the authority to tie considering his subject; it therefore will be released wrongly. Even if minor comes of age and he makes it legal, this legalization would not be considered, because, falsehood is never acceptable (as we shall soon see in the research on falsehood among theories of supporting evidences). Rather, he has to renew its sealing (of the contract) after his maturity if he so wills. Juristic principle has the following to say on that:

Every contract that is released, for which uo owner is found to possess the right to recommend it, legalize, approve and execute it when it is been released, such one would be a false contract (see *al-Badāʾiʿ*, 5/149-150).

The *fuqahā*ʾ in finding cause for the falsehood of this type of contracts: they say that legal guardianship is condemned in it. By legal guardianship, they mean in this situation, that there must a person who would own legally the authority to execute these contracts, even if it is not the person that practically took up the responsibility to hold the contract. Even if this guardianship does not completely carry this meaning, and then the contract becomes false and cannot be concluded.

This is different from personal guardianship. That is the contractor personality should have legal authority by being owner or representative the owner like agent aud caretaker. This personal guardianship is not a condition for sealing contract rather the contract of the curious one shall be tied by the other. However, its execution will be based on recommendation of the one who has the right of legal disposition.

It would be observed in this situation that legally forbidden contract under the list of falsehood, the reason for its unlawfulness might be ascribed to the way of sealing the contract such as the sale of sexual contact, and withdrawal, and dropping away prohibition (ignoring it) among things forbidden by the Prophet (s.a.w.) in the past (see para 27/6); or that it be ascribed to the object of contract such as sale of anesthetics for forbidden usage, or renting the service of committing sinful actions or perpetrating evils; or it be attributed to the subject of contract such as making voluntary grant from the money of an underage. All these contracts are invalid whatever be the legal reason for their prohibition, after the prohibition must have fallen under a list of falsehood, categorically stated by text or inferred or implied analogically.[212] The non-validity might also be ascribable to a reason connected with the object being contracted upon or with the contractor, such as sale of hunted animal of the holy mosques or hunted animal by Mecca pilgrim who has entered the state of ritual consecration by *ḥajj* or *ʿumrah*. Even if he hunts animal out the holy mosqne, its sale is prohibited just as eating it is forbidden because it is considered as dead meat by *Sharīʿah* text that forbids that.

Example of that also in Syria today, all contract tied using gold money is considered null and void after sealing contract with it has been forbidden by a special constitution.[213]

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[212] Example of that with us is in the constitutional laws, since the Ottoman era, whereby initiator contracts for real laws on estates of sale or mortgage or other things. The Ottoman law has compelled processing all these estate contracts within the sphere of estates office and registering it in its official register under the list of the invalid. Therefore, estate contracts would not be considered if sealed outside the estate register even if a bill is prepared for it. And it is not binding on the person that refuses to implement and register it due to its invalidity. It is on this that judicial interpretation moves with us in understanding texts of the Mālikī constititution of estates of number 3339 released during the era of the French Delegation of the year 1930 C.E.

Apart from the fact that the new body of Syrian court of distinction *(Maḥkamāt al-Naqḍ)* had deviated lastly from the former interpretation in the understanding of the texts of this last constitution. It therefore established that all of these estate contracts be in itself considered valid even if they were sealed in secret. And claims for them will be valid, and it is binding on its contractor execution with regisration, but ownership cannot be tranfered between two contractors with this contract. No action of the contract will be carried out on other than these two people except from the date of registration (see *al-Qarar al-Tamyīzī*, released on the 18th of Rabīʿ al-Awwal 1368 A.H./1949 C.E. under No. 3, *Asās Ḥuqūq*, 46).

This is what was also adopted and affirmed by the Syrian civil constitution that was released from us in the year 1949 C.E. within the 3rd edition of this *al-Madkhal al-Fiqhī*.

[213] This constitution was released from the French Commission on 26th February 1930 C.E. under number 18 L.R. in the era of the French Delegation on the Syrian and

The reason for prohibition might also be attributable to an external factor outside object of contract and its subject such as a sale during the time a call to Friday prayer is in progress. This is so with those who see it as invalid among the jurists due to prohibition by Qur'ānic verse iu which Allāh the Exalted says: "*You hasten unto your remembrance of Allāh and leave activities of buying and selling*" (al-Jumuʿah, 62:9).

It should be observed also in this situation that mere legal prohibition of a particular contract, even if by clear particular text, does not necessitate that the contract be forbidden under the list of the invalid in as much as the is no context indicating this reward in the intention of the lawmaker. Mere legal prohibition of a contract in the view of Ḥanafī analogical deduction at times may be result in non- sealing of the contract, and at times the contract may be concluded in spite of contradiction to legal text. However, it will be as faulty as the one termed "the wrong" as we shall see in the research on invalidity and incorrectness from the theory of legal supportive evidences.

Lebanese countries. It does not cease to be applied till oday. It has considered dealing with gold as meaningless, and it compels in the former contracts that the contractor should pay the necessary equivalent of of the gold in Syrian currency money equivalent to the official price nnounced by the French Delegation.

Expression and translation in it has come as *al-taʿahhudāt* engagements contracted with gold. Extinct foreign judiciary and the present national judiciary many times have failed in prcatising this constitution, to the extent that some rulers rule that gold consignments do not compel the depositor to return it in real material. Rather, by returning what is equivalent to it in money currency according to official pricing and not market price. With that, more than half of the value of the consignment would be lost for the depositor. Because, the official pricing for the value of gold in Syrian paper currency is less than half of the actual market price.

This ia a mistake, and the correct is that what is meant by the word *al-taʿahhudāt* found in the mentioned constitution is the engagements whose implemention/application will be taken from the Mālikī school, such as sale, rent, and conciliation and even marriage, if it is contracted on a dowry of gold money, and other dealings/relations in which there is engagement by giving money release from an owner and entering the hand of another owner.

Therefore, this contract shall not include consignment.Rather, it is compulsory that the gold consignment be returned materially, because engagement with its return is not taken from the Mālikī school. Rather, it is a compulsory duty to protect it on ownership of the depositor/consigner, with the evidence that the mentioned constitution does not consider gold as a forbidden material for possession and for compulsory issuance. Nay, dealing with it is prohibited. Whosoever has the right to acquire and possess gold and keep it for himself has the right to keep it as a consignment through the medium of another. Hence, it will be compulsory for the depositor to return the real gold material. With that, some injustices and inadequacies contained in this political constitution would be removed.

31/5 Fourth: That the contract should fulfil its particular conditions for its conclusion:

We explained at the beginning of this section that conditions for sealing a contract are of two kinds: general and particular (see para 30/1).

Thus, it is a general condition before any contract can be sealed that its special conditions must be met, which the law requires its fulfilment if it has peculiar conditions legally demanded in it and not in other contracts.

Such is like witnesses in marriage contract. Witnessing is a condition for holding marriage contract and not other contracts. Thus, marriage cannot be contracted except all these special conditions are fulfilled in addition to other general conditions.

Likewise, real contract for example, cannot be concluded until submission of object of contract is ensured in addition to affirmation, acceptance, etc.

31/6 Fifth: Usefulness of the contract

Mortgage for example would not be tied in appropriation to trust like when a depositor takes a mortgage on a consignor in place of the consignment because the consignment is a trust not guaranteed on the depositor. If it perishes without shortfall in its preservation, it is not right for its owner, the consigner, to require its value from the mortgage. Hence, the mortgage becomes useless (see *Radd al-Muḥtār* in *al-Rahn*, 5/317 and in *al-Waqf*, 3/367).

Likewise, it is not considered in the principles of Ḥanafī analogical deduction, sealing contract between two people without engaging in trade for example. Because, the freedom of a person in choosing a legal means for his livelihood is part of the general Islamic system, and this contract forbids him from doing that, hence, it would be useless to him.

In addition, the sealing of contract on a replacement that will be taken by one of the contracting parties in lieu of a legally compulsory matter for him without contract, is also not taken into consideration. Like say when he ties a contract by taking a replacement in place of his refusal to commit a sin. This contract is invalid and does not deserve replacement in it. The reason is that the person is legally compelled with this refusal without having a need for sealing the contract.

On this, the jurists affirm in the principle of contract of conciliation that peace on the remaining of what deserves existence is invalid, if they tender a replacement in it, the giver of the replacement should retrieve it (see *al-Fawā'id al-Bahiyyah fī al-Qawāʿid al-Fiqhiyyah* by Shaykh Maḥmūd Hamzah, p. 148).

They also affirm in lease that a man renting of his wife for domestic services of the marital home and its management for monthly salary is not a valid contract. This is becanse the management of the home is a duty upon the wife by religious stipulations of the law according to her ability without any contract.[214] Generally, they affirm that it is not right for a person to rent a service of a person to perform a duty compelled upon him by the religion before contracting it. They have exempted from that, the permissibility of renting a person for adhan (call to prayer) aud for Imāmate and teaching the *Qur'ān* as a necessity, but they did not recommend that for reading of the *Qur'ān* (see *al-Badā'iʿ*, 4/191-192).

31/7 Sixth: Validity of affirmation until occurrence of acceptance

Rescinding of the affirmer's decisiou before acceptance of the other party is secured invalidates the affirmation. Hence, acceptance would not be considered after it. Likewise, death of the affirmer or loss of his qualification before acceptance would render it useless.

This might occur frequently in situatious of sealiug the contract by writing between two absent parties. A person may send a letter containing affirmatiou of a contract from his own end. He later might die or become meutally retarded before arrival of the delivery. Thus, acceptauce of recipient of the letter would not be considered when he receives and reads the letter. Because, the affirmation upou which it is based has become null and void because of the death of the affirmer before occurrence of acceptauce.

31/8 Unity of the sitting of holding the contract

The sitting of tying the contract is the situation in which the two contractors will come to a negotiation ou the contract. Hence,

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214 However, the wife is not allowed to do so as far as the civil law is concerned. This is the difference between civil law and religious law as mentioned on the earlier part of this introduction (para 2/4).

affirmation would be cancelled when the sitting disperses before acceptance, and the contract will not hold with acceptance after that. Rather, this acceptance will be considered a new affirmation with which a new sitting will commence.

This theory of contract sitting appoints a time for acceptance within which there will be the right of deliberation for the acceptor. Hence, during this period, he must accept without necessarily having a need for acceptance immediately following affirmation.

The reason for that is that acceptance originally from theoretical perspective, must be directly connected quickly to affirmation for the contract to be sealed.[215]

However, due to difficulty of that, our jurists have specified a place for the contract. The hours to be spent in the place are considered a time unit. On this, the jurists said: "the sitting puts the odds and ends together" (see *al-Badā'i*ʿ, 5/137, and *al-Hidāyah*, the beginning of *Kitāb al-Buyū*ʿ, 5/460).

The sitting of the contract is demarcated by a period starting from the time of affirmation, and ending with either agreement and sealing of the contract or with disagreement and dispersion of the two parties or with the decline of one of them like say when he turns away or he engages with other affair.

There is no difference between the decline of the affirmer and that of the acceptor in terminating the sitting. This is because affirmation alone does not bind the affirmer. Hence, his withdrawal before acceptance nullifies the affirmation.[216]

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[215] This is what the Shāfiʿī analogical deduction upholds, so they made conditional, spontaneity of acceptance after affirmation so that legal connection can be realized. However, there is a kind of difficulty and fault in this, but a corresponding fact to it is that the Shāfiʿī interpretation has upheld the principle of choice of place for each of the two contractors after joining the contract in sale and other similar necessary contracts that allow for forfeiture of sale. Such that each contracting party will now have the right to forfeit the contract so long they are still at the sitting and have not dispersed, as we shall see in (see para 2/40).

[216] It will appear from the texts of jurists of the two schools of Ḥanafī and Shāfiʿī, in depicting sitting of contract, that they consider two elements in it: (one of them is) place of the two contractors, and (secondly) is their situation, which is the situation of the two contractors when they enter into negotiation. Thus, sitting of the contract will differ following a change in one of this two elements: (a) if the position of the two contractors changes between affirmation and acceptance, affirmation will become invalid and the contract will not conclude by acceptance after that even if they become negotiators (b) If the situation of negotiation terminates with decline of one of them after affirmation, contract will also not hold with acceptance after that even they maintain their position. Nevertheless, we see that there is no legal evidence for the element of position. Hence, here we have restricted in depicting the sitting of the

If the affirmation is by writing to an absent person, the sitting of the contract will start from when the absent person reads the letter; if he accepts in his sitting, the contract is concluded. If his sitting ended with his decline, affirmation becomes invalid (see *al-Hidāyah wa-Shurūḥuhā* 5/461; *al-Ashbāh,* v. 2, p. 196). However, there are exceptions for this principle:

a. Certainly, acceptance of the heir or his rejection, its occurrence after the death of the legator is conditional; neither his acceptance nor rejection will be considered before the death.

b. It would suffice for considering his acceptance that he remains silent and does not reject the will. Even, if he dies without acceptance or rejection after the death of legator, the bequeathed money becomes an inheritance for inheritors of the legatee by approval.

c. Likewise, in agency and endowment when its represents a person absent; or it endow for one absent. Sitting of knowledge of the representative or the endowed for is considered; if they both do not waut representation or endowment in it, they are both endorsed.

31/9 Summary of conditions of joining the contract and conditions for validity:

We explained in the forgoing passages that these seven conditions that we have expatiated, their total realization depends on formation of every contract. Hence, they are conditions for tying contracts generally.

If one of these conditions is missing in sealing a contract, the result will be that contract will legally not hold even its form is physically seen; the existence of the contract will therefore be like its non-existence in the legal view. Thus, it will not attract any results or responsibilities, which the law stipulates for concluding it. Therefore,

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contract to the second element, which is the situation of negotiation since it is closer to the tolerance of Islamic law and its objectives. It is probably the one being informed by the texts of jurists of the Ḥanbalī School when they categorically states that: "Situation of sitting is like situation of holding the contract" (see *al-Sharḥ al-Kabīr ʿalā al-Muqniʿ*, 4/4).

the contract, in the terminology of the jurists is called: invalid contract.

There are also legal conditions apart from these they are called: conditions of validity, and when anything is missing from it, the contract is not invalidated. Rather, it will hold. But, it will be considered faulty in some subsidiary aspects, not basic ones. Such is like ignorance of one of two exchanges in contracting a sale, or ignorance of conditional time for commitments in the contract. Example is when two persons transact sale without defining the price, or when they transact a sale with a postponed price without specifying the time. This implementation of this type of contract may push into a confusing disagreement between the two parties. Moreover, it may prove difficult to resolve since ignorance is the evidence of each party in upholding a larger or a smaller (share) according to his interest.

Then, a contract of this type of defect requires dissolutions, and it is called a forfeited contract (bad contract), in the view of Ḥanafī analogical deduction.

Most of the conditions for validity are special conditions. Some of them are conditions recommended for every contract, but not conditional in others. Understanding of its overall structure depends on explaining the idea of damage and its results, as we shall see in the theory of legal supportive evidences. For this reason, we did not dwell here on anything among the conditions for validity.

Even as most of Islamic analogical interpretations, except the Ḥanafī deduction, do not differentiate between the nullified and the invalid; hence they consider holing of contract between two situations only: it is either an authentically sealed one or one forfeited not concluded.

SECTION 32

CONTRACT INTENTION

THE FIRST THEME: DIVISIONS OF THE INTENTION

The Manifest Intention – The Hidden Real Intention

32/1 Intention is categorized into two: Real and Manifest

The real intention is the hidden intention that no one can know but the manifest intention is the one reflected through expression or what stands in its place such as commitment.

32/2 The Real Hidden Intention:

The hidden intention alone cannot represent actions and compositions. Thus, no contract can hold with mere intention even if the two parties involved agree on the existence of their both intentions. Whosoever intends divorce or suspension for instance cannot become a divorcer or a suspender by his mere intention and determination since whatever deserves action cannot be complete with mere intention.

However, intention has a legally considered directive impact in describing what accompanies it. When it accompanies an action or a refusal, it marks it, and it earns it a quality that will attract a special civil law in the view Islamic law[217] (see *al-Ashbāh wal-Naẓā'ir,* p. 43).

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[217] Example of that is that the intention of possession in acquiring the permissible makes acquisition to earn possession. In the laws of warranty, they say: if a depositor uses a consignment guaranteed for protection, he would be considered transgressor on it. Therefore, he will guarantee it like a usurper if it perishes. And if he leaves it, and he returns it to protection intending that he returns for the usufruct, he is responsible as usurper in the occasion of damage, even if such was not by his act or omission. But if he keeps it without the intent of benefitting from it, he will not be responsible. Rather, he will be regarded as trustworthy keeper: there is no responsibility on him if it gets damaged. However, in the capital offence, intention is the basis of distinguishing murder from manslaughter. In either case, circumstances would he considered (see *al-Majallah,* 2, and its commentary).

Based on this, there is no consideration for silence as regard the acceptance. The legal rnle is that: *No word can be ascribed to a silent (person)* (*al-Majallah*, 67).

However, in some instances, the *fuqahā'* approve of some contracts made by silence; with the provision that there should be some explicit gesture or circnmstance which could be considered as the word. Example is the type of dealing we explained earlier, in which the execntion stood in as the word. Another example is the renewal of rent contract with the silence of both parties: If both keep silent at every new month without the nullification of the contract, the rent contract is considered to have been renewed.

Likewise, if the landlord had intimated the tenant of the increase in the rent beginning from the coming month, and the latter remained silent in the apartment until the new month, such silence is considered an acceptance. Consequently, he is bound to pay the new increased rent (*al-Majallah,* 438 and 494).[218]

Exactly, the silence of maiden whose consent for marriage was sought by her guardian, such would be considered as an acceptance based on the prevailing custom, for it is normal that such maiden would always appear shy to show the interest, and not to reject.

Nevertheless, the rule as far as silence is concerned is that, it has no effect except in some cases of disclaimer or renunciation of the right. For instance, the renunciation of the right of preemption with the silence to request for such, and the renunciation of the right of option of maturity with the silence of the maiden to nullify the marriage, as we shall we see in the appropriate place.

32/3 (b) The Explicit Interest

The explicit interest is the real desire expressed by word or action regarding a certain contract. This is an important factor in the contractual agreement. With this, there is no need to look for the real implicit interest, in so far the real interest is well covered; and there is nothing which indicates the contrary, hence, the explicit interest is the only recourse for the purpose of clarification. This explicit interest then suffices as an evidence of the real desire. As a result, all

[218] In our contemporary times, this is governed with the rule guiding the extension of rent contracts which prevents the landlord from renting the house or increasing the rent above the specified rate approved by the law. Thus, silence no longer signifies binding and acceptance.

rules of the contract become valid with this explicit interest which is considered as the fundamental factor in the contractual agreement vis-à-vis its scopes and binding stipulations.

With respect to the scopes and stipulations of the contract, the circumstantial evidence as well as the custom of the people, are considered as constitutive of the explicit interest. They both entail some observable additional indication on which the parties rely, with utmost clarity, beyond reasonable doubt, hence, such indication should be considered as an expression. For this reason, the *fuqahā'* regard this customary way of entering into the contractual agreement as effective in defining the scopes and the binding stipulations of the contract. Hence, the popular rule goes thus: "*What is customarily known is like a stipulated condition*" (see para 6/5).

Therefore, the recourse would be made to the circumstance in the contractual agreement whose stipulations are not made explicit. For instance, the sale of milky cow includes its colt brought with it, even though it is not made explicit.

Also, if there is no specification of the date when the contract starts regarding the rent contract, the day of the agreement will be considered as the beginning of the contract.

Furthermore, regarding the agency of purchase, the agent is duly bound to observe the corresponding rate. Moreover, if the carrier authorizes the agent to purchase an animal, it will be understood as carrying animal and not a riding one.

Further still, if the mode of payment is not specified with the regard of sale and rent contracts and the like, and the customary practice is installment payment, then such practice will be followed as dictated by the custom.

In the above cases, the real interest is considered with reference to the circumstance and the custom. This is because they are explicit enough to be understood, as it is difficult to specify the scopes and the stipulations of the contracts without them. Thus, it is inevitable to have recourse to them.

THE SECOND THEME: CONCEALING OF THE REAL INTEREST, LACK OF IT AND CONFUSION THEREOF

The relation between concealing the real interest is lack of it and confusion thereof. The results are:

1. The theory of contract formality: *al-muwāḍaʿah* or *al-talji'ah* - for consideration - or in respect to the person, the case of 'borrowed name' - joking.
2. The theory of confusions in the interest or defects of acceptance.

32/4 Although there is no need for confirming the real implicit interest, once it is established, the effect of the explicit interest in the ramification of the contract ceases the moment there is an indication as to the lack of real interest. Hence, the real interest is no more concealed; and the explicit interest remains the only recourse for the expression of such interest. However, since there is an indication contrary to the explicit interest, it then becomes established that, there is a lack of confusion in such interest.

It must be observed here, therefore, that the relation between the three instances, namely, **concealing of the real interest**, **lack of it,** and **confusion thereof**. Its concealing does not stand in as much as the explicit interest in form of offer and acceptance has stood in its place.

As for its lack, it means that offer and acceptance do not express an unequivocal interest as to the contract.

While the confusion thereof is the middle-course of both concealing and lacking of real interest, it indicates the existence of the real interest with no indication to the contrary. However, the interest is beclouded with the clause, which causes confusion regarding the definite position of the contracting partner i.e. offerer, to proceed with the contract or not.

Based on the last two instances, namely, lack of the interest, and confusion thereof, two theories evolved: the theory of contract formality, and the theory of confusions in the interest or defects of acceptance.

a. If the agreement of the contracting partners, regarding a contract, is a mere superficial disposition , and there is an indication of lack of the real interest from the beginning, then, such contract is considered formality; in other word, it only has a periphery and superficial aspect, not the real aspect of contract.

b. If the real interest is not lacking, but it is only entangled in some confusion, the contract is valid. However, with such confusion, one of the contractual features becomes weakened and defective. In legal term, this is called *ʿuyūb al-riḍā* i.e. defects of acceptance.

We shall give examples of the theory of contract formality in the part 33. However, as for the defects of acceptance or confusion in the interest and its rules, we shall treat them in the subsequent parts as follow:

- *Al-Ikrāh* (coercion) in section 34.
- *Al-Khalābah* (enticement) in section 35.
- *Al-Galaṭ* (mistake) in section 36.
- *'Uyūb al-Riḍā al-Ṭāri'ah* (the emergency defects of acceptance) as a result of improper execution, in section 37.

SECTION 33

CONTRACT FORMALITY

33/1 The contract formality could be considered from two cases: First: The case *al-muwāḍaʿah* or *al-talji'ah;* and Second: The case of joke.

THE FIRST THEME: *AL MUWĀḌAʿAH*

This is a situation whereby the contracting parties secretly, agree on a position contrary to what they pronounce. It has three instances, namely: *al-muwāḍaʿah* with respect to the basis of the contract; *al muwāḍaʿah* with respect to the substitute, and *al-muwāḍaʿah* with respect to the person.

33/2 (a) *al-Muwāḍaʿah* with respect to the basis of the contract

It is a situation whereby the two contracting partners connive secretly, before the ramification of the contract, that the contract would only be a formality. The motive is either to deceive the others, or in consideration of a hidden agenda.

This deceitful act is common among the debtors, as they sell their properties in order to deprive the creditors of possible lending. They may even tie up the formal lending and loan contracts with their associates and relatives, with a view to competing with the real creditors. Later on, the money would be returned back secretly, to the debtor who had connived with them on deceitful loan contract.

The reason for this type of deceit may be as a result of fear of superior and corrupt ruler, or an imperious usurper, especially in some places where anarchy and despotism reigns supreme unchallenged. In this case, the owner of the property would enter into a deceitful and unreal contract with others, (in order to save his property from the oppressive ruler).

It may be in such a way that the testator would falsely, admit of a debt in favor of one of the inheritors , so as to enable him have a giant share in the estate later, at the expense of other co-inheritors.

Due to the fact that there is a connivance between the two parties in this theory of *al-muwāḍaʿah,* it is referred to as *muwāḍa'ah* or

tawāḍuʿ. Also, because of the fact that there is recourse to another party, by someone to enter into a deceit and unreal contract, out of fear of the oppressive ruler, this theory of al *muwāḍaʿah* in this form is also called *talji'ah*.

However, whether it concerns entering into the deceitful contract, or it has to do with false admission of the debt, in either cases. This type of contract is void, eventhough, it has been formally ratified. This is due to the lack of the real interest in the contract, and of the admission respectively.

In the occasion of argument as to the reality of the contract, or the admission of the debt, such contract or admission shall be upheld as real and valid, until the claim to the contrary is proved. Each party must claim and affirm its reality, and invite his partner to take an oath for disproval. The third party who is affected by such deceitful contract e.g. creditor (seeking the loan) or co-inheritor, must equally claim and affirm it or be sought to take an oath disproving such deceitful contracts (see *al-Badā'iʿ* 5/176-177, and *Tanqīḥ al-Fatāwā al-Ḥāmidiyyah,* 1/130).

33/3 (b) *al-Muwāḍaʿah* with respect to the substitute

The theory of *al-muwāḍaʿah* may aim at a certain consideration agreed upon, in return, aside the basic contract. In this case, the validity of the contract is not affected. However, the consideration agreed upon in return in public may be modified, but the secretly agreed term remains intact.

Both parties may secretly, agree on a certain consideration lesser than what they announce publicly. Quite often, this practice is common among some people in the marriage contract, in order to attract fame with exorbitant dowry.[219]

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[219] This bad custom in marriage is now prevalent in the community. They conduct the *Nikāḥ* on the inflated dowry, whereas they had secretly, agreed on the moderate amount. There are two factors which prompt the bride family to behave in this way: leniency toward the bride-groom in consideration of his financial capacity, and consideration of huge amount of dowry as a source of pride. In actual sense, this is a wrong social and rational misapplication. Really, leniency in dowry is encouraged, religiously, rationally and socially, for facilitating and unblocking the obstacles in the way of marriage. However, it should be made public for the people to emulate, in such a way that they would be familiar with such noble practice, and dispense with their bad customs. By this, they would consider nobility of the bride-groom, instead of his wealth. In most cases, this kind of practice leads to legal confusions in the court of

Quite often, people employ this practice, by selling the landed property in order to prevent the co-pre-emptor from claiming his right due to the huge price involved.

Nevertheless, in the present time, this practice has been cubed with the passing of the property ownership law, no. 3339, section 201 to the effect that, if there is any disagreement between the pre-emptor and his contracting partner, as to the actual price of the landed property, the judge is vested with the authority to decide on it, with the help of the experts.[220]

Conversely, the contracting parties may enter into the contract secretly, agreeing on a certain consideration more than what they announced publicly. This is the case, regarding the purchase of landed property. The purpose of this, however, is to lessen the transfer price on consideration basis.

In all cases considered so far under *al-muwāḍaʿah* with respect to the consideration , the secretly agreed rate will only be valid, if the contracting parties mention during this secret agreement that, the rate they would announce in public, is a mere and formal one; it lacks validity.

However, if they did not mention this unequivocally, during the secret agreement, then the rate announced publicly would be considered as valid, because, it is the normal and standard practice. In most cases, the parties tend to disagree later as to the term of agreement. However, the rate announced in public is intact, except if there is a prior agreement on the contrary i.e. if they had agreed not to consider the rate announced in public (see *al-Badāʾiʿ*, 5/177).[221]

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law, as a result of disagreement in the actual amount of dowry, especially when one of the couple dies or in the event of divorce.

220 It has been mentioned in the third edition of this work that the Syrian Civil Law has abrogated the right of pre-emption. Thus, it is no longer applicable (see the footnote in para 23/7 of *al-Ḥāshiyah*).

221 There are divergent opinions regarding the applicability and validity of the conditions earlier agreed upon by the parties, which was not mentioned during the ramification of the contract. To the Ḥanbalī School, those earlier stipulated conditions are still applicable and valid. In his book, *Qāʿidat al-ʿUqūd*, Ibn Taymiyyah said:

"The normal and standard practice in the school of law (Ḥanbalī's)is that the conditions agreed upon by the partners prior the contract, are part of the contract. If they connived secretly and later ratified the contract, then such conditions would be valid and applicable, however, it is a breach of contract for one of the parties not to honor those conditions" (see *Qāʿidat al-ʿUqūd*, p. 204).

It should be noted that, we had referred to the manuscript of the above mentioned book i.e. *Qāʿidat al-ʿUqūd*, by Ibn Taymiyyah) in the 3rd edition of our book, *al-Madkhal al-Fiqhī* in different places. However, the same book by Ibn Taymiyyah has

33/4 (c) *al Muwāḍaʿah* with respect to the person: The case of borrowed name (Impersonation)

The theory of *al muwāḍaʿah* upon which the contract as a mere formality is made may pertain to the contracting partner, and not the contract itself. This is in the case of someone engaged to impersonate his contracting partner formally, in favor of the latter. Afterward, he would announce that all the contracts and proceeds there from, are in reality, for his contracting partner, and that his name was borrowed for him i.e. his partner. This is technically known as "**the borrowed name**".

In actual sense, this form of contract is between the user of the name of his partner formally, and the partner who would benefit from the contract behind closed doors. It is more or less the covert agency of which the parties agree secretly: the agent appears as the real owner.

Consequently, the real owner assumes the position of the ceremonial owner. In other word, the real owner is the rightful beneficiary of all the proceeds accrued from the contracts for which his partner's name was borrowed. This will be decided in accordance with the legal conditions and stipulations, which shall be discussed at the appropriate place, in order to protect people's right. This step is necessary so as to prevent any possible exploitation of the announcement of the borrowed name, as a cover up to deprive the interested individuals, having a stake in the contract, of their rights, e.g. critically sick person or bankrupt.

Indeed, this has been explained in *al-Majallah* clearly; its rule is briefly discussed in the second chapter in the book of *al-iqrār* (*al-Majallah* 1591-1593).

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been printed by Maṭbaʿah al-Sunnah al-Muḥammadiyyah in the year 1368 A.H (1949), thanks to the efforts and supervision of Shaykh Muḥammad Ḥāmid al-Faqī. But the title name was changed by the publisher i.e. Shaykh Muḥammad Ḥāmid al-Faqī, to another title, *Naẓariyyat al-ʿAqd*. His preface to the hook gives an impression that, the change was informed by the assumption that the western scholars used to refer to the same discourse as ***Naẓariyyat al-ʿAqd,*** so he adopted their style.

Based on this, we decided to make reference to the original copy printed with his name (Ibn Taymiyyah), as we disagree with the change of the title. Despite his huge efforts in the printing and publishing of books, such attitude should not have emanated from him.

SECOND THEME: *AL-HAZL*

33/5 Amusement is the opposite of seriousness. It is the expression of a sardonic person who does not aim by his word a legal implication. It may take various verbal forms in one of the following:

- In unambiguous term related with the contractual agreement, by both or one of them, e.g. I sell, I give (as a gift) or I borrow, jokingly.
- By a prior secret agreement, e.g. for the parties to connive that this contract which they are about to enter into, is merely a joke; no serious legal implication is intended. Based on this, they ratify the contract.
- Or by circumstances which connote that the partner is only joking. Although his utterance may be in contractual term, but he does not intend the legal implication.

In all above instances, such contracts are invalid. As a result, they do not have legal implication. Even if it involves transfer of ownership of which the buyer has possessed, such contract is yet, not valid, due to the absence of real interest.[222]

However, the scholars unanimously agree that in the event of disagreement over the seriousness or otherwise, it shall be considered serious, for it is a normal course. The popular legal principle is that "consideration of the utterance is better than its rejectiou". The onus of proof is therefore, on the party claiming it to be an ordinary joking, in the way it was explained when discussing *al-muwāḍaʿah* for there is a similarity between both *al-muwāḍaʿah* and *al-hazl*.

33/6 Conclusively, this contract formality can be employed in all verbal dispositions without intending the legal implication. However,

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[222] There are divergent legal) opinions regarding this case: Some contend that the contract is in place but not void: There is no legal implication for it. A buyer, who is merely joking, cannot own a possessed article. Neither, can a borrower who is merely joking, benefit from the loan. While others suppose that such contract is null and void, due to the absence of the real interest. Also, it is invalid because of the consensus of the majority scholars that there is no legal implication for such. In many instances, those majority scholars used to reiterate the illegality of this form of contract (see *al Badāʾiʿ* 5/176, *Fatḥ al-Bārī* by al-Kamāl ibn al-Hummām, 5/459 and *Radd al-Mukhtār,* 4/7). Indeed, the last opinion appears more appropriate looking at the general principles guiding the contracts, their types and rules. As such, we consider this contract as invalid. Rather, it belongs to the categories of contract formality.

there three exceptional cases where the Islamic law does not allow this contract formality. Rather, it considers the verbal dispositions as having the legal consequences, regardless of the real interest. These cases are: marriage *(al-nikāḥ)*, divorce *(al-ṭalāq)* and emancipation (of the slave) *(al-'atāq)*. The Prophet (s.a.w.) was reported to have said: *"In three (cases) seriousness is (considered) seriousness and joking is (considered) seriousness: Marriage, Divorce and Emancipation (of the slave)"*.[223]

Thus, the marriage contracted out of joking or secret agreement in formality would be considered valid; cohabitation and other affairs, between the couple, are thus legal.

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[223] Narrated by Abū Dāwūd (2194), al-Tirmidhī (1184), Ibn Mājah (203) from the *ḥadīth* of Abū Hurayrah. Al-Tirmidhiī said: This *ḥadīth* is good but strength *(ḥasan gharīb)*. Al-Ḥākim (2/198) said: The chain of narrators is sound *(saḥīḥ al-isnād)*. But al-Dhahabī said: Its chain is feeble *(layyin)*. Al-Zayla'ī in his *Naṣb al-Rāyah* (3/294) is in the opinion that it is reliable and profound based on some other *ḥadīth* and the sayings of the Companions.

SECTION 34

DEFECTS OF CONSENT: COERCION *(AL-IKRĀH)*

34/1 PREFACE

By impurities of the will or defects of the consent we intend- as motioned earlier-cases which not be ruled as absence of nodal real, as they will not be ruled as safe from all defects, instead [wheneve] any scourge befalls the will of the contractor, it will not be considered as his true, perfect binding consent. These impurities in Islamic jurisprudence:

- Either arises by a cause which accompanied the birth of the will and influenced in its formation or in its direction from the starting with corrupt influence, similar to child born in malformed shape, as seen in the case of coercion in concluding a contract.
- And either arises at times by an accidental cause which is not seen while reaching a agreement, which will lead to deficiency in execution of the contract. The will, will be considered defect by such causes, because mutual consent was not ascertained at its root, similar to the case of destruction in some of the sold commodity before handing it over, defecting the consent of the buyer in the rest of the commodity in his share's price only, these are the cases which we will see nnder the topic: division in conclusion of the contract.

Hence, the accidental causes [influencing] the will which originated purely like in the mentioned case will return back to the will and will defect it similar to the cause accompanied the birth of the will.[224]

These impurities in modern law are named as defects of the consent. In general all forms of defects of the consent are fousee.

Coercion, misleading, error and deficiency in execution. Some of

[224] In foreign law, nothing is wrong in a will unless it was with it since it was created.

these cases are believed to be further divided in many derivatives.

This makes it possible for us to classify the defects of the consent in two types:

First: Accompaniment of defects in formation of the contract which are coercion, misleading and error.

Second: Defects which are born by accidental cause after the formation of the contract but are potential to influence in the previous consent and this is the fourth defect: deficiency in the execution of the contract.

In general, the defects of consent has a common result i.e. it makes the contract susceptible to invalidation by obtaining one of these consent defects, but all of these defects require some conditions in order to be effective in consent and in channeling to the result. These requirements differ from one other.

In the coming discussions me will turn to elaboration of these defects by its types, versatilities and synopsis of its laws.

34/2 Coercion *(al-Ikrāh)*[225]

Coercion is the most important defect of the consent in Islamic jurisprudence because it fetters the will and subjugates it immediately. The jurists have assigned special chapters on coercion, its laws and its effects in great detail compared to other contracts, the entire verbal and practical conducts be it civil, penal or religious. The most important to us here is the discussion which is related to the influence of coercion on the contracts.

Before we explain the law of the coercion, it will be appropriate for us to expose the meanings of the three words on which the rulings of coercion is based; the terminal point if their meaning in existence and non-existence. The three words are: will, option, and consent.

- Will is the mere determination of a deed and inclination to it.
- Option is the power to give preference between doing a deed and not doing it.
- Consent is the longing to do a deed and satisfaction in it.

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[225] Both the words, *mukrih* (obligor) and *mukrah* (obligee) are written the same way in Arabic, the writer derived the word mukrah (obligee) from a different word root *Istikrāh* (see para 10/2).

Entire emanating deeds of the human does not emanate except by will and option. The man is considered to be an intender of his deed when he determines it and inclines to it. In the same he is considered to be optional in his deeds when he has the power to abstain from it, even though this abstention will append him with great harm. This is because he will not proceed to action until when he has given preference to action above abstention for the purpose of escaping the harm, when it was in his power to abstain and accept the harm.

But option sometimes is correct and safe. This is when the deed originates from free-will; and at times existing option is incorrect and not safe. This is when preference is more contemptible to two evils or two harms. In this case the option stays and the consent disappears. By [this], we can [manifest] that:

i. In these cases the will is the most general/ common of these cases.
ii. The level of option is more specific than the will; this is because the intender of the deed has the power opposing to what he intends to or does not have power, i.e. either he has option or he is forced.
iii. The level of consent is more specific than the option, because at times the man does a deed optionally, i.e. despite he has power of not doing it, but without his consent, i.e. without any appetite in doing with satisfaction, for instance a person kills in self-defense though he does not have any inclination to killing:[226]

- For example one who enters the military in our time willingly when he is in a system which does not accept from the authorized citizens enforcement of financial recompensation. Then in this case he is intending for the recruitment without any option in it.
- If financial recompensation was accepted by the system in exchange of the recruitment, and he gave preference to pay the recompensation reluctantly, then in this case he is in paying both intender and optional, but he invalided the option.
- If he volunteered in entering the military under a non-enforcing system or he volunteered to enter the military for

[226] See *Uṣūl al-Fiqh* by Muḥammad al-Khuḍarī, p. 127; and *Kashf al-Asrār*, 4/382 onwards; and Abī al-Baqā', article on *al-Irādah*.

second time after his service under the enforcing system in desire for extra payment then in this case he is intender, optional, and consentful.

34/3 Definition of Coercion and its Classification

After these elaborative-remakes we can define coercion as: Oppression on a human by harmful-means or by the threat of harmful-means in compelling him to do or not to do. This definition unveils two observations:

1. This coercion is in two forms: either a person will coerce another person by pouncing harmful deeds on him. The coerced will ask for libration by accepting to do what the coercer demanded in order to escape the befalling harm.

   Or a person will coerce another person by heartening him to do something otherwise he will project the harm on him. The coerced obeys under the influence of terror in order to be safe form harm which may befall him in the case of abstention.

   In the form of coercion by threat, the jurists stipulate that the person who threatened should be capable of implementing the threats otherwise there will be no terror.

   The legists name the first form as sensuous coercion and the second as psychological coercion. These names suit well.

2. The subject of the coercion will be either positive or negative, meaning to do something or not to do something:

   - Example of doing: Coercion to conclude a contract.
   - Example of not doing: coercion of a person not to abolish the transaction of buying which has for him right of with-drawal (*al-Khiyār*) within a limited period, until the period finishes.

   Then, the coercion looking at its harshness and level of its effect according to the strength of the frightening medium used in it, our jurists classify it into two types:

   - Perfect-coercion *(ikrah al-tām)*: A coercion in which there is fear to lose life, or impairment of limbs, or in which there is server, violent beating and its kind, or long-time imprisonment, or long-time shackling, or humiliating work

for a person of status, and similar to these. These are amongst the strong inflnencing vehement mediums, either on the coerced himself or on someone the coerced intent to such as his father, son, or wife.

- Imperfect-coercion *(ikrāh nāqiṣ)*: a coercion in which its means do not impose except light or little sadness for instance simple beating or threat.

If you want you can say strong coercion and weak coercion in this classification. Thus the strong coercion is considered to dispossess the consent and invalidate the option, while the weak coercion dispossesses the consent and does not invalidate the option.

The consideration of terrifying means or non-terrifying means differ according to the situation of the person.

The consideration of terrifying means or non-terrifying means differ according to the situation of the person. At times what terrifies the sick or women will not terrify the healthy person and the men.

The means of the coercion is not required to be material, for the literary means might be of greater impact on some people. If a man threatened his wife with talaq (divorce) until she acquits her dowry or until she gifts him something, these will be considerable coercion for her. Similarly if a man stops his danghter's wedding with her husband until she admits to get hold of her inheritance from her mother (opposing to the situation of *al-ṭalāq*) (*Radd al-Muḥtār*, 5/134-135).

34/4 The validation of all the verbal conducts and its implementation require consent in line with the precious commentary. And for this reason coercion with its both types strong and weak will effect all of the verbal conducts. It will take away the binding effectual strength of the conducts; irrespective of these conducts to be contracts or conducts of an individual will, for instance discharging, confession and dropping the right of the pre-emption. If a person performs these conducts under the influence of coercion even with a weak one, he will have option after the disappearance of the coercion between continua and cancellation (*Majallah*, 1006-1007).

The Islamic jnrists stipulate the coercion not to be legal in order to effect the contract. The coercion will be illegal when the aggresse on the will is without rights. If the coercion is with rights i.e. legal then it will not have any impact, for example, the coercion of a judge

on a person in debt to sell his properties exceeding his needs for the payment of his loan, for the judge has the right to coerce on every person opposing the legal execution of things compulsory on them while they are capable.

The condition in coercion- not to be legal-converge with the requirements of the legists in means and ends of the coercion to be non-legal. If its means and ends were legal, i.e. in the case of the creditor threatened the money lender to remove the suit before the judgment until he coerced him to hand one the mortgage, then the coercion will not retuke the safety of mortgage contract.

It can be manifested from all that have been said, that coercion in execution of a contract will not stop its convening, because harm in [such coercion] is specifically limited to the contractor. For the safety of the coerced contractor, granting him the right to withdrawal, i.e. right to invalidate his contract is sufficient. This is because after the disappearance of the coercion he might see the things he was coerced with not inconsistent with his interest; instead at times in reality he desires [those things] implicitly in the execution of that contract.

For this reason the orginal will is not considered inconsistent with the coercion like its inconsistencies in the cases of contracts; instead coercion is considered as visible suspicion which will bequeath mistrust in verification of the original will, thus limiting the impact of the coercion by making the contract non-binding on the contractants; by this there will be option for the contractant because of the coercion between establishing his contract and invalidating it. This opinion is the point of conflict in the Islamic jurisprudence.[227]

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[227] The stand in Islamic law on *Ikrāh*, or forcing someone into a contract, vary as following:

a) Some scholars said that using *Ikrah* in a contract makes that contract invalid.

b) *Abu Hanifa* says that a forced contract is a corrupt contract and not invalid, and thus the provisions of corrupt contracts apply to this situation (a corrupt contract is one that is valid, but must be broken) Except for one case. The case in which the person who was forced to make the contract agrees to the contract after the forcing had stopped, in this case, the contract is valid again and not corrupt. This is justified that corrupting the contract was to protect the forced party's best interest.

We have already mentioned the difference between a corrupt and invalid contract (para 31/8) and we will discuss in detail the difference between the two in Ḥanafī sect in section 1/54 and onward.

c) Abū Ḥanīfah's student Zufar ibn al-Hudhayl says that *Ikrāh* makes a contract suspended, and this suspension is in the hand of the forced person. If they agree on the contract then it is valid and vice versa. Forcing someone into a contract damages their interest, and it is enough to suspend the contract to the will of the

34/5 The Ḥanafī is the only exception in verbal conducts in which joking does not effect–meaning to say the issue discussed previously will not be applied in the contracts such as marriage, divorce and freeing the slave (para 33/6). Coercion on these contracts does not have impact in its execution instead these contracts will be executed in the case of coercion as in the case of consent according to their opinion. This is their analogy (*qiyās*) of the coercion situation basing on the exceptional joking situation is the mentioned contracts and conducts.

But in the issue of coercion on divorce in which there is financial consequences, the husband will claim the dowry (*mahr*) from the coercer. And if the coercer of the husband on divorce was the wife herself, the dowry will drop.[228]

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forced party to protect that interest. Everyone among the Ḥanafīs agree that a forced contract is valid if the forced party agreed to it after the forcing action was stopped (see *al-Badā'i'* 7/188; *al-Hidāyah wa-Radd al-Muḥtār* in *Kitāb al-Ikrāh*).

The preferred opinion in Hanafi is that of Abū Ḥanīfah himself, in that a forced contract is a corrupt one. But his student's opinion is stronger and more supported, and according to article 1006 from the legal magazine, Zufar's opinion was chosen to act upon.

Foreign laws say that a forced contract is valid with the possibility to make it invalid if the forced party requested so. The same goes for all contracts with consent issues.

d) Maliki sect is close in its opinion to that of Ḥanafī, they say that a forced contract is valid but not binding to the forced party, and it only becomes binding with their consent. Additionally, they regarded forcing a contract and putting pressure indirectly on one of the parties equal. Pressure on a party meant that it was not forcing on the contract itself, but pressure on a party that leads them to the contract. For example, a governor forced someone to pay unjustified money leading the forced party to sell a house under a forced contract. This is called Pressured Selling, although scholars differ in their opinion on whether the buyer of the house should know about the pressure selling to void the contract.

e) The Shāfi'īs has taken to the invalidity theory. They decided that all contracts involving the forcing of someone into the contract are invalid, because consent is a condition for the validity of a contract. They say that consent and choice are two related terms, and forcing takes them both away from the person. The person who acted under forcing did not act out of will, but of self-preservation. When there is forcing there is no will, and the same goes for intercourse and divorce. On the other hand, Hanafi sect say there is a difference between choice and consent (see *al-Mulkiyyah wa-Naẓariyyat al-'Aqd* by Abū Zahrah, para 262-263; *al-Mabsūṭ by al-Sarakhsī*, 24/56-59).

228 This is the ruling for ruling in verbal actions. As for actual action that involves hostility to others, Ḥanafīs say that if the action was made permissible under necessities, as in destroying someone else's money, then it is affected by Strong Forcing and make it permissible. In this case, the forcing party is the responsible and not the one who did the harm. Weak forcing does not affect actual actions because all it takes is the right choice, and consent is not a condition. If someone did an actual action under a weak

Opinion of the Majority Schools in the Issue

Other then the majority jurists opposed the Ḥanafī school and did not except their analogy, they [also] differentiated between coercion and joking in the three conducts in which joking does not effect. They confirmed that the coercion effects in it and stops its legality or its bindingness (according to the conflict of Islamic jurisprudence in the impact of the coercion) as in all other conducts. This is apposite of joking, because the joker has the choice in directing the cause but not intending to establish its laws. And thus it is possible to establish a law despite the legislative interest necessitates it.

Coming back to the authority by coercion it does not have any choice, its compulsion will not be accepted, especially, the legal texts are explicit in not blaming the human with things coerced on him.

This opinion of the majority in our view is more reasonable and more in accordance to he wisdom of the legislation.[229]

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forcing, then he is responsible for the money not the forcing party, because weak forcing does not justify doing the action.

If however, the action was not made permissible under necessities, then the forcing does not exempt the person who did the action, such as killing another man. If a person carries on with the forced actions and kills a man, then the special punishment, which is retribution, is sentenced to the forcing party not the person who was forced.

229 We would like to note that after the third edition of this series, Prof. 'Abd al-Razzāq al-Sanhūrī published the second volume of his new book, *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī* containing more details about the theory of forcing in Islam.

SECTION 35

DEFECTS OF CONSENT: MISLEADING *(AL-KHILĀBAH)*[230]

35/1 Misleading in the Contract

Is one of the contractants deceiving another by means of verbal or practical deception convincing to consent in the contract in a way that in absence of the deception there would have been no consent.

The base of this legal concept is in the prophetic tradition that Ḥabbān ibn Munqidh ibn 'Amr al-Anṣārī used to gull in the commodities. The Prophet (s.a.w.) said: *"When you conclude a contract, say: no misleading and I have the right of withdrawal for three days"*.[231]
The mentioned prophetic tradition encloses two classes:

The **First** clause prohibits deception misleading in all the transactions. It is a prevention moved by the *Sharīʿah* if even though the contracting part did not require it, the *Sharīʿah* mentioned it for caution and warning. The requisite of this perception is the right to withdraw for the cheated party; if he wants he can continue the

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230 *Al-Khilābah* is an Arabic word meaning "trickery" and comes from the word *Khalaba*which means tricked with soft words (see *al-Nihāyah* by Ibn al-Athīr). It is noted here that we chose the word *al-Khilābah* to mean trickery in all its forms in the contract theory.

231 The *Ḥadīth: "When you conclude a contract say: no misleading"*, narrated by al-Bukhāri and Muslim. Al-Bukhāri narrated in *Kitāb al-Buyūʿ*, 3/86; Kitāb al-Wakālah, 3/175; and Muslim narrated in *Kitāb al-Buyūʿ* (1533) with an addition of the text, *"I have the right of withdrawal for three days"*. Al-Ḥāfiẓ Ibn Ḥajar in *al-Talkhīṣ*, 3/21: "It is reported by al-Ḥumaydī in his *Musnad*, al-Bukhārī in his *Tārīkh*, al-Ḥākim in his *Mustadrak* of the *ḥadīth* of Muḥammad ibn Isḥāq who related from Nāfiʿ from Ibn 'Umar. In the *Muṣannaf* of 'Abd al-Razzāq, it is reported by Anas [ibn Mālik] with the text: *"A man bought an animal and had a condition of four days of option, so the Prophet (s.a.w.) fused the sale and said: "The option is three days"*. All the scholars accepted this *ḥadīth* but their devising from it where different:
- Some of them agreed to use the right of option in financial transactions, as we mentioned before. The Hanafis took this devising and emphasizing the second part of the *ḥadīth* (see para 3/7(9); *al-Hidāyah wa-Fatḥ al-Qadīr, Bāb Khiyār al-Sharṭ* in *Kitāb al-Buyūʿ*, 5/498).
- Others focus on the first part of the *ḥadīth* independently, which is to stop trickery. They say that any trickery done by one of the parties leading to loss of rights to the other party makes the option of waiting valid. The Ḥanbalīs adopts this opinion (see *al-Mughnī maʿā al-Sharḥ al-Kabīr 'alā al-Muqniʿ*, 4/69-90 and 113).

contract and if he wants he can invalidate it upon approval of the deception. It is apparent that conducts other then the sale transaction is parallel to the later because deception is legally prohibited in the business/social conducts in general, and in all situation. The purpose of implementing the right of withdrawal is removal of harm the contractor consequenced by deception.

The **Second** clause lays down the right of consideration known as: the stipulated right of cancellation, which was discussed preciously in the example of the analogy (*qiyās*). This needs to be stipulated because the purpose of this right is, the contractant in need of advice and calculation gets ample time in which he is able to achieve the two, and not that its cause is something legally prohibited like deception and fraud. Not all the contractant is in need of this consideration; for this reason this right is not established except for the contracting party stipulating it.

Misleading in general situation is amongst the impurities of the nodal will. It is not confined to specific forms and means, instead every agent of misrepresentation by the contractant, and his misleading to conclude the contract is part and parcel of the misleading. Nevertheless, the most important point is that misleading is the master means to win over the contract. It obviously reflects various forms and means widespread amongst the people, the discussion of which the jurists has apportioned, while some of the reflections are addressed by the prophetic tradition with special prohibition.

Four well know forms are among the prominent forms of misleading: betrayal, price raise, imperil and fraud of defects.

35/2 (First): Betrayals (*al-Khiyānah*)

The jurists depict the betrayal in *bay' al-amānah.*[232] For example, someone sold something with a fixed-price profit on a capital and lied regarding the capital i.e. he said it is ten, while in reality it was less. This is a betrayal by the saller by which he misleads the buyer to

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232 The price of a sold item is determined between the two parties through negotiations without knowing the capital of the seller, which is known as Bargaining Sale. If the capital of the seller was known in the negotiations, then it is called *bay' al-amānah*. Consequently, if the selling was by adding some profit to the capital, then it is known as *murābaḥah*. If it was without any profit, then it is called *tawliyah*, and with a little loss it is known as *waḍīʿah*.

extract from him more profits than they agreed upon. For this, the buyer will be granted right of invalidating the contract in the opinion of some jurists and in the opinion of other jurists the betrayed amount will be reduced frmo the price plus form the profit: thus, if the betrayed amount was 1/4 of the capital, 1/4 will be reduced from the price with 1/4 reduced from the provisional profit as well (see *Radd al-Muḥtār*, 155/4).

35/3 (Second): Price Raising *(al-Tanājush)*

The price raising (*al-tanājush/al-najsh*)[233] is where the owner of the community concludes with a person who shows his interest in buying the commodity and pays more than its price while in reality he does not intend to purchase. He only intends to confuse other with his tempt to purchase. The Prophet (s.a.w.) has prohibited this, because it is a form of deception.

The price raising in the opinion of jurists is the defects of the consen. For this reason, the buyer will be given the right to invalidate the contract with the condition that the [salesman] pays the buyer the amount of grave deception in the price.[234] This is the opinion of the

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233 *Najash* is when a hunter lures the prey to somewhere where it is easier to hunt. It is used also when a seller excites the buyer falsely and tricks him into buying.

234 *Al-Ghabn:* Is when the benefit of one of the parties in a contract overwhelms the otherand there is no balance between what is given and what is taken.

Ghabn can happen to any party in the contract whether it was a selling or lease contract. The seller can be tricked if he sold under price, or the buyer can be tricked if he bought something overpriced. It has two types according to the amount: Minor *ghabn* and obscene *ghabn*.

Minor *Ghabn* (*al-ghabn al-yasīr*) is when the amount tricked is in the range of the usual price range of that item. For example, if an item was sold for ten Dinar and then it was shown to experts to price it, some would say it is worth ten and some say it is worth nine. The one Dinar here is considered a lesser ghabn because it is an estimation margin. Obscene *Ghabn* (*al-ghabn al-fāḥish*) is the trickery with an amount that exceeds the price range of the item.

If an item was sold for ten Dinar, and then was estimated by professionals at different prices of seven or nine, but ten was never an estimate by anyone. The difference between ten Dinar and the highest estimate by an honest expert is called the obscene *ghabn*.

The Hanafis determined these amounts for judicial standards, and said the obscene *ghabn* is determined by these numbers: Five percent of the value of movable transactions; Ten percent of value of Animals; Twenty percent of value of properties. Any value of *ghabn* exceeding these limits is considered obscene. This is stated in the article 165 of the *Majallah*. On the other hand, lesser ghabn has no effect in the opinions of scholars but it cannot be guarded against. So whenever the word *ghabn* is used it refers to obscene *ghabn*.

majority and the three legal schools (Mālikī, al-Shāfiʿī and Ḥanbalī). Whereas to the Ḥanafī, price-raise does not defect the consent, thus, the right to invalidation can not be justified, in preponderance to the stability in the deal. However, piously (*diyānah*),[235] it is *makrūh* in the level of prohibitive (*al-Sharḥ al-Kabīr* 4/79; *Radd al-Muḥtār*, 132/4).

The Mālikīs apply the analogy of price-raise on the buyers side as well, for instance in public sale when the buyer colludes with his competitor to stop at a price, so he can purchase a commodity with a low price. In this also, the Mālikīs provide the establishment of the right to invalidate the contract for the sales-man, because price-raise of the buyer is similar to the price-raise of the sales-man (*Sharḥ al-Kharshī wa-Ḥāshiyah al-ʿAdawī,* 83/5).

35/4 (Third): Deception *(al-Taghrīr)*

Al-Taghrīr litterally means to put someone in risk, i.e. danger (see *Lisān al-ʿArab*). In the terminology of the jurists, it means to deceive with the verbal (*qawliyyah*) or actual (*fiʿliyyah*) means in order to encourage one of the contracting parties to conclude their contract. *Taghrīr* can be classified into two:

- In price, the legal jurists call it verbal deception *(taghrīr qawlī)*
- In description, which they call actual deception *(taghrīr fiʿlī)*[236]

a. Deception in the Price

Verbal deception in price is when the seller or laud lord said to the buyer or tenant, "this thing costs more and cannot be bought with

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[235] See the meaning of *ḥukm al-diyānah* (religious ruling) and *ḥukm al-qaḍā'* (judicial ruling) at the beginning of the book (para 2/3-4).

[236] Our jurists divided *taghrīr* (deception) into verbal (*qawlī*) and action (*fiʿlī*), depending on the instrument used.

This is the same as what we verbally call "deception in the price" *(taghrīr fī al-siʿr)* because prices are not visible characteristics. The natural instruments of deception in the price are speech and false statements.

The actual deception is the same as what we call "deception in the description" *(taghrīr fī al-wasf),* because convincing a person in a dishonest way is a means of fraudulent deception.

Therefore, we are inclined to designate and categorise our view according to the purpose of the deception, not the instrument. We said: deception in price and deception in characterization, because it is clearly and frequently in conformity with the substance of the law.

this price, or so and so wanted to pay me this amount but I did not agree, and other similar false deceiving words".

Thus, if the verbal deception accompanies grave deception in the price, the jnrists obligate the right to invalidate the contract for the deceived party for him to escape the harm of deception looking at the consent he achieved not pure because of the imperil (*Radd al-Muḥtār*).

b. Deception in Description

Practical deception in the description is by forgery of description in the session of contract where the contracting party delludes the commodity in an artificial non-real justering way. This is like directing to the exhibited merchandise for sale by putting the high grade form. It is on top so that it becomes the anticipated as if it's the face and the lower grade down.

In the same vein, when the water-mill's water is less, the seller with-held the water, then released it upon showing the mill to the buyer in order to declude him that the water of the mill-which is its strength is abundant gursting fourth. Similar to this in our contemporary time is the playing of the seller with the mileage meter of the used vehicles. Its uumber is reduced to delude the buyer that the car is less used.

Another famous example of practical deception is in milk-ginning animals which are purchased only for the sake of the milk. These animals are laced-up in the time of selling. This takes place when goat or cow or camel becomes arid or gives less milk, so the owner ties the back of the udder until the milk gathers and their udder fills up, then, he exhibits these animals for sale delluding with plenty of milk. When the buyer will milk these animals for the first time, decrease of milk will become obvious to him. This issue is well-known to the jurists as the blocked-goat.

The Prophet (s.a.w.) prohibited tieing up the milk of the camel and goat,[237] and by this prohibition selling of animals with repleted milk is established (*bayᶜ al-muhaffalāt*).[238] Majority of the jurists

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[237] Narrated by al-Bukhārī and Muslim in *al-Buyūᶜ*: *"Do not tie up udders of camels and sheep, and he who buys them after that has been done has two courses open to him: after he has milked them he may keep them if he is pleased with them, or he may return them along with a sit of dates if he is displeased with them."*

[238] Narrated by al-Bukhārī and Muslim in *al-Buyūᶜ*: *"Whoever buys a sheep which has not been milked for a long time, has the option of returning it along with one ṣāᶜ of dates".*

consider this as one of the types of practical deception in the description, which obligates right to invalidate the contract for the deluded party, even if the deception did not accompany any deception. This is because may be the delusion stet description in the commodity was deliberated by him; thus that description became remarkable in the time of concluding the contract, hence the expiring of the description will obligate the right to invalidate for the betrayed contactor similar to the expiration of the conditional descriptions (*al-Mughnī wal-Sharḥ al-Kabīr,* 4/80-81).[239]

35/5 (Fourth): Fraud of the Defect *(Tadlīs al-ʿAyb)*

Fraud of defect is concealment of hidden defect by one of the contracting parties which is in his knowledge in the session of contract from the other party in commutative contracts such as selling and leasing.

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[239] The topic of the none milked camel rose a lot of discussions in *fiqh*. Narrated by al-Bukhārī and Muslim: *"And do not tie up udders of camels and sheep, and he who buys them after that has been done has two courses open to him: after he has milked them he may keep them if he is pleased with them, or he may return them along with a sit of dates if he is displeased with them."* There are different *Ijtihad* for that:

Some said it is to be returned with one *ṣāʿ* of dates no matter how many times it was milked, taking the ḥadīth literally.

Abū Ḥanīfah said that the camel is not to be returned, but the buyer returns the difference in price if it has changed since he bought the animal.

Abū Yūsuf said that the camel is to be returned with the value of the milk that was produced from it. Because it might be worth more or less than a *ṣāʿ* of dates.

Abū Yūsuf says that the concept of one *ṣāʿ* of dates is to repay the price of milk that was produced, but the main thing is to repay the owner with the price of the milked produced.

We believe that Abū Yūsuf's opinion is one of the fairest opinions and it should be taken by. His opinion is better than that of his mentor, Abū Ḥanīfah that says to return only the difference in the price of the camel. Because the buyer could have bought the camel for a reason that was not present in the camel, so returning should be justified.

The magazine did not research into this topic but simply explored opinion and took that of Abū Yūsuf. Scholars have argued the opinion of Abū Ḥanīfah in saying that the camel is not to be returned. In my opinion, the opinion of Abū Ḥanīfah should be taken depending on whether the camel a milking one or not, after milking the camel. Even though the camel's utters are tied.

In the case that the camel did not produce much milk to be called a milking camel, Abū Ḥanīfah agrees to returning the cow and revoking the contract because forcing the buyer with the camel contradicts the rules put by Abū Ḥanīfah himself. One of the rules of Abū Ḥanīfah says, *"What is known by tradition is like what is conditioned"*. It is known that the rules of every sect are to be used to interpret what the scholars meant.

The Islamic jurist has consensus that frauding the defect will obligate the right of invalidation of the contract for the party frauded the right is called*khiyār al-ʿayb*. The defect sold or leased merchandise will be returned to the fraud seller or lesser and the contract will be dissolved.

This does not mean that the*khiyār al-ʿayb* does not establish for the buyer and the one in his meaning if the seller did not have the knowledge of the defect in the time of selling. Instead, the right for the buyer will be legally established in all the situations, upon appearance of the defect in the merchandise which was hidden from him, even if the seller did not know, this is because it is compulsory in all the contracts that the consent of the contracting party be based on basics clear from defects in the time of contract, and that the other contracting party is responsible for all the old defects appearing in the place and he is the guarantor for it, until the party does not stipulate the disavowal of the seller form this guarantee.

But if the seller or the one in his meaning knew the defect and consealed it, then he will be the forger of the defect and will be under the ruling of the misleading. In the situation where the seller did not know the defect, he will still be the guarantor of the defect because of the contract's requirement, but he will not be forger.

The difference between forgering the defects do not appear by looking at the guarantee of the defect, because his guarantee is an associated ruling in both situations. It does appear in some other rulings having the nature of penalty. For instance, the seller stipulated in the contract of selling his disavowal of the guarantee of the defect (i.e. his non-responsibility of any possible defects in the merchandise), the buyer agreed with the stipulation depending on the apparent defect lessness, then, old defects showed up:

a. In this situation, if the seller was ignorant of any defect in his commodity and he only stipulated the above stipulation as a precautionary measure, his stipulation will be correct abolishing the guarantee of the defect from his custody according to the legal schools of Islamic jurisprudence. The buyer will be considered self-responsible as if he was aware of the defect and bought it in full consent.

b. In the situation, if the seller knew the defect and concealed it form the buyer, then he stipulated his disavowal from the guarantee of the defect ill-intentionally. According to the strong

opinion such stipulation is not accepted, he will be subjected to the guarantee, this is because his stipulation is for deception not precaution. He is ill-intended with his stipulations taking advantage of it is not permitted.[240]

35/6 General Summary of the Misleading

Looking at the forms of misleading we discussed from the Islamic juristic schools-betrayal, price raise, imperil and frauding of defects and the similar forms which we did not discuss but are seen in the legal books of the schools, it is possible to conclude general rulings for the misleading which we will determine in the following details:

The misleading in the forms stated, its example and deceptive methods to which one of the contractants resort to, spoils the consent of the other party and affects the binding strength of the contract, by which a right is legally established for the misled party giving him as his requirement prerogative to invalidate the contract, according to the jurisdiction of the legal schools.

But that times with misleading, existence of fraud of the misled contractant is required and at times not. This depends on the end-destination of the misleading:

a. If the target of the misleading was increasement of the price for the misled party, then in that time the misleading should be accompanied by grave-fraud in order to defect the consent and juristify the invalidation of the contract. This is as seen in the depictions of price-raise and the verbal imperil of the price. In all of these and its kind, the misleadingr intends for the expansion of the price. If this led to grave-fraud, then in that moment the right to invalidate will be established for the misled party otherwise, no.

   Sales of trustship such as *al-murābaḥah* and its sister types are exception to the rule because - if the target was expansion of price- it will obligate for the buyer in all situations right to

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[240] The third Caliph, 'Uthmān (may Allah be pleased with him) passed this judgement and it is adopted by the present (Syrian) Civil Code. However, the Ḥanafis has a different opinion as they said such a condition is valid and the seller will be discharged from the compensation of defect despite knowing with bad intention (see my two books, *'Aqd al-Bay' fi al-Sharī'ah al-Islāmiyyah*, in vol. 4 of this series, para 127; *Bidāyat al-Mujtahid* by Ibn Rushd, 2/153-154.

invalidate the contract or the right to settle the price equivalent to the amount of betrayal (this is according to the conflict of the juristic opinions in the law of betrayal as in the previous discussion 35/2) even if the grave-fraud in the price was not obtained with the betrayal of the buyer.[241] This is because in *murābaḥah* and similar types stand on the basis of the capital agreed by both parties. Any lie in stating the capital will lead to conflict in agreed upon of the two contracting parties, even if there is no fraud.

b. If the target of the misleading was decept of the misled party in the description of the merchandise such as the quality or any other descriptions, it will defect the consent and justify the invalidation of the contract even if the misleading did not accompany fraud in the price, for instance in the repleted goat when sold with a price not exceeding the value of the goat itself and displayed fruits when sold not exceeding the price of the rejected fruits under the surface of the good-grade. As mentioned early that may be the misled contractant deliberated the decluded description decluded, its expiry will obligate the right to invalidate (see *al-Mughnī wal-Sharḥ al-Kabīr,* 4/69, 80, 90, 113; *Radd al-Muḥtār,* 4/96, 131, 155).[242]

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241 For example if one sells something for ten whereas his capital is eight. Afterwards, it is proven that his capital is seven and the sold item is equivalent to ten or more in the market. In this case, the buyer was not affected by the betrayal of the seller. Despite this, however, the buyer has the right to revoke the contract.

242 Note: According to foreign jurisprudence, *al-khilābah* (misleading) means to explain in a completely different form. In French, it is called "*le dol*" and it was translated by the Arabs legists in Egypt with the word *tadlīs* (fraud). The word *tadlīs* was used by the earlier Muslim jurists in three schools of thought: Mālikī, Shāfiʿī and Ḥanbalī. Sometimes, this is the meaning used by contemporary attorneys, and sometimes, the meaning of concealment of the seller is the hidden defect in the sale which it is the original meaning of *tadlīs* (fraud).

We have explained here that we used the term *khilābah* (misleading) because it is indicative of the intended meaning of cheating, as I explained with respect to the *ḥadīth* advanced by jurists of all schools of thought. It is the legal evidence in the same subject. The word *tadlīs* (fraud) became limited to the original meaning, it is a concealment of a subject matter and it is one of the forms of misleading according to the general meaning.

Rule of the Abstract Fraud and Its Exceptions

35/7 It can be classified from what have been discussed that grave-fraud alone in the contracts can not defect the consent until something of misleading accompanies the later on this, most of the opinion stand. This is because the abstract-fraud in all deceptions does not indicate except to the meatiness of the frauded-contractant in investigation of the price and information of the just exchangeable rate; it does not indicate to deceiving of one contracting party of another. Emery human has the right to pursue expansion of the benefit using free legal way not deceived and deception, until he does not harm the people at large. If he harms, then his freedom and benefit will be put to a limitation, for instance in situation of the monopoly of the necessary-materials and iu the case of controlling the vendors by the prices, where the controller seels the monopolies good against the will of the owner, and when takes respirt to fix the price of the vendors when they comer and control the prices.

In normal dealings of the people in non-monopolizing and controlling situation, the requirement of law is not to stop cheating which is free from betrayal and fraud, but to establish both contracting parties on same footing of freedom and capability, then, it becomes compulsory for every human to open their eyes and protect himself from the deception. Every human endeavor for his interest impendent and responsible to investigate something more-interesting for him is obviating others from it. And the nature of the careless is compulsory to be on its account.

These are the populace of the Islamic jurisprudence on the abstract frauds[243] with an attention to its exceptions:

35/8 Exceptional Situations in which the Abstract Fraud is Considered Defect of the Intention:

The Ḥanafī and other legal reasoning have separated three areas where grave-deception is not permitted even if the abstract fraud is

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243 The evidence from the divine texts is the saying of the Prophet (s.a.w.): *"Leave the people on their situation since Allah arranges their rizq through each other".* Related by Muslim in his *Ṣaḥīḥ* in *Kitāb al-Buyūʿ* (1522) and al-Tirmidhī (1233), and al-Nasāʾī (4496) from the *ḥadīth* of Jābir (may Allah be pleased with him). There are two views among the Hanafis with regard to the permissihility of termination of contract due to misleading. However, the one accepted view stands on the impermissibility (see *Fatḥ al-Qadīr*, 6/107; *Radd al-Muḥtār*, 4/159).

not accompanied by the misleading. These three areas are: right of the orphan, endowment, and *bayt al-māl*.

(Any) Fraud taking place by concluding contract in any of the properly (*māl*) of the three aspects, is legally rejected for the frauding party, became these three aspects need more tonnage for the cause of the law for disdain of the people holding the later in order to preserve its right is copious (*Majallah*, 356).

The Ḥanbalīs separated two situations in which fraud empty of misleading is considered defect of consent by the fraud party permitting them to invalidate the contract. The two situations are as follows:

1. Situation of the intimate person
2. Reception of the riders

   a. The intimating person is the one be it a buyer or seller who submits to the contracting party ignorant of the price. If the deceive later the in the price than the intimating party has the right to invalidate[244] the contract because of the tradition of the Prophet (s.a.w.): *"deceiving the intimate is unlawful"*.[245]

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[244] The Mālikīs discussed in detail *Ghabn al-Mustarsil* and they say that if it was obscene then the party has the right to revoke the contract. They define *Ghabn al-Mustarsil* as follows: when one party confides in the other and declares that they do not know the market prices, and ask for the seller or buyer to determine the price according to the market. If the other party tricked them, then they have the option to revoke the contract. However, if the person who does not know the prices of the market does not declare that, then the scholars differ in the option of revoking the contract. Additionally, if the party knew of the market prices and where tricked, then they do not have the option to revoke the contract.

The Ḥanbalīs do not specifically say that *al-Mustarsil* is the person who declares their ignorance in market prices, but they say that *al-Mustarsil* is the one who does not know the prices only. They fact is once the buyer confined the seller with the pricing since the buyer does not know, and the seller uses that trust to trick the buyer. This is known as *Gharar Qawlī* (verbal trickery).

[245] Narrated by al-Ṭabarānī in *al-Kabīr* 126:8 (7576) from Abū Umāmah al-Bāhilī wherein the *sanad* of this *ḥadīth* mentioned Mūsā ibn ʿUmayr al-Aʿmī who is considered a very weak narrator. This *ḥadīth* is of different version when narrated by al-Bayhaqī, 5/348, *"whoever is sent to a pious believer to sell or buy on behalf of another person, but was subjected to ghubn during the transaction, then the extra proceeds made from that ghubn is considered ribā"* but the same weak narrator exists in the *sanad* here also. Al-Bayhaqī did also record this *ḥadīth* but with a different *sanad* that includes Jābir and Anas, and in different wordings that goes: *"the ghubn conducted on al-mustarsil is considered ribā"*, however, the *sanad* here does include Yaʿīsh ibn Hishām al-QarqīsyānÊ. Al-Bayhaqī said about him: He is even weaker than Mūsā ibn ʿUmayr.

If the intimate knew the price or he rushed and became ignorant of that he coued have known if he was firm, in this case he will not have any option because his deceiving was then because of his rushing and negligence.

b. The reception of the riders is there a person goes out to the outskirts of the city to receive caravans coming to the city with their commodities from villages and jungles. The receptionist buys from them things they were carrying to the market or sees to them what they wanted. If he deceived them companied to the price of the market, the caravans will have the right to invalidate the contract according to the Ḥanbalī opinion; even he did not use any betraying technique.

   The argument of Imām Aḥmad ibn Ḥanbal is based on the *ḥadīth* reported by Imām Muslim[246] where the Prophet (s.a.w.) receive the riders and gave them the right to invalidate if they came down to the market and found out that the receptionist who sold and bought from them has actually deceived them (*al-Mughnī wal-Sharḥ al-Kabīr*, 4/77-89-90).

[246] Narrated by al-Bukhārī, 3/92-94; Muslim in *al-Buyū'*, 3/1156 fron the *ḥadīth* of Ibn 'Umar, 1517, Abū Hurayrah, 1519, Ibn 'Abbās, 1521.

SECTION 36

DEFECT OF CONSENT: MISTAKE *(AL-GHALAṬ)*

36/1 Definition and Preface

Mistake *(al-ghalaṭ)* is a presumption in which the contractant envisages a non-fact as a fact, which prompts him to conclude the contract, had it not been for this presumption he would have not under taken the contract.

This is like someone bought a thing thinking it to be excellent while in fact it was low class; or he thought the thing to be equal to the price he bought with but it was not, r he sold a carpet for example thinking it to be a usual one where it was a rare antique or he withdrew[247] from his share of inheritance thinking it to be one sixth but actually it was one third, or he gifted me of his horses thinking it to be another one; or he had two houses one on east and another or west he rented the west one thinking it to be smaller where in actuality it was bigger; and so on.

This, if we refer to the previous discussion on misleading, we will also see the presumption present with the misled contractant. This is because in misleading there is deception by oue of the contracting party with another in the price or in the quality. Hence, the element of presumption is common in both misleading and mistake; but difference between the twos, the presumption in misleading emerges from the responsible deed of the dear, whereas in mistake, the presumption is spontaueous, i.e., it emerges in the mind of the possessor by its own accord, not by the action of the other contacting party.

Two Contrary Elements: Regard of the Will and Stability of the Deal

In this context and its couuter pat figh and legislatiou stand facing the two opposing elements, both compulsory to be taken of

[247] *Al-Mukhārajah* means the sale of inheritance by an heir of his share to another heir.

considering one will contradict considering another, and they are: respect of the contractant's will and stability of the deal.

a. Respect of the contractant's will require us to consider the original will of the contractant which his conscience encompasses. If in expression of the will (external will) came any mistake, then this extend will of the contractant will differ from his original internal will which is in one accord with his imagination and presumption. It will be compulsory then to consider his will not safe and it will be compulsory to widen for him sphere to invalidate the contract. This will require him a principle to respect the will of the contractant if he is alone in the field.

b. But there is a general interest in the field of dealings which completely requires it's opposite and that interest is the stability of the dealings.

The meaning of stability in dealing is, the conducts of the will by which people deal with each other to be by means of consentual contract making which has firm outcomes not visible to breakdown with the causes contracting party does not know, not that he is negligent to avoid them, and this is so he can base his affairs on the result of his dealings while he is assured of its stability and confidence with its steadiness. This view of the interest of stable dealings require dependence on the external will of affirmation *(al-ījāb)* and acceptence *(al-qabūl)* and requires the mistake of one of the contracting parties not to influence in the strength of this contractual relation, because it will be difficult for the other contracting party to recognize the mistake of his companion untill an obvious evident lead to it. In every contract it is possible that one of the contracting parties will be mistaken in its aspect. If invalidating the contract is justified for him because of the mistake, it will be surprised for the other contracting party. Thus, trust of every contractant on the outcome of their contract will fall away because of the probability that one of their partne is in mistake.

For this reason and because of giving preference to the interest of stability of the dealings, Islamic law does not give much importance to mistake in the contract compared to the foreign law, and the Islamic legal scholars did not devote to the theory of mistake by forming a separate discussion as they gave shape to the theory coercion. This is because the Islamic law depends on the external will

(affirmation and acceptance) as foundation in reconstructing a contract,[248] untill the original internal will remains hidden as the discussed early (32/4).

And this is how the issues of mistake in Islamic law was not composed in a special discussion, instead it was distributed separately in different places and in various discussions relating to it, like appearance of the defect in the local commodity, lost of quality or conflict of genus in the contracted commodity, and like the right to see the commodity as we view see [in the upcoming discussions].

This is why whoever wanted to compose the theory of contractual mistake in Islamic law in the manner of its theory in foreign law, it was important for him to glean this issnes, maxims and laws from those chapters and discussions which were related to it. This is what we will attempt to do according to the ammount possible and the ammount this introduct have capacity for.

36/2 When the Mistake of Contractant will be Considered Defect in His Consent Allowing to Invalidate the Contract?

After the preface we say: A person who followed the issues of mistake sporadic in chapters and various feasible sources of the fiqh of four schools did not consider the spontaneous mistake of one of other contracting party as defect of his consent allowing him to invalidate his contract except in situations where the mistake is obvious with no surprise for the other party.

The reason is because the mistake if not obvious, the original consent of the contractant who make mistake will be consealed area, it will be then compulsory to depend on the external consent. Giving him the right to invalidate the contract upon confirmation of his mistake –eventhough in this is his deliverance and protection of his right and interest-in that time itself will be crime to the right of the other party and his interest without any motive or negligence by him and this is thing which will convulse the stability of the deal.

However, if the mistake is obvious, the original consent then will be explicit. In this situation, granting the mistaken party the right to invalidate is the thing which will make incumbent upon him the

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[248] This is very apparent from the definition of the contract. Muslim jurists did not define the contract as 'a congruence by two desirees' as defined by under the law, rather they defined the contract as 'a conjunction of offer and acceptance' as previously discussed in another place (para 27/2).

principle to respect the contractual consent. It will not violet the stability of the deal because the other party will be standing on the clear proof of his partners mistake,[249] there will be no surprise in invalidating the contract.

36/3 When the Mistake of the Contractant Will Be Explicit

It is evident by following the texts of jurists that the mistake of the contractant party in his contract will be considered explicit, if he unveils frankly his intention in amidst of making the contract himself or his intention was unveiled apparently by the inferences and evidences. These two situations are:

36/4 (The First Situation): The Unveiling By the Contractant His Intention Frankly

As far as the situation of the mistaken contractant who reveals his intention himself explicitly is concerned, it is like the issue in which the contractant specifies the genus of the commodity in the contract or he describes the commodity with a certain description, then it turned out its opposite. In this situation the jurists possess detailed law pertaining to the effect of the mistake on the contract:

a. If the mistake occurred in the genus of the contracted commodity for instance one sold or bought the stone of the ring assuming it to be sapphine but it turned out to be glass or bought a bag of cedar but it turned out to be wheat, then the contract is not complete according to the Ḥanafī school, because conflict of the genus made the locale of the contract-subject none-existent which is one of the constituent factors of contract discussed early (para 29/1).[250]

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[249] This is what foreign law requires in the theory of error, where they say that to revoke a contract due to an error caused by one of the parties, the other party must be aware of that error.

[250] This is what scholars call Error obstacle, meaning it stops the completion of the contract. This includes error regarding the item of interest in the contract, such as when someone sells a horse and the buyer thinks he buying a different horse.

In addition, this type of errors, the obstacle error, is not considered a consent error because it stops the completion of the contract. Whereas consent errors are minor and the contract can still be completed, but at the same time, the erroneous party can revoke the contract at will.

b. If the mistake was in the description then it will differ in the ruling between two situations:

   i. If the subject-contract was specific with the essence but was absent in the session of the contract, or was present bnt the contractant did not recognize its description in inspection, for instance one sold a specific textile from the broad cloth that it is of English origin, or sold it that it is red while the buyer was blind or the business was at night in the dark, then the commodity turned out to be opposite of the description designated in the contract, the buyer will have the option to invalidate the contract because of the vanishing of the stipulated description in the time of the contract. His consent will not be considered safe because of the vanishing of the description. This is known as *khiyār al-wasf.*

   ii. If the subject-contract was present in the session of the contract unveiled indicative under the speculation of the contractant and its description was amongst those things which could be recognized by this inspection such as the colours and sizes, for example, the seller said: *"I sold you this small white colt with this much of price"*, while it was black big horse, or he said: *"I sold you this white-footed horse"*, while it was not white-footed, or this green car while actually it is black, and the buyer accepted. In these cases the contract will convene essentially for the buyer. He will not have any option of invalidating the contract. This is because be is not excuseable by the mistake after such inspection and indication. Conflict of the designated description with the actual does not have any consideration in these situations, because indication here in the things present is the most

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It is noted here that the difference in the material is considered an obstacle error in Islamic fiqh, whereas it is considered a consent error in the legal perspective and the contract is completed with the option to revoke it.

Additionally, the selling of the wrong horse is considered an obstacle error in the legal perspective and does not complete the contract. Whereas in Islamic fiqh, it is considered a trivial error and the contract is binding with no option to revoke it. Because the open consent on one of the horses makes the contract binding because the error is not clear now and the contract holds, to maintain the consistency of transactions. Unlike the issue of different material, naming the exact thing of interest and its material in the contract makes the error important and affects the contract.

powerful. If with it combined and opposed by a method of introdnction weaker than it such as verbal description, than consideration will be given to the indication. In this instance the jurists resolved a maximnm: Description of the present is nonsense and of the absent is considerable (*al-Majallah* 65).

36/5 (The Second Situation): Appearance of the Contractant's Intention by the Evidences

The situation of unveiling the mistaken contractant's intention by the means of evidences rather than by himself has many examples in the schools of jurisprudence.

The Ḥanafī jurists mention that a person bought a slave who was well known to write beautifuly or fake finely, but found the slave has forgotten those skills, or bought a maid well known to cook well and saw well, but found her forgotten those skills, in this case the buyer has the right to invalidate the contract even if the description of the two was not stipulated in the contract frankly, because it is evident that the buyer bought the slaves in interest of those description, thus those description became stipulated by the means of indication (*Radd al-Muḥtār*, end of the fourth volume on *Khiyār al-Sharṭ*; *al-Baḥr, al-Rā'iq* of Ibn Nujaym, 36/6).

The Mālikī School state that: "when a person sold stone in the jewelry market, this indicate that he is selling jewel, even if he does not announce the genus of the stone in the contract. Thus when it was verified that the stone was not jewel, the buyer has the right to invalidate the contract. If he sold that stone in other than jewelry market, the buyer will not have the right" (see *Sharḥ al-Ḥaṭṭāb al-Mukhtaṣar*, 4/466-467).

By indication the descriptions will be considered provisional even though not announced in the contract for safety of the subject-contract from defects in commulative contracts. The buyer or the lessee's right is for instance to compute the commudity or the heired to be empty of defects; and from the requirements of the seller or the lessor is acquaintance of and evaluation. If any defect showed up in the commodity or in the heird the buyer or the lessee will be considered mistaken. They will be excusable in their mistake and will

come right to return. In this, there is no surprise for the seller or the lessor, because it compulsory for them to anticipate this.[251]

In summary, the outcome of the situations in which the mistake of the contractant is considered impurity of the contractual will is the mistake of the contractant is obvious where he unveiled himself his intention frankly or his intention was unveiled by the means of indication. If the reality opposed his unveiled intention then he will be excusable in his mistake which defects his consent, for clarity of the mistake compared to the other contractant. Invalidation of the contract will not be surprise for him violating the stability of the dealings.

36/6 The Indistinct Mistake

If the mistake was subtle and unclear, and the parties' desires were not clear or couldn't be derived from the evidences and clues, Islamic *fiqh* does not then acknowledge that mistake. Preference is always given to the apparent intention as long as the real intention is unknown; this is to make sure that the dealings between people are stable. It is feasible then to sacrifice the partial personal interest of the party for the greater good of transactions stability, and the assurance of both parties with its success.

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[251] Professor al-Sanhūrī in his new book, *Maṣādir al-Ḥaqq fi al-Fiqh al-Islāmī*, 2/130, 1st ed., says: "Everything that is safe from defects in the contract is required by the description of items. If the defect exists and that the buyer misunderstood, I am of the opinion that it is appropriately defective. Hence the option of defect is connected to the theory of accountability; it is not only one of the forms".

Imām al-Kāsānī, one of the Ḥanafī scholars, said in his book, *al-Badā'i'*, on *khiyār al-'ayb* (the option of defect) 5/274:

"Security is conditional in the contract like the inherent condition." If there is a mismatch of expectations, then the option is available... because the sale is an exchange contract built on knowledge and equity ... and because of security the buyer will not be disappointed. This necessitates option because consent is a prerequisite of sale. The lack of consent inhibits the true sale; and deficiency necessitates the option, the ruling is established based on the strength of the evidence".

This statement from the author of *al-Badā'i'* as you can see clarifies the rule of the option of defect in Islamic jurisprudence which was built on the basis of the buyer's consent, the appearance of the defect in the subject matter, such adulterations will render the consent defective.

We have explained (para 5/35) that fraud relating to defects *(tadlīs al-'ayb)* is present in the context of misleading *(khilābah)* through enchanting descriptions.

We must add here that the defect does not involve the defect by the fraudulent seller on the buyer which was unknown to the seller itself due to some errors. We shall also see that there are also some deficiencies in execution which is the fourth type of defect of consent.

Based on this, jurists say that if someone sold a prayer rug without stating what it is made from, and thinking that it is made of cotton, but it turned out to be from linen, then, he does not have any option, but to complete the sale. The same applies if someone bought a rug thinking it one thing and it turned out to be another, he is bound by the contract and the sale is final. Al-Ḥaṭṭāb narrated this from Mālik. (This however is different from the case in which the bnyer specifically states that he wants a linen rug in the contract, and received a cotton rug. The buyer here has the choice to revoke the contract because his intention was clear). The same applies to the buyer of a camel (*baʿīr*)[252] thinking it to be female, bnt in fact it is a male camel. Unless the buyer's intention was clear in that he wanted to milk the camel, in this case the mistake is not subtle and revocation of the contract is allowed (see *al-Baḥr al-Rā'iq* 6/26; *Radd al-Muḥtār* on *Khiyār al-Sharṭ*, v. 4; and *Sharḥ Mukhtaṣar al-Haṭṭāb* 3/466).

Al-Ḥaṭṭāb also narrated that if someone sold a stone (namely a stone) and it turned out to be a gem without his knowledge, then, the sale is finale and obligatory, even if the buyer knew that it was a gem. This is because the name 'stone' is a general term that also includes gemstones, and thus, the naming was correct[253] (if the buyer asked for a dress worth 1 Dīnār, and the salesman gave a dress worth 4 Dīnār, then, the seller can swear and get the dress back).

Al-Ḥaṭṭāb said explaining the former: "Mālik differentiated between the seller who sold a gem not knowing what it was and who sold a dress worth four Dīnārs instead of a one Dīnār dress. The first did not know but did not ask someone who knew, whereas the second made an honest mistake that cannot be avoided, so he can take the dress back".

Moreover, in this explanation of the two similar cases (the gemstone and the dress) we see the essence of the *fiqh* principle concerning mistakes. If the mistake was clear with clear intention, then, the contract can be rescinded without compromising the stability of the transactions, and if the mistake was unclear, it is not taken into consideration. In the former example, both the seller and

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[252] *Al-Baʿīr* is the inclusive name for both male and female camels, like that of sheep, it includes both ram and ewe, because the word ha' in "sheep" does not denote the feminine gender but denotes a single unit.

[253] Here, there is acceptance of the buyer in the erroneous sale, but his hidden desire was not clear and an obvious mistake. This is unlike the case where sapphire is sold but turns out to be rubies, or sapphire is bought but turned out otherwise.

the buyer know that the item is a one Dīnār dress, so if the buyer took a four Dīnār dress it will not come as a surprise if the seller challenged the contract and took the dress back (see *Maṣādir al-Ḥaqq* by al-Sanhūrī, p. 123).

36/7 An exceptional case where subtle mistake is considered an excuse

Khiyār al-Ru'yah

There is a case in which Islamic law gave the right to revoke a contract because it might be in mistake. It is the case when a buyer buys something he did not see, as was said in the *ḥadīth*: *"He who buys something without seeing it, has the choice of buying when he sees"*.[254]

The Ḥanafīs undertook *ijtihād* by this *ḥadīth* and decided that if someone bought something specific without seeing it, he has the right to revoke the contract when he sees it and did not agree on it. This right is called the option of seeing. This right, however, is conceded with the consent of the buyer after seeing the item sold. It is also conceded if other people`s rights are involved, as in the case that the buyer resold the item before seeing it.

The Muslim jurists justify this right because it shields the buyer from harm, because he might find the item he bought does not fit his his needs because he did not see it, and so obliging him with the item will harm him. Whereas if the buyer saw the item at the time of the contract or before and the item has not changed, then the right of seeing does not apply anymore, because he bought based on the knowledge of the item.

The right of seeing is not applicable to the buyer if he sold something he did not see, because the *ḥadīth* only mentioned the seller. This was justified because the purpose of buying something usually is to fit some need of the buyer, whereas the need of the seller is the price of the item not using the item itself.

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[254] Narrated by al-Bayhaqī, 5/268; Ibn Abī Shaybah, 6//7(18) from Maḥkūl as *ḥadīth mursal* wherein mentioned Abū Bakr ibn Abī Maryam as weak narrator. Ibn al-Hammām said in his *Fatḥ al-Qadīr*, 5/531: "Mālik and Aḥmad used this *ḥadīth* though there is a weak narrator by the name of Ibn Abī Maryam. Many scholars accepted this *ḥadīth* as *ḥadīth marfū*ʿ and it is narrated by Abū Ḥanīfah". See *Iʿlā' al-Sunan*, 14/49 onwards; in page 51, it is quoted from Imām Muḥammad ibn al-Ḥasan in *al-Ḥujjah*, page 236: "This *ḥadīth* is known and no dispute that it is the *ḥadīth* of the Prophet (s.a.w.) where he said: *"whoever buy something witought seeing it, it is his option to see it"*.

Seeing in this context means to examine something wholly, not laying on the eyes only. Examining musk, for example, means smelling it, not seeing it, examining fabrics is done by feeling it and so on.

It is noted here that the Islamic society estimates the probability of mistake in the transaction according to the needs of the buyer in general. The right is valid for whoever bought something they did not see, and does not need a proof of mistake from the buyer. It is considered a general area of mistake when someone buys something they do not see, and the judgment of mistake is left to the buyer because he only knows his true needs.

Additionally, describiug something without seeing it does not concede the right of seeing for the buyer.[255]

The most important thing to note here is that the probable mistake that the option of seeing was intended to avoid is an unclear mistake (or a subtle mistake) for the seller. According to the rule of subtle mistakes, it states that the mistake should not make an excuse to break the contract, and this is why the option of seeing is an exceptional case to the subtle mistake rule.

The option of seeing is valid in all compensations contract like renting and reconciliation like the case in selling. It has detailed provisions that are out of the context of this book and can be found in articles 320-335 of the *Majallah*, and *Kitāb al-Bay*ʿ in the works of the Ḥanafīs.

36/8 Different Aspects of Mistakes

We have uncovered the broad lines of the theory of contracts mistakes in Islamic *fiqh*, and assembled these separate lines to form the theory. We also showed evidential examples where the mistake revolves around the item of interest of the contract.

However, in Islamic *fiqh* there are other forms of mistakes in different aspects of similar contracts. Among these mistakes are the ones relating to foreign laws, mistakes in the contracting party,

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[255] This is unlike what was adopted by the Syrian Civil Code in Article 387. It was deemed that the basic description of everything sold in the sale contract prevents the buyer from his right of voiding the sale due to lack of adequate knowledge regarding the subject matter if it was identical to the descriptions mentioned.

According to Imām Mālik, the option of inspection of a specific obscure matter is not established for the buyer unless made conditional on the seller (see *Kitāb al-Kāfi fi Fiqh Ahl al-Madīnah* by Ibn ʿAbd al-Barr al-Namrī al-Qurṭubī, p. 329-330.

mistake in the value and in the shariah ruling. We couclude the chapter on mistakes with some examples and explanations of those different variations.

36/9 Mistake in the Contracting Party

One of the contracting parties might mistaken the other contracting party, thinking him to be someone else, or thinking him to be a relative of some sort but turns out to be not.

This mistake becomes more important when the contracting party's identity is directly related to the contract and holding a meaningful importance.

Other than that, this mistake holds no importance as in the case when a seller sells something to a buyer thinking him to be someone else.

In addition, the purpose of the seller in general is to collect the price of the merchandise whoever the buyer is. The *fuqahā'* have showed scripts indicating the applicability of this principle:

a. In *'aqd al-ziwāj* (contract of marriage), if one of the spouses had a life threatening illness, whether sexual or non-sexual, like insanity or leprosy. If this illness was present before the marriage contract and the other spouse did not know of it, then that spouse has the right to break the marriage contract if he/she wants.[256]

   In this situation, one of the spouses made a mistake in the identity of the other. He/she thought the other spouse was healthy where in fact the latter was not. In addition, the spouse is directly related to the contract of marriage.

b. In the *al-ijārah* (leasing contracts), it was said that if someone commissioned a woman to breastfeed[257] his child, and then discovered that the child does not accept the woman's milk, or if the woman was foul or a thief, the parents have the right to annul the contract before the end of the contracting period.[258] Because

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[256] Taking the status of Family Law in Syria and some other countries.

[257] Wet nurse is a breastfeeding women hired to breastfeed and take the responsibility of the well-being of a child.

[258] This is because the robber fears them, and the prostitute fears that her prostitution may distract and corrupt the virtuous upbringing of the child (*al-Mabsūṭ* by al-Sarkhasī, 15/112-119).

the qualities of the breast feeding woman are directly related to the contract, and thus, it is a valid for revoking the contract.

c. In *al-shufʿah*,[259] if it does not claim his right to *shufʿah*, the right of a future claim is dropped. However, in case the *shafiʿ* later discovers that the buyer was someone else with whom he is not comfortable being neighbors, he reserves his right to claim *shufʿah* ((since people differ in their preference to a neighbor, so that one's satisfaction with a certain neighbor does not imply his/her approval of being neighbors with another. Therefore, if he found out that the buyer was a person other than the one that was named to him, he reserves his right), which was reasoned by al-Sarakhsī in his book, *al-Mabsūṭ* in para 14/105.[260]

36/10 Mistake in the Determination of the Value

Mistakes concerning the setting of a value to an object under a contract undermine the satisfaction of the contracting party due to the injustice which they cause.

Therefore, we can safely say that all kinds of extreme injustice which were previously mentioned in our chapter on *Khilābah* justify the right of said contracting party to terminate the contract whether a proof of *taghrīr* (deception) is present or not, as they can be considered a form of mistaken determination of the value.

Furthermore, since our discussion of this subject only comprises spontaneous mistakes which a contracting party may inadvertently fall into by acts of *Khilābah* or deceit by the other party, all cases of unintentional injustice which justify terminating a contract (extreme injustice exploiting the money of the public treasury, *waqf*, and/or orphans) can be considered a form of mistaken determination of value (see para 35/8).

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[259] The first right of refusal is the priority allowed by law for a partner in the real estate, if his partner were to sell his stake, to purchase the shares of the latter, which was sold by the motivation of greed. The partner who has the right of refusal is called an intercessor. See the theory of property (para 23/7).

[260] It should be noted in this regard that the satisfaction of the *shafiʿ* with the buyer is not a contract, but rather it is an action of will which is able to waive a right. However, the mistake of naming the buyer correctly would affect it as it would do to contracts. Hence, it supports what we had deduced as a principle in *fiqh* in the discussion concerning committing mistakes.

Furthermore, the issue of a seller who mistakenly gives away a four-Dīnār worth piece of clothes instead of the intended one which is only worth one-Dīnār, as has been previously detailed by the scholars of Mālikī in our elaboration about the clarity of the mistake which can also be considered a case of a mistaken determination of value (see para 36/6).

36/11 Mistakes Related to Legislations in the *Sharīʿah*[261]

These refer to states in which a contract does not conform the relevant legislations in *Sharīʿah* due to the contracting party being unaware of them when the contract was formed.

The basic general rule states that ignorance regarding the legislations of *Sharīʿah* does not excuse a failure by the ignorant to execute those legislations; otherwise, it would have been possible for people to evade applying the legislations of *Sharīʿah* throughout their actions by claiming lack of knowledge of them. Therefore, one who commits a felony is held under its punishment, and whosoever concludes a contract is liable under all its terms and conditions even if he is not aware of them.

Hence, if one abandoned his/her share of an inheritance[262] for a certain amount of money which he/she received, thinking that the share was one quarter of the inheritance when it was actually one half, the exchange would be considered effective and binding, and he/she would have no say in the matter.

Nevertheless, there are plenty of occasions, which do not involve contracts in which scholars of *Sharīʿah* would consider the ignorance of an obligated party regarding certain legislations of *Sharīʿah* as a pardoning excuse, as long as the facts does not suggest that his/her carelessness lead to such ignorance.

An example to the previous statement is that one who converts to Islām in a non-Muslim country and drinks alcoholic beverages unaware that they are forbidden in Islām is not considered by scholars of *fiqh* to have become liable with the punishment of drinking alcohol; since his/her ignorance is understandable, unlike a Muslim that resides in a Muslim country, who if drank alcohol would

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261 The law experts call it 'error in law'; whereas they call mistakes in all other aspects of a contract 'error in fact'.

262 *Al-Mukhārajah* describes an inheritor's act of selling his/her share of the inheritance to another inheritor (see para 46/20).

be liable to the proper punishment because Islamic legislations would be well-known publically, so that ignorance regarding them would be due to sheer carelessness rather than coming from a justifiable reason.

In fact, there are many other examples of pardoning on the basis of ignorance in *Sharīʿah*[263] (see *al-Ashbāh wal-Naẓā'ir* by Ibn Nujaym; and *al-Ḥāshiyah al-Ḥamawi fi Aḥkān al-Ḥamawī* 2/138).

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[263] Notice: Professor *al*-Sanhūrī has diligently written an extensive research about contract mistakes in Islamic fiqh in the second part of his new book. *Māṣādir al-Ḥaqq fi al-Fiqh al-Islāmī*, which was published after the third edition of this chapter in *fiqh*. Thus, we referred to that research of his, on mistakes, to quote from in this new edition of this chapter.

SECTION 37

UNEXPECTED DEFECTS OF CONSENT DUE TO THE DEFICIENCY IN THE IMPLEMENTATION OF THE CONTRACT

37/1 Preface

The principle is that implantation of the contract is an adjurist independent level from the level of origination. After the complete conclusion of the contract with correct mutual consent both of the party will implement what obligations the contract has places on their shoulders. If one of them denies, implementation will be compeled by the judicial power [looking at this] the implementation of the contract then is from the discussion of the effects of the contract and things relating to it, not from the discussion of the defects of the consent attached to the origination stage of the contract. This is because the means of implementing a perfect contract is actualigation of the things on which mutual consent took place in correct form. Presence of the consent and its safety from the impurities defecting is important in the stage of concluding the contract. After this, it is not compulsory to complete the implementation of the contract with mutual consent as to complete the conclusion of the contract. Instead there are many implementations of the contracts by the judicial compulsion on the denying party after his complete consent in contract making as me mentioned early.

This judicial compulsion of the implementation does not interfere with the consent desired in the conclusion of the contracts, instead it is the respect of this consent which tool place perfectly and caused rights and obligations between the contracting parties binding on both of them, according to Islamic law of their special rights for which they have free disposal.

However, there are cases of implementation defienceise which has close links with the precious mutual consent. In these cases the qadi can not execute the implementation of the contract according to the semblance of the mutual consent-with the condition if one of the parties acclaim.

Then, because of this for the deficiency of implementation-whether by the fault of one of the contracting parties or by any cause

which has nothing to do with it-effects will be considered returning to that perfect consent of the harmful contractant, thus making the consent non-perfect. This is because that consent was not from him except on the basis to achieve the implantation of the contract in according to his ageeddd limits.[264]

The most famous cases of implementation deficiency which defeces the previous consent are:

a. Division of the deal
b. Appearance of non-frauded defects in the commodity.
c. Appearance of the commodity to be leased or mortgaged
d. Refusal of the contractant to pay/fulfil with the condition that compulsion on its exact execution is not possible.

Elaborations of these are as follow:

37/2 (a) Division of the Deal

Division of the deal (*tafarruq al-ṣafqah*) means fragmentation of the deal which will be in the financial commutative contracts upon occurring of that which will deem dividing necessary. For instance, if a person bought a commodity of which some part perished in the hand of the seller before handing it over. In this situation the contract will be void inevitably in the perished part because of loosing the locale (*mahl*) of the contract, for there is no contract without a locale. In this way the deal divides for the buyer, because he bought all, but he managed to get some. He will be required to complete his need with another deal which might not be easy for him or he will be burdened with a higher price, thus in this situation the buyer will be granted right to tale the remaining commodity of his share. Form the price or the right to invalidate the contract (*Radd al-Muḥtār*, the beginning of *Khiyār al-Sharṭ* 4/46). The meaning of this is the division of the deal-which is deficiency of the implementation-returned to the precious consent and defected it, because the consent will not come form the buyer except on the basis to buy the complete commodity not some of it only.

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[264] Law scholars separate completely between the phase of consent and the phase of carrying out the contract. According to law, errors in carrying out the contract cannot be accredited to the consent phase. There is in law ways to carry on a contract if it cannot be done actually, it is called implementation by compensation.

Similar can be said in the issue where the cause of diving the deal did not occur after the contract-such as perishing-instead the cause was present before making the contract, but was hidden. It became obvious after the contract. For instance if something is bought with a specific amount, then it appeared to be less from the amount designated in the contract. This is also division of the deal, implementation in it will be deficient and will defect the consent. [This issue] obligates the right for the buyer in a more preferable way (*al-Majallah*, 218-223; *Murshid al-Ḥayrān*, 354-358). This is because the damage in the locale in reality accompanies the origin of the contract, though its appearance and recognition came late. Division of the deal is quite similar to the mistake occurred in the time of concluding a contract, instead it can be counted as one of the forms of mistake.

Similarly, if he sold something the division damaged, then, he showed right on some of the commodity.[265] The buyer will be given the right for the remaining of the commodity, because of implementation deficiency in the part he deserved. Thus the previous conseut will become deficiency because of implementation deficiency (*al-Durar*, the end of *Bāb al-Istiḥqāq*, 2/193; *Mushid al-Ḥayrān*, 412).

37/3 (b) Appearance of Defect in the Un-Frauded Sold Commodity

As meutioned earlier that defect in the sold commodity, if is because the seller frauded the buyer, it will be considered as misleading, which will obligate the right of invalidation for the buyer (para 35/5).

Now coming to the defects uot because of fraud- which even the seller did not know himself-has been mentioned earlier that it is considered among the category of mistake iu which the right to invalidate is also established for the buyer even though no misleading is found by the seller. This is because it is assumed that the buyer is buying on the basis of intactness of the hidden defects. When it appeared opposingly, he will be presuming and actually in the obvious mistake, because his consent in the intention of intactness will be considered unveiled. The maxim confirms this well: the consideratiou in the contracts go to the purpose.

[265] The Arabic word used here is *al-istiḥqāq* which means to claim one's property held by a third party.

Here, we also see that the unfrauded defect, as it is possible to be countered as the mistake, it is also possible to be considered as the implementation-deficiency- especially when the defect came in the sold-commodity while it was still in the hand of the seller before handing it over-because when intactness of the sold-commodity is supposed in the contract, appearance of the defect will make the implantation deficient which legally is impossible to repair. This is because the judge with his legal powers can not actualize the implementation of the contract according to how the contract was concluded, and return the defect-thing back to normal, and this implementation-deficiency will make the consent of the buyer deficient. The example is same as the one mentioned in dividing the deal, thus the buyer will be granted a right to invalidate known as *khiyār al-ʿayb*[266] (*Radd al- Muḥtār*, 4/72; *al-Majallah*, 336-337)

37/4 (c) Appearance of the Sold-Commodity to Be Mortgaged or Leased

When a person bought a thing, then, it appeared that the thing is mortgaged with some other person, or the thing is leased to him while the leasing period did not end, and the buyer did not know this in the time of buying, he will have the right to invalidate the contract, this is because the general policy in the contracts is that the contract between the two cannot effect the rights of acquisition of third person, for the two contracting party does not have any right except on their pecularized rights.

In our given example, the right is for the leaser in utilizing the leased sold-commodity for the rest of the leasing period, and the right is for the mortgage in restraining the mortgaged sold-commodity until the payment of the loan, the two rights are protected. Contract of the leasing or the mortgaging owner will not demolish them.

The result of the above is that the buyer can not demand the handing over of the commodity to him which he bought until the lease is complete or the mortgage is free: By this the implementation of the selling contract will become deficient, and in line with this will make the consent of the buyer deficient, who did not buy except on

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[266] We remind here what we have cited previously from Imām al-Kāsānī in the footnote of para 36/5 about the rational of *khiyār al-ʿayb*: "*...since the expectation of the buyer to get the commodity free from defect and it did not happen, hence it jeopardises his consend*".

the basis that the commodity will be handed over to him immediately, while he did not know that it was mortgaged or leased.

For this, the jurist considered this situation as a defect which will befall the consent of the buyer, and granted the buyer right to chose according to his requisite between: either to wait for the completion of the lease period or the period of freeing the mortgage, so that he can be handed over the sold commodity or demand to invalidate the contract (*al-Majallah,* 590 and 747).

37/5 (d) Refusal of the Contractant to Fulfill the Conditions on Which the Enforcement is Impossible

When the contractant refuses to fulfill the permissible (sahih) conditions which the other contracting party required in the contract, the real ruling in this is, the refuser will be forced to fulfill the condition by the power of law as pointed previously (para 37/1). According to this is the legal opinion of Ḥanafī School and others.

But this opinion is opposed by those issues and incidents on which legal enforcement is not possible due to the later two's nature. Such as when a person sold something with a price deferred to a time, and stipulated the buyer to give him a specific mortgage or provide him a specific surety and on these conditions he concluded the contract. Then, the buyer refused to provide the mortgage or the surety, or the third person declined to become guarantor.

The preferable legal opinion in this situation is that it is not possible to legally pressure the buyer to provide the demanded mortgage. This is because the mortgage is a nominal contract (*ʿaqd ʿaynī*) like gift. It does not become complete and binding on the mortgager except by execution and extradition. And this in all situations is a contract which cannot be concluded except with mutual consent, the consent can not be eliminated by forcing its bearer (*al-Badāʾiʿ*, 5/171).[267]

Similarly, it is said in the issue when the buyer refuses to provide the stipulated surety.

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[267] This is the view of Imām Abū Ḥanīfah and his two companions, Abū Yūsuf and Muḥammad in this issue.

Zufar ibn al-Hudhayl, another companion of Abū Ḥanīfah is of the opinion that the buyer is forced to eliminate the mortgage performance if declined, because the mortgage when made a condition in the sale has become a right of the contract and must be implemented (see also *al-Badāʾiʿ*).

This is when the execution of the selling contract will be deficit with such a deficiency that its reparation will not be possible by the way of legal judgment. Accordingly previous consent of the seller will deficit because he did not sell except on the basis of providing the mortgage or the surety. He will be granted the option to invalidate the contract if he wished.

On this turn, it will be necessary to draw a line of distinction between deficiency of the execution *(ikhtilāl al-tanfīdh)* and infraction of the execution *(ikhlāl bi-hi)*.

- **Deficiency of execution** is the occurrence which does not have any connection with him to execute the contract according to the manner the mutual consent was perfected. This is similar to the issue of dividing the deal by perishing of a portion of the community or by demanding his right. This deficiency will always defect the consent and justify the invalidation of the deal.

- **Infraction of the execution i**s because of the denial of one of the contracting party to execute the contract according to the mode the mutual consent was achieved upon i.e. it is obduracy by one of the parties to execute while he had the power.

This infraction by one of the parties not always and necessarily conclude to defection of the consent of anothe party, and to is right of option to invalidate the contract as seen in the situation of deficiency. Instead in it two situations can be differentiated either it is possible to force the denier to execute by the power of the law and that is the time the consent will not be defected; or enforcement on the denier is not possible and in this, the infraction will fall on the previous consent with a curling effect. It will defect the consent and legalize the invalidation of the contract.

This explanation which we scribed here relating to infraction of execution is the one on which's basis the texts of the *Majallah* and entire the texts of the Ḥanafī School stand.[268]

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[268] The legal theories in contracts states that if one party fails to fulfill their part of the contract, the other party has the right to revoke the contract, even if the first party can be forced legally to fulfill their contract. This is legally called the right to revoke a contract. In law they distinguish between revoking a contract, which is used when one party does not fulfill their contract, and dissolution of a contract when there is an error with consent.

Attention

37/6 Looking at the entire discussions, *fiqh* stands on the basis of free mutual consent, there are two attentions:

1. The contract in Islamic law stands on premise of truth honesty and good intention between the tow contracting parties in instructing the contract then in execution of the contract according to their agreement. This is in accordance to the words of Allāh in the Holy *Qur'ān*: *"O ye who believe! Eat not up your property, among yourselves in vanities: but let there be amongst you traffic and trade by muual good-will"* (al-Nisā', 4:29).

   For the endorsement of these foundations many goods were legalized, granted to the contractant. This gave him the right to invalid to the contract whenever impurity contaminated his consent defecating it. This in law is known as defects of the consent. This is either for the protection of the contractant from becoming victim of his repose to obligating the premise of truth and good intention for his [contracting] partner, when his partner attempts to take advantage of his response this deluding him. As seen in the situation of misleading; And for the respect of the previous intention of the contractant when something which was opposing the origin of the consent befalls after the contract and this obligated to re-look at the [first] consent even if it is not by the incapacity of the other party as seen in the issue of dividing the deal.

2. The lesson in foundation of the contract and setting up its laws is indeed for the external-will of *ījāb* and *qabūl* (affirmation an acceptance). Whatever comes under its boundary is considered except the hidden intention in one of the parties concealed from

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The is justified by the law scholars by stating that if someone fails to fulfill the contract on time, the other party`s interest may be lost, and should be given the chance to break from the contract if he wishes to. Additionally, the faltering party must make compensation to the damaged party. Moreover, this is what our civil rights law states in the article 158.

It is in my opinion that this view is fair and justified. It is also acceptable in *fiqh* because it obliges to the rule of doing no harm in accordance to the *ḥadīth*: *"Harm should not be caused nor reciprocated"* (see para 10/2 and 81/18). Although the Ḥanafīs does not accept this law, it is clear that the rules of other sects agree with this law completely. More on this topic, *Faskh al-'Aqd*, see para 45/6.

another party is excusable because of his ignorance of it, until any of the evidence which would unveil the hidden intentions, do not appear; [in the instance of appearance] those hidden-intentions will be counted in the account of the contract and will become argument against the other contracting party.

Looking at this, Islamic law has perfectly reconciliated between the principle of respecting the intention and the principle of stability of the mutual deal. It united the two principles with best of the unions and apportioned both of the principles' consideration in different situation with the perfect apportions.

SECTION 38

EFFECTS OF THE CONTRACT: ENFORCEABILITY *(AL-NIFĀDH)*

FIRST THEME: THE GENERAL EFFECTS OF THE CONTRACTS

38/1 For the contracts, there are general effect and specific effect limited to some contracts other then the other.

The specific effect is the rulings and juristic results which the contract according to its objective.

The sale contract (*al-bayʿ*) transfers the ownership in exchange of a connsideration; the gift contract transfers it without any compensation; leasing transfers beneficial ownership in exchange of a consideration; mortgage gives the right to restrain the property of the debtor in exchange of the debts; the contract of agency delegates power to the agent in conducts; in this way every contract has a specific consequence which is its legal ruling, the discussion of which will come later in its own chapters.

Concerning the general effects, these are consequences which are shared by all contracts if not most from the legal rulings and results; they are our purpose of discussion here.

Contracts have three general effects when considered from the basic natural results of the majority of the contracts and agreements, and they are: enforceability (*al-nifādh*), obligation (*al-ilzām*), and binding force *(al-luzūm).*

We will address enforceability in this chapter in general, then to obligation and exbinding force in chapters 39 and 40.

Enforceability (*al-Nifādh*)

38/2 The meaning of enforceability of the contracts is that the consequences of the contracts are legally enforceable from the time of its conclusion. Meaning to say that this legal ruling and its specific consequences in respect the rights and in the properties on which the contract made was achieved solely by the consent of the two contracting parties.

For example: The meaning of enforceability of the sale contract is that after its correct conclusion the ownership of the commodity will transfer to the buyer and the ownership of the price to the seller, and will obligate both sides all other obligations the contract generated; such as obligation of handing-over and receiving, warranty on the defect of the commodity if any, and so on.

Enforceability of the marriage contract means that after the conclusion of marriage benefits between the spouses becomes lawful and it will obligate on both of them rights and engagements for each other generated by the contract between them; the man becomes responsible of the woman's maintenance (*nafqah*) according to her legal requirements and limits, and the woman becomes responsible to legally follow and abide by man, etc.

Similarly, this can be said of all the contracts, such as leasing, conciliation, distribution and so on.

Thus, when the contract yields result from the moment of its conclusion as shown above, it will be termed as an enforceable contract (*al-Majallah* 374).

38/3 The opposite of the enforceability is cessation *(al-mawqūf)*. The ceased contract will not yield result upon its conclusion; iustead despite its correct conclusion its specific peculiar effects and all its juristic consequences will be put to a hold, i.e. it will be hangiug restrained iu a way that it will not be materialized and be effective because of presence of an obstacle preventing its authentication and effectiveness legally.

This is similar to the issue of compulsion (*al-ikrāh*). One who compels to conclude a contract does not want his contract to be ceased so that he is content with its enforceability after the end of the compulsion as discussed earlier under defects of the consent.[269]

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[269] We have presented elsewhere that there was a solitary opinion in the Ḥanafī school, and it is the opinion of Zufar ibn al-Hudhayl who was a companion of Abū Ḥanīfah who based it on another opinion which held that compulsion on a contract renders it annullable but is not suspended, and it is the opinion of Abū Ḥanīfah himself (see the footnote of para 34/4).

Here, it is abundantly clear that compulsion is considered as one of the reasons of unenforceable contracts in the consideration of consenting defects as presented earlier. That is because one of the determinants in the theory of compulsion that a forced contract imposed - despite what was agreed – is not enough to influence what was not consented by the forced individual after the disappearance of the compulsion. Another function of the consenting defect is that it does not stop the effect of rulings on the contracts that are considered to be defective. Indeed, it does not stop the

Similarly, if a person sells someone's property without his permission or the father for instance married off his adult sane danghter without her consent. The contract here exceeded the rights of both parties and afflicted the rights of the other then the two. This other is the owner of the sold commodity in the example of the sale-contract and owner of the daughter in the example of the marriage contract. This other's right is considered to be obstacle preventing the effects of this contract. The effects will remain hanging until the obstacle remains. The effects will not be materialized nor be effective until the obstacle will vanish.

In the example of the sale-contract the ownership will not transfer and the price will not merit; and in the example of the marriage contract the marital advantage will not be lawful and the marital rights will not be established nntil the obstacle will disappear. [The obstacle will only disappear] by the original owner's consent to the contract concluded in his property, and the daughter's agreement with marriage which her father concluded without her consent; then this sale and marriage will penetrate i.e. their peculiar prescribed effects will derive legally from the two contracts. This is because by the disappearance of the obstacles the ceased contract surpassed as we discussed earlier under the discussion of obstacles (para 28/7).

This is the concept of cessation or unenforceability deeply embedded as you saw in the discussion of obstacles; elaboration of which was at the end of the introductory explanations of the concept of contract (para 28/7).

38/4 Types of Obstacles

In order to curb the types of the obstacle which prevents the enfrocibility of the contracts and report them in the general starting points it will be appropriate to:

1. Present the basic types of the ceased-contract in various forms and shapes.
2. Summarized in light of the unenforceability, the types of the impediments to enforceability which appears amidst the types of the ceased-contract and to this, we will now attend:

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contracting party of the consenting defect the right of nullification as presented earlier. It is necessary to regard the forced contract as complementing the consenting defect which is considered as terminated.

38/5 First: Types of the Ceased-Contract

The *fiqh*-pursuit has informed us to many types of ceased-contracts which the Ḥanafī jurists has enumerated up to thirty-eight types (see *al-Durr al-Mukhtār wa-Radd al-Muḥtār*, on *al-Fuḍūlī* in *Kitāb al-Buyūʿ*, 4/139).

From these types we will narrow down the explanation and elaboration to seven types only, which we see as the proto type, presentation of which will suffice the acquaintance with obstacles of the penetration. The seven proto types are as follows:

1. Contract of compulsion (*al-ʿaqd bil-ikrāh*): According to the opinion of those who see it as ceased void contract. This is the opinion of Imām Zufar which we adopted as mentioned earlier (para 38/3).

2. Contract of the privileged minor (*ʿaqd al-ṣaghīr al-mumayyiz*): When the minor conducted on his property a contract which has the possibility of both profit and loss such as sale, leasing, distribution, conciliation and so on. This is because he is incapable, with incomplete capacity. Legally, he is blocked for the protection of his rights and his property. Only his representative will do the conducts on his behalf from the guardian or trustee.

   If the privileged minor himself concluded a contract which has the possibility of profit and loss for instance transaction, his contract will not penetrate, because the right to conduct on his property does not belong to him, instead belongs to his legal deputy. Hence, his contract will be depend on the permission of his deputy. If the deputy saw interest in the minor's contract and gave permission, the contract will penetrate. And if he rejected, the contract will be void as we will see in the concept of capacity and guardianship.[270]

3. Contract of the legally incompetent blocked (*ʿaqd al-safīh al-maḥjūr ʿalayh*): The incompetent is the one who wastes his property and squander it in ways which are not rational. The qadi will declare him as legally incompetent (*safīh*). By this declaration

[270] We will soon see the age of discernment starts, from both the *Sharīʿah* and legal perspectives, from the seventh year sharp and ends when the age of maturity is reached as defined in the Family Civil Law.

he will be incapable similar to the privileged minor.

If the legally declared incompetent concluded a contract on his own which has possibility of both profit and loss, his contract will depend on the permission of his trustee. If the trustee permits, the contract will penetrate and if he disallows, the contract will be void.

4. Contract of the indebted engrossed in loan (*'aqd al-madīn bi-dayn mustaghriq*): The indebtor if his property is engrossed by his loan, legally it is permitted for the qadi to put block on him i.e. prevent him from conducting on his property basing on the demand of his creditors for the protection of their rights, so that he does not resort to conducting contrabandism of his properties from the creditors. On this, he will not have the right after the block to conduct on his property.

   If he concluded a contract in his property for instance he sold or gifted or mortgaged something from the property, his contract will depend on the permission of the creditors.[271]

5. Conduct of the sick on death-bed (*taṣarruf al-marīḍ maraḍ al-mawt*):[272] If he donated by any means—gifting, or will or sale with favoritism price—which exceeded one third of his property. In this case his donation will not penetrate in the surplus of his one third hertage, because he is blocked from doing so legally; instead the donation is dependable on the permission of the inheritors, if they allow it will penetrate if not than it will be void. This is when the sick donated to one who is not amongst the inheritor and he is not in a debt engrossing the hertage.

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271 Scholars from different sects said that person has control over his money since the debt is on him. Whereas his capital money is free and he has full control over it. This is what was said in Hanafi and Hanbali sects.

However, the later Ḥanbalīs said that a person in debt has control only over the money that remains after covering his debts. This was because some people in debt used to smuggle their money before paying their debts.

The later Ḥanafīs followed that concept and added that debtors can only make endowments on their none-quarantined money after subtracting the amount owed. This implies that the debtor cannot give away money unless he has enough to repay his debt (see the footnote of para 15/6 and 77/2).

272 A death sickness is one that makes the person unable to do their usual work and eventually leads to death. If it was cured after a while then it is not a death sickness.

Islamic *fiqh* allows a person with death sickness to give away a third of his money at most, and stops further giving away to preserve the right of the heirs. More details ou the theory of death sickness in chapter (4/65).

If the sick on death bed donated to one of the inheritors, his donation will depend on the permission of rest of the inheritors no matter the amonnt of donation is small because his donation effectuated in his death sickness which is in the ruling of will adjoined to after death and it is already determined by the majority of the jurist that *"there is no will for the inheritor"*[273] (para 23/8).

6. Conducts of the apostate from Islām in financial compensational contract such as sale, or donations such as gift, endowment and will. His contracts and all other finance related conducts in the state of apostasy will be considered to be ceased with no penetration. If he comes back to Islām, the contracts will penetrate and if he dies or killed or entered the dar al-harb and the qadi judged to consider him entering the dar al-harb, all his contracts and conducts will be void.[274]

7. Contract of the un-commissioned (*al-Fuḍūlī*): *Al-Fuḍūlī* literally means a person who is busy with meaning-less things (*al-qāmūs*).

   Legally means a person who conducts on other people's rights verbally without any official commission.

   Thus, if he conducts on other people's rights with official commission, then, he will not be *al-fuḍūlī* instead he will be deputy of the other, either legal deputy such as guardian of the minor[275] or judicial deputy such as guardian decided by the qadi for a orphan; or contractual deputy such as attorney.

   Looking at this, the origin of commission is either law, or judiciary or contract. The one who is not commissioned on a conduct by anyone from any of these origins, he is a fuduli (the un-commissioned). This is like if a person sells or leases someone else's property; or concludes a marriage contract for a woman

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273 This is the text of a *ḥadīth* that varies in its strength, but was told in different was that strengthen the *ḥadīth* and was accepted by the sect scholars.

274 This is the opinion of Abū Hanīfah whereas his companions (Abū Yūsuf and Aḥmad) say that an apostate's actions are valid, because he is still eligible and sane. Abū Hanīfah defends that becoming an apostate is punishable by death and hence, the man`s money is suspended on the outcome. And in order to have full control over money one must completely own the money.

An apostate woman however, is punished by a lifetime of jail and therefor her possession of her money is stable and she can control it freely.

275 For example, his father, his grandfather in the absence of the father. We will see on the discussion on the theory of guardianship and capacity.

without her consent. Similarly if one of the partners sold or leased or mortgaged or gifted the entire shared property i.e. his share and his partner's share without the commission of the partner, the contract will be ceased in relation to the partner's share.

The contractant in all these and its alike is termed by the jurists as fuduli; to the extent if the father concluded a marriage contract for his sound adult daughter without her permission even if she was a virgin, will be considered fuduli and the penetration of his contract will depend on her consent.

Note

It is important here to take into account that the issue of fuduli is only within the boundaries of verbal conducts. If the verbal conduct succeeded to actual implementation, such as if a person sold property of someone and handed over the property to the buyer, than in this case the seller will become arbitrator and his act will be taken as arbitrariness.

38/6 Types of Obstacles of the Enforceability

After presenting the various basic types of ceased contracts, it becomes obvious that the obstacles which prevent the enforceability of the contract and ceases it can be ascribed to two types: doubtful and right of the other i.e. other than the two parties.

38/7 The doubtful, will mean the concealment of the portent situations in the conduct which will only convene upon its disclosure, looking at the point that with the existence of those portent situations and with its absence it is impossible to assert, than considering the conduct with it as void will not be possible, nor convening and penetrating. Thus the conduct will depend on the disclosure of the portent situations: if it shows that the situations are obtainable the conduct will penetrate, and if appeared otherwise than the conduct will be void.

Example of this is the situation of compulsion, marriage contract of the hermaphrodite:

a. Compulsion

It is not clear with the compulsion that the compelled contractant agrees with the contract he was forced to conclude, because it is in his interest, or he does not agree had it not been for the compulsion, thus the contract will cease and will not be declared void. If after the disappearance of compulsion it is ascertained that the intention in the conduct is obtainable the contract will penetrate and its rulings will record back to the date the contract was concluded and if is refused than the contract will be void from the time compulsion took place.

If these possibilities were not there in the compulsion, then it was compulsory to consider the conduct by compulsion as void. This we referred to it in the discussion of defects of the consent (see para 34/2-4).[276]

b. Marriage contract of the hermaphrodite

The marriage of hermaphrodite is also considered to be ceased on disclosure of the situation:

If it is reveled that hermaphrodite is a man and was married to a woman or is a woman and married to a man, the marriage contract will penetrate and its rulings will establish. If it turns out the opposite, then the contract will be void from the time it was concluded.

38/8 The Right of the other which is in three aspects:

1. Either the right of the other is pertaining to the exact subject of the contract such as the sale of someone's property. Donation of the sick in death bed exceeding one third of his property also comes under this, because the cessation is because of the rights of the inheritors directly to the subject of the contracted.

   Similar to this is the conduct of the apostate, the cessation in it is because of the rights of the inheritors or the bayt al-mal because the punishment of the apostate is death compulsorily until he comes back to Islām.

[276] It is well-known that compulsion is a reason to postpone or invalidate the contract. We have mentioned this previously, but now it appears that the preferred stand is that is among the doubtful that encompasses this and others.

2. Or the right of the other will pertain to the finance of the subject of the contract not exactly the subject, like the conduct of unblocked debtor which will harm the rights of the creditors. The rights of the creditors are attached financially to the debtor's property because of the consumption of their loans, and their rights are not attached exactly to the property of the debtor; to the extent that if the debtor can pay off their rights with some other source, his ceased conducts will penetrate in his properties on which he made the contract. If the creditor rights are attached exactly to the debtor's property such as the right of inheritance of the inheritance, then it is not possible to avert from the exact property by paying them the loan cash.

3. Or the right of the other will be attached with the competence of the conduct not the exact subject of sale-contract. Conduct of incomplete capacity blocked legally because of underage similar to privileged minor, or blocked judicially because of foolishness, or because of engrossing loan will come under this.

   Hence, the one with incomplete capacity because of being blocked incapable, underage or foolish or indebted will not own the right of conduct in his property and wealth, for the right of conduct is for his deputy the guardian, or the trustee or the judicial guard; they are the one who will conduct on his behalf as you will see the elaboration in the discussion of capacity and guardianship. If the one with incomplete capacity conducted by himself without the permission of his legal deputy, he will be exceeding the right of that deputy and his competence, even though his conduct is on his own property. His conduct will be dependable on the permission of that legal deputy who owns the right of conduct: if he permitted the conduct will penetrate other wise it will be void.

38/9 Enforceability after the Cessation Will always be Conditional

It is clear by the above discussion that the unenforceable contract is considered to be concluded perfectly before the permission or rejection in the legal opinion of the Ḥanafīs. Thus, permission from the bearer of the right will result in the enforceability of the contract and the rejection will discard it.

Based on this, if the permission exists, it will have dependence and deflection, meaning to say a reciprocal consequence. After the permission the contractant will be able to benefit from the results of the contract from the time of its conclusion, because the permission did not establish the contract instead it implemented the enforcement, i.e. it opened the way for the contract's effects which was a preventive cessation in order to run it and effectuate it, the effects together with the contract generated by it are considered to be from the date of its conclusion not the date of permission.

The governing factor in this subject is that the attaching permission is like the former agent.

After the permission, the *fuḍūlī* will be considered to be the agent of the right-bearer prior to the contract. And because the conducts of the attorney is effective on the behalf of the mandatory from the time of its conclusion, the contract of the *fuḍūlī* will also be effective on behalf of the permissive from the date of the contract's conclusion.

The permission does not confine to the explicit expression only, instead all the mediums to express the consent either it is explicit or implicit, verbal or non-verbal from that which is accepted in concluding the contracts will be accepted in permission of the ceased contracts.

Thus, he who gets the information of the sale-contract on his property by the *fuḍūlī*, and he handed over the commodity to the buyer voluntarily, his deliverance will be considered as permission for the *fuḍūlī* contract.

If the non-commissioned concluded a woman's marriage contract with a man, the woman on getting the information voluntarily proceeded with wedding procession of the man, it will be considered her permission.

For the authentication of the permission, you will see some requirements in the book of sale-contract of major Ḥanafī works (*Radd al-Muḥtār* 4/140 and *al-Majallah* 378).

The most important of the requirements is that refusal should not precede the permission; this is because if the refusal of the ceased contract proceeded, the contract will be void, the permission will not be accepted after this, as you will see in the discussion of invalid.

38/10 Observations

It will be necessary to keep note on two things in the light of the above discussion:

1. Not always the ceased conduct is dependable on the permission of a person beside the contractant, instead this is the major practice; at times the ceased penetration does no depend on the anyone's permission, instead on the elimination of the situation which obligated non-penetration. As seen in the conducts of the apostate of Islām. Penetration of his conducts rely on his return to Islām according to Abū Ḥanīfah: If he returned to Islām his ceased conducts will penetrate, and if he died in the state of apostasy or was killed or joined the *dār al-ḥarb* his conducts will be void.

2. The objective of Islamic legal system in the concept of cessation is not always to protect the other's right, but in most of the situations the objective is to protect the right of the conductor himself as seen in compelled-contract and in the contract of a privileged minor.

Similarly it can be observed that in these situations—in which cessation is for the protection of the other's right—it is possible to consider the obstacle of penetration is the right of the other. This is obvious, there is no doubt in it after we have known that right of the other necessarily does not have to be attached with the session of the contract, at times it can be attached with the competence of the conduct. The obstacle of penetration in the contracts concluded by incapable underage is the right of the other, meaning to say right of the under age's legal deputy who will conduct on his behalf. Coming back to the Islamic legal objective of making the contracts of this underage dependable on the permission of his legal deputy is the protection of the underage's property and protection of his rights from involving in an illicit conduct because of his lackness in reason.

SECOND THEME: SCOPE OF THE CONTRACT: ENFORCEABILITY ON PERSONALITIES

38/11 We saw earlier that it is not permitted for the contracts to trespass the rights' of the others, in the situation of trespassing, the latter ceased and its enforceability was blocked as in the *fuḍūlī* contract.

However, we saw personalities other then the contractants on whom the contract of the contracting party penetrating; they were imprisoned by the juristic rights as if they were the contracting party,

they were in the place of the party itself, these third personalities are from the other according to the targeted meaning of the word "the other." This is like, when a person mortgaged some of the properties for his debts, then he died; the mortgage will move to his inheritors even though they did not concluded the mortgage contract. The inheritors will not be able to take the mortgaged property from the mortgager and distribute it within themselves until they pay all the debt; even though they are not entitled to pay the loan from their specific properties if the payment was not in the inheritance.

For this reason it is important for us to know who are these personalities in the position of the contractant, on whom the effect of the contract will effectuate, and penetrate in their rights, then who ever will be other then these personalities will be the ones meant by the word "the other" in our statement: "the contract will not penetrate in the rights of the others."

38/12 Abiding by the legal rulings which are related to the contract and to its effects, it indicates to personalities who are in the position of the contractant from all aspects or from some, thus the contract will penetrate in their rights, and the effects of the contract will effectuate on them within specific grounds, and the specimens are as follow:

1. **The person who has an agent representing him in the contract in all sorts of representations (*al-wilāyah, al-wiṣāyah, al-wakālah*)[277]**

   The contract of the deputy on the behalf of the mandator will penetrate on the latter as if he is the pursuer and he is the bearer of pursuit. The attorney of sale-contract, or leasing, or conciliation or marriage or divorce or any other conduct, once he concludes these conducts on the behalf of the mandator within the boundries of his attorney power, all the peculiar effects such as ownership, commitments, omissions, marital, separations will effectuate on the mandator according to the type of conduct he was mandatered for.

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[277] *Wilāyah* is a legal guardianship of parents over a minor, such as father then the grandfather. *Wiṣāsayh* is a legal guardianship assigned by the judge to handle the matters of orphan minors. *Wakālah* is a contractual guardianship as in type 7 of contracts.

Similar to this is the guardian or trustee of the incapable underage or an insane adult, when he concludes a contract in the interest of the underage or the insane within the boundaries of his power of guardianship or legal trusteeship, for instance he bought for them something which they need or he sold something which they do not need, or he leased their property or rented for them.

All of these will penetrate and effectuate the effects on the minor or on the insane. They will own whatever he bought for them. The price will be binding on them which he will pay according to the authority given to the guardian or the trustee in the same line. Whatever was sold from their property will go out of their property.

In same category are the contracts which the judge executed on the individuals requisite to his legal power or his general guardianship such as the qadi's selling of the property of the temporized debtor in order to pay of his debts, and his selling of the monopoly property to its monopolizers.

And this penetration pursued from the contract of the deputy on the mandator is the basic distinguisher of the deputy's contract from the non-commision's contract as seen earlier.

2. *Al-Mutafaḍḍal 'alayh*[278]

There are exception cases as when someone is not a deputy attempts to perform other people actions as two accompanies in travel, one of them is died , the other sets measures to bury him and transfers his property to his heir as selling his goods and buying all things he needed for death all his actions are executed

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[278] The concept of conditional contract *(al-ʿaqd al-mawqūf)* is not found in modern law as it is in Islamic jurisprudence.

But in the case of implication, they discuss about *(al-faḍālah)*, we named it here due to being related to contracts *(tafaḍḍul)*. They broaden right of third person *(mutafaḍḍil)* to go ahead with the person he represented from him in contracts that action is considered in Islamic jurisprudence *(fuḍūl)* unwanted, not *(tafaḍḍul)*.

We saw the term *(al-faḍālah)* does not exist in Arabic language. We changed it to *(tafaḍḍul)*. We preferred its use in our jurisprudence addressing new exceptional cases in which a person deals on the behalf of other, without his previous permission. Therefore, we have to distinguish between both topics they are: *al-fuḍūl* who depends and is not implemented; and *al-tafaḍḍul* which is implemented on others, and carried out.

by the owner (heirs), this accompany is not considered as a busy - body he does not pay a guaranty for what he spends as Imām Muḥammad did when one of his students is died, Imām Muḥammad sold the dead man's books for burying him, someone told heir "you are not a guardian" means "none assigns you to be a guardian of the heirs", so Imām Muḥammad recited that what Allāh glory be upon him said" *"Allāh knows anyone who attempts to destroy people and any one attempts to repair"* (al-Baqarah, 2:220).

Anything is the same is accepted according to analogy, the reason for that favoring should be depended on tradition of necessity, there are a lot of examples are mentioned in *Kitāb al-Ghaṣb* from *Radd al-Muḥtār* (5/117); *al-Ashbāh wal-Naẓā'ir* by Ibn Nujaym (as we shall see in the third part of this series of *al-Madkhal ilā al-Naẓariyyah al-ʿĀmmah lil-Iltizām fi al-Fiqh al-Islāmī,* 11/1).

Also of one of the two partners spends many to repair the real (mutual property), the other partner abstains to do so, the first partner should spend money and gains the other portion of wasting money, these contracts are executed without any authorization from the second partner.[279]

3. ***Al-Wārith*** (the Heir)

All the dead man's contract is executed after his death and the heir is obligated to perform all deals and agreements during his competence and wisdom. And the heir hasn't gained any money or property except the rest money is maintained after fulfilling other people rights.

If the legator had mortgaged some of his wealth, the heir did not take this amount except when he paid the debt from the inherited thing because the mortgagee has a right to posses the mortgaged thing before confirmation of the heir's ownership.

4. ***Al-Mūṣā lahu*** (the legatee) who is apportioned a certain amount from the wealth of the leagator:

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279 The legal item 1313 issued that the partner who spends money under the judge's permission, he should return to his partner and pays his real portion, but if he spends without any permission, he should page for his partner the value of establishment and buildings, the difference here is that building value often less than money spent to build it.

Because this property should not excused 1/3 (one third) of the wealth, it is transferred to the recommended man with all his rights according to a correct contract.

If the property is leased, his lease is executed under the guardian's right and he should not take the property except after lease termination.[280]

38/13 All these cases are indicated that all contract are executed to confirm the person's right and that is related to two causes deputy ship of authorization

Deputyship means someone behaves at the same manner of other person and he legislatively performs all his contracts as in substitution and favoring cases.

Authorization means anyone is not the holder will perform the holder's contracts in all his rights and money as in guardian ship and in heritance.[281]

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280 Islamic independent judgments in legal question are different in discussing lease annulment when one holder is died. The preferred opinion of the Ḥanafīs is annulment and in the Shāfi'īs is execution. The same case is when they discussed the continuing lease after the leaser's death or not for which it considered in the legal provisions.

281 Legal scientists divided this search into two kinds: Special authorized person who is a successor of the ownership to possess a property or other special things from his property as anyone is recommended to have a certain property of the wealth. General successor, any one hold the real holder in all his rights and money as the heir in European foreign laws, he should accept or refuse the inherited wealth, if he accepts, he had to pay all the dead person's debts even if they are increased or exceeded the wealth, also he is deserves all his rights and money (see para 23/8).

SECTION 39

EFFECTS OF THE CONTRACT: OBLIGATION *(AL-ILZĀM)*

39/1 Obligation *(al-Ilzām)* and Necessity *(al-Luzūm)*

Obligation in terms of concept of contract gives two meanings:

The first means: Creating implements, we said implementing contract that obligates the holder (one party). **The second means**: The holder cannot null the contract according to his will, we said, obligatory contract that the holder has no right to null the contract without the other holder's (party) permission.

In Islamic jurisprudents concept, this meaning is called implementing or a necessary contract, the holder can't null it without agreement. This agreement to null the contract is called abrogation as mentioned in chapter 45 discussing contract annullment.

Our purpose is accurately determining the practical concepts to prevent suspicion, we will decline "obligation" concept in contracts on the first meaning, and the second meaning will be decline to unpromising to null the contract. We shall view that in this chapter – with general information about obligation and implements.

Obligation

39/2 It is a general effect for all contracts without exception, each correct contract obligates implements and restrictions for each party and alternative obligations between them. They are the special effects of the contract according to its subject and condition.

Discussing the obligatory contract effect and creating its obligations will include the following points.

1. Obligation definition and generally identifying its kinds.
2. The difference between obligation and the essential provision of the contract.
3. The possibility to create obligations and obligatory contract theory.

We will reveal these points as follows:

39/3 Obligation Definition – identification of its kinds

Obligation: allows the person to perform an action or to abstain to do any action for other person's interest.

a. To guarantee what he ruined of other person's property, he takes the pledge on himself to repair it for the owner's interest.

   He compensates each damages directly caused to the other person. The mean poor man's expense, should his rich relative pay it for him, is an obligatory performance for the poor man's interest.

   We should give the sold thing and guarantee its hidden disadvantages as two obligatory actions for the purchaser's interest and also price payment and the sold thing receiving are two obligatory actions from the part of the purchaser for the seller's interest. It applies in all these examples are obligatory action as positive implements.

b. Not transgressing on one's soul, body, money and dignity are obligatory actions Legislation obligate them on all adult persons.

   As using the kept thing (something entrusted to someone's custody) and does not neglect it, are two obligatory actions for the lodger's interest. We also cannot transgress the usual limit in using borrowed thing and leased thing they're two obligatory actions on the borrower and leaseholder for the lender's and the other leaseholder's interests. All these obligations in these examples obligate abstain of an action are negative obligations.

39/4 From the preceding examples, the following points are raised:

1. Obligation is created through contract as obligating the lease to pay the rent and obligating the seller to guarantee the disadvantage as in guaranty for the ruined things & compensation of all damage, its direct source is obligation on the damaged person who caused harm.

   When obligation is put through contract, it is called contract obligation, and when it is put through other element (source), it is called uncontrastable obligation.

2. The difference between obligations of contracts obligation is not a contract, we cannot consider them as expressions to point to contract as some students do. This expression is a great mistake, because contract is one source of obligation sources. As one reasons of the generated obligation as we saw obligation as legal effect is caused through contrastable obligation or any other cause as usury and ruin, they obligate the person who ruined the thing to pay financial guarantee.

In summary: The contract and the obligation have something in common as what is between effect and affect in relation to the differences in opinion.

After referring to the definition and explanation, we conclude that the obligation, regardless of its kinds, has general effect in each contract.

There is no contract does not obligate the two parties, or obligates alternative restrictions between them because purpose is to reach acceptable right outcomes don't exist before the contract.

However, certain obligation of a certain contract as sale, lease, and mortgage contract, have special effects of contract as obligating the seller to give the sold thing and obligating the purchaser to pay the price, and obligating the mortgaged person not to neglect in keeping the mortgaged thing till debt payment and so on.

39/5 The difference between contract obligation and the original provision of each contract.

All obligations are created in each contract between the two parties are not the origin provision of the contract. We will indicate that each contract has two effects:

1. The original provision of contract.
2. Different obligations of each contract.

a) The origin provision is the typical effect of the contract or the main right (legal) purpose legislation is put to reach.

   As transferring property to the purchaser in sale contract considering price payment or without paying money as in gift, also the purpose of lease contract is temporally transferring interests for a compensation in a rent or without a compensation as in borrowing and permission of sexual pleasure in Marriage,

also it stayed the current dispute between the two opponent parties in reconciliation contract and so on.

We shall indicate that the original provision of contract is the subject of it at the time of contracting as we previously explained in the first chapter (para 29/4-5).

b) The obligations which are created by a contract is an obligation on every adult person to perform action or abstain to do so according to the other party's interest, as delivering the sold property, guarantee of disadvantages, price payment, not using the borrowed thing (the deposit) as we mentioned before in these examples.[282]

39/6 The Effects of This Differentiation

There are two important effects of differentiating between the [actual rule] *ḥukm al-aṣlī* of the contract and the [obligations] *iltizāmāt* which are established by the contract.

The first effect: the actual rule arises whenever there is a valid contract, and it does not require execution. Therefore, whenever there is a valid [sale and purchase contract] *ʿaqd al-bayʿ ṣaḥīḥ* the ownership is automatically transferred to the buyer, and this is also the same when there is a valid rental contract *(al-ijārah)*, marriage contract *(al-nikāḥ)* and arbitration *(al-ṣulḥ);* the person who has rented is entitle to the subject matter of the rent contract, and is permissible for the spouses to stay together as husband and wife after the marriage contract, and there will be no litigation in the disputed rights by the [arbitrated parties] *mutaṣāliḥīn,* and so on.

This is because all these laws are the ultimate goals of which the contract was made as a means to attain them; hence whenever there is a valid contract it will lead to this goal. While *iltizām* is compelling someone of something which is in the interest of another person, and every compellation need execution, hence its implication is not

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[282] See *al-Durr al-Mukhtār wa-Radd al-Muḥtār,* the beginning of *Kitab al-Buyūʿ*, 4/6. The distinction between the original (main) provision and obligations in contract is abstract from all jurisprudents texts in all contracts after contract definition and indicating its conditions to reveal mostly its main provision and sometimes jurisprudents called obligation as followed or affiliated provision as in sale section, they said that sale contract's provision is – to confirm possession.

attained by just contracting a valid contract, but it needs to be executed after entering into the contract which gives rise to it.

Therefore, from this result we can have a landmark in differentiating the *ḥukm al-aṣlī* of a contract from the *iltizāmāt* of a contract, these differences are:

What a person understand when hearing a valid contract has be contracted that is *ḥukm al-aṣlī* of that particular contract, and what he does not understand just by contracting a valid contract, but needs to inquire in order to understand if it has taken place that is *iltizām*.

For example, when a person hears someone has sale his car, he understand that the ownership of the sold car has been transferred to the buyer and he has become the owner of it, but someone can never understand just from knowing the valid contract has been contracted whether the consideration has been paid by the buyer or not, and whether the seller has handed over the car to the buyer or not, because paying of the consideration and handing over of the subject matter of a contract are both *iltizām* which needs to be implemented by [the person who has obliged himself to perform it] *multazim*, and its implication does not happen by just entering into the contract like in the case of transferring the ownership in sale contract *ʿaqd al-bayʿ*.

It is the same; if someone heard a lady has been married, he does not understand from the contract that the husband has paid the [dowry] *mahr*, and if a person heard that someone has left his belongings to another person, he does not understand that the person who the belongings are left with is not supposed to use them.

The second effect: when the contracting parties disagree on implementation of some *iltizāmāt* of the contract, the *iltizāmāt* will be considered not implemented unless and until [the person who is obliged to perform it] *multazim* proofs that he has implemented.

For example, when a buyer denies receiving the subject matter of the sale contract, it is upon the seller to prove he handed over the subject matter. If the seller denies receiving the consideration, it is upon the buyer to prove he has paid. This is the case with all the *iltizāmāt*.

39/7 How the contract establishes *iltizāmāt*, and the theory of implication of the contract

There are two kinds of *iltizāmāt* which are established by the contract between two parties:

a. Some of these *iltizāmāt* are imposed due to the nature of the contract, hence the contracting party is deemed obliged to perform them even without the other party stipulating it as a condition. For example, handing over of the subject matter by the seller and compensating the damage, and obligation of the buyer to pay the consideration in the sale and purchase contract, and the obligation of the renter to handover the subject matter and the tenant to pay the reut, and a voiding damaging the subject matter of the rent contract.

   These *iltizāmāt* and others of there kinds in every contracts, the law has made them effects of the contract which are established according to the needs and in order to attain the equilibrium which must be observed by the contracting parties in regards to right and obligations. For this reason, there is no need for the parties to stipulate these kinds of *iltizāmāt* in the contract; this is due to what has been established by the texts of law. The collection of these kinds of *iltizāmāt* in every contract is known in the *fiqaha's* jargons as implication of contract *(muqtaḍā al-ʿaqd).*

   The sources of knowing this kind of *iltizāmāt* and limiting what falls under *muqtaḍā al-ʿaqd* are the texts of law and the opinion of the Muslim Jurists in specific chapter of every kind of specified contract *(ʿuqūd al-musammah).*[283]

b. Contractual *iltizāmāt* of other types do not oblige upon contractors unless another contractor makes it a coudition in the contract. That happens as in the case that he seller of a horse stipulates that he is giveu to use it after the sale for the rest of the month, or if the buyer stipulates on the seller that he should fetch the sold item to his house, or if the contributor stipulates ou the receiver to redress with anything or the buyer stipulating that he would uot be responsible for hidden defects in the sold item, or the lease giver stipulating that all the rent be paid in advance. These and the similar case, on which there are no evidence of the *Sharīʿah* or the *ijtihād* of the jurists, would not fall on the coutractor or under the purview of the contract unless they are stipulated.

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[283] *Al-ʿAqd al-musammah;* every contract which has a name which differentiate it from others, and the law has stipulated specific rules for it, like sale and purchase, rent...etc. (see para 46/1 and 47/3)

More on this, we will see while discussing the authority of contract decisions and what *iltizāmāt* can be stipulated as per the *Sharīʿah* and what not.

SECTION 40

EFFECTS OF THE CONTRACT: BINDING NATURE *(AL-LUZŪM)*

40/1 This section is divided into two themes: **First:** When does a contract become binding? **Second:** The theory of unbinding and contracts which are not binding.

THE FIRST THEME: WHEN DOES A CONTRACT BECOME [BINDING]?

Khiyār al-Majlis and Different Juristic Views

40/2 We said: The meaning of binding is the inability of a party, after contracting a contract, to free hisself from its commitment unless they have mutual agreement of dissolving it *(al-iqālah).* A contract is a bond which binds the contracting parties; hence, the intention of one party cannot break the contract or amend it.

Al-Luzūm is an essential principle in contracts, and if it were not for it, the contract will lose its crucial characteristics in establishing businesses and work in the earning life.

We observed previonsly that a contract is made up by two certain intentions, which are expressed by the words of the intender; that is, the offer and acceptance or what represent them.

Among its implication is that the contract is concluded immediately after the concurring of the offer and acceptance or what represent them, and by that action; the effects of contract are established, and therefore, it becomes binding. Hence, none of the parties can withdraw from the contract after the acceptance concurs with the offer.

This is what is established by our jurists as a principle in contracts. There is no exception from it, except some contracts which their nature demands them not to be binding, and they are known as *al-ʿuqūd ghayr al-lāzimah* or in contract which gives one party an option to retract from it, either by a condition of mutual agreement between the contracting parties or by the obligation of the law. We shall explain this soon.

The juristic opinions are unanimous; whenever a binding contract does not allowed for a party to withdraw except by mutual agreement, because nullifying the contract is changing the rights which were known to the contracting parties; hence, the nullification of it is left for their mutual agreement as it is the bases of the contract.

Nevertheless, there are different juristic opinions on when does the binding contract gains its binding effect:

- The Shāfiʿīs and Ḥanbalīs are of the opinion that, in the sale and purchase contract and the entire binding contract which can be invalidated, such as *ijārah* and *al-ṣulḥ ʿan mālī bi-māl*. The contract is not binding except when the parties end the contracting meeting *(majlis al-ʿaqd)* by physical parting *(firaq al-abdān)*, and before parting each of the parties has the right to withdraw from that contract. This opinion is based on the *ḥadīth* where the Prophet (s.a.w.) says: *"The contracting parties have option as long as they do not part and the wisdom of this rule is to give a room for the parties to take time to think, so they will not be contracting out of the blue, and this is what is known as khiyār al-majlis".*
- The Ḥanafīs and Mālikīs are of the opinion that the contract is binding when it is concluded by the offer and acceptance or what represent them, be it an action or a signal. None of the parties is allowed to withdraw unless the other party agrees. This is the opinion adopted by judges in the Muslim countries nowadays.

Those who adopted this opinion had interpreted the above *ḥadīth* about the *khiyār al-majlis* in other meaning. They interpreted the word *khiyār* and *tafarruq* with what allays with their school of thought, and they base their opinion, that is, immediate binding in the binding contract; such as sell and purchase contract on other evidences from the *Qur'ān, Sunnah* and *Qiyās* (analogy) (see *al-Mulkiyyah wa-Naẓariyyat al-ʿAqd* by Shaykh Muḥammad Abū Zahrah, para 107).

This opinion is in line with the current notion of rights. It is the best way to avoid disputes between the parties, and it is in track with the practical need; that is quick decision in giving a definite intention that give rises to civil right, which is also in compliant with the Islamic law in all other kinds of contracts which are much greater and much dangerous than the sale and purchase contract, such as the

marriage contract, which the *Sharīʿah* did not give any option after acceptance.

The interpretation which the author prefer for the *ḥadīth* which talks about *khiyār al-majlis,* is the option given to both parties while negotiating in the period between the offer and acceptance, and the meaning of *tafarruq* is the ending of *majlis al-ʿaqd* either positively or negatively; that is the one offering has the option to continue to offer or withdraw his offer before the acceptance, and the second party has the option to accept or reject before they part; that is to say till the end of *majlis al-ʿaqd* , therefore, parting from each other necessitate its ending.

The parting can be either by refusing candidly or indirectly by turning away; this will nullify the offer hence acceptance cannot be based on it, or by acceptance; which will conclude the contract and oblige both the parties accordingly.[284]

THE SECOND THEME: THEORY OF NON-BINDING AND NON-BINDING CONTRACTS

1. Non-binding due to the nature of the contract; the three kinds of *ʿaqd al-istiṣnāʿ*.
2. Withdrawing the binding effect from binding contracts and these are the situations;
   a. In case of invalid contract
   b. In case of coercion
   c. In case of the contractual options

40/3 There can be exception on the general binding effect in some contracts; hence, both or one of the contracting parties can withdraw from the contract and invalidate it just by his own will without the consent of the other party.

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[284] Most of the narrators of this difference in juristic opinion in *khiyār al-majlis* say the [translation] *ta'wīl* of the *ḥadīth* which mention the *khiyār* of the contracting parties according to Ḥanafī, the meaning of [parting] *tafarruq* means *tafarruq* with their words by acceptance and concluding the contract (see *al-Hidāyah, al-Kifāyah,* and the beginning of *al-Bayʿ*).

However, this *ta'wīl* seems to be pushy in trying to give the meaning of *al-tafaruq.* What we have mentioned here before is better; the aim of the *ḥadīth* is outlining the period of *khiyār* which is allowed for the parties between the offer and acceptance [bargaining] and limiting it to ending of the *majlis.*

Sometimes, the absence of a binding effect in a contract can be unlimited and sometimes it can be limited to specific situation; and it is due to one of the two reasons:

- May be the nature and aim of the contract does not require the binding effect, hence, the contract will be known as non-binding contract *(ʿaqd ghayr lāzim),* because the character of non-binding can be clearly noticed from the contract.
- Or may be due to a general situation which cause the renunciation of the binding effect on the binding contract, which grants the contracting party the right to nullify it, hence, the binding contract becomes non-binding on him. For this reason, the discussion will branch into two in this topic.

FIRST BRANCH: NON-BINDING DUE TO THE NATURE OF THE CONTRACT

40/4 These are contracts which are known as non-binding contract *(ʿuqūd ghayr lāzimah),* because they are not binding even just in some situations. This character always associated with it. There are nine contracts which are divided into three kinds, regarding to the non-binding effect; whether unlimited or limited, and whether natural or unusual.

40/5 The first kind: Contracts which are not binding absolutely for both parties. These contracts are *al-īdāʿ, al-iʿārah, al-sharikah, al-muḍārabah, al-rahn,* and *al-kafālah.*

1. *Al-Īdāʿ*

This is a contract which is meant to protect a thing not by its owner. Each of the parties; *al-mūdiʿ* (the person who gives the thing to be taken care of) and *al-wadīʿ* (the person who take care of the thing) can terminate the contract by his own will. This is because *al-mūdiʿ* needs assistance from someone else to protect his property, so he can do without this assistance any time he wants or he needs to use it. The same applies to the *al-wadīʿ* because he volunteered to take care, so he can withdraw himself any time he wishes.

It is important to take note, if *al-īdāʿ* has an obligatory compensation in return, it will be *ijārah* on protection and not *al-īdāʿ*, it will take the rule of *ijārah* which we will discuss in the third kind of

binding effect. Therefore, *al-wadīᶜ* cannot terminate the contract or withdraw himself any time he wishes because he is an employer.

2. *Al-Iᶜārah*

This is a contract which allows the ownership of utility of something for free, so it is giving charity of utility.

The person who borrows can be contented with using the borrowed thing, so he can nullify the contract and return what he borrowed whenever he wishes. The same applies to the lender where he can withdraw from the contract and claim it back any time he wishes, whether the returned item had a fixed period which has not reach or it did not have a fixed time of return.

It should be noted that if the owner who lent on a fixed time retracts and demands his thing before the fixed time as stipulated in the contract, he will be responsible to compensate any damage caused by his retraction (see para 25/4-5)

In the property borrowed for the purpose of *al-rahn*, when the borrower use it as a *rahn* for his debt, and the owner who is the lender wants it back, he should pay back the creditor the amount of the debt which his property was a *rahn* for it. Later, he should reclaim it from the person who borrowed from him.

3. *Al-Sharikah wal-Muḍārabah*[285]

It is allowed for any of the parties to nullify and liquidate the *sharikah* anytime he wishes but he needs to inform the other party. The rules of nullification will only apply on the date when the other party knew of the nullification (*al-Majallah,* 1353 and 1424).

4. *Al-Rahn*

It is binding on the side of the person giving it i.e. the debtor (*al-rahīn al-madīn),* and it is not binding on the side of [the person who is keeping *al-rahn* i.e. the creditor] because it act as a security to protect his right, hence, he may forsake and give up his right and he returns *al-rahn* to its owner (see para 47/9).

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[285] *Muḍārabah*: It is a partnership company (*sharikah)* between two parties, whereas the capital will be provided by one party and the work will be carried by the other party [and share the return in the specified terms]. It is also known as *qirāḍ*.

5. *Al-Kafālah*

Al-Kafālah is like *al-rahn;* it is binding on the side of *al-kafīl* (guarantor) and not binding on the side of the creditor who *al-kafālah* is done for, as explained in the *al-rahn* on the side of creditor.

40/6 The second kind: Contracts which there basic rule is non-binding, but they become binding in certain situation.

Generally, they are divided into four kinds of contract: *al-wakālah* (agency), *al-taḥkīm* (arbitration), *al-waṣiyyah* (bequest), *hibah* (gift).

1. *Wakālah* (Agency)

It is a contract whereby a person authorizes another to represent him in civil activities.

Each of the parties has the right to nullify the contract at any time he wishes. The agent can withdraw himself, or the person apointed can discharge him, because *al-wakālah* is seeking and giving aid. The person appointing an agent can stop seeking help likewise the agent can quit giving help.

It should be noted that the rules of discharging an agent applies from the date and time when the other party come to know the discharge (*al-Majallah,* 1523-1524),

When the agency is related to the right of a third party, it becomes binding and the agent cannot be discharged or the contract cannot be terminated unless with the permission of the third party, that happens in a number of situations:

For example, when a debtor gave property for surety and he appointed an agent based on the request of the creditor to sale the surety property when he fails to pay back in time; hence, neither the agent nor the one appointed him can terminate the contract without the permission of the creditor, due to the connection of his right with this agency in easing of his debt recovery.

Another example, when the debtor wants to travel and the creditor pleaded to the court to delay his travel, or appoint an agent so he can institute a suit against him, and debtor appointed an agent for litigation based on this request from the creditor and the travel, therefore, he cannot discharge his agent (see *al-Majallah,* 1521)

2. *Al-Taḥkīm* (Arbitration)

Al-Taḥkīm is when two disputing parties go to a person they appoint by their free will for settling the dispute between them instead of litigation. Each of the parties has the right to terminate the arbitration contract and discharge the arbitrator before he rules in the dispute, but if he has already ruled, neither of them can terminate it, and the arbitration becomes binding (see *Majallah* 1847).

3. *Al-Waṣiyyah* (Bequest)

This is among the unilateral contracts, hence, it is allowed for [the testator] *al-mūṣī* to nullify the contract or withdraw from it as long as he is alive and when he dies it turns to be binding in a limit of a third of his property. The right of withdrawing from the contract is not transferred to his heir.

4. *Al-Hibah*

The nature of a gift has a meaning of non-binging in it. It is allowed to withdraw from giving it and taking back the gift as long as there is no any hindrance from the seven impediments known in the chapter of *hibah*.

Whenever there is an impediment of relocation from *hibah,* then it will be binding hence the donor cannot claim the gift back.

Among the impediments of relocation from *hibah,* and the situations which make it binding is when the receiver of the gift is a spouse of the giver or is among his next of kin; also when the gift property is damaged in the custody of the receiver, or it is no longer in his ownership; he has discharge it by either selling or any other form ownership transfer.

In all the abovementioned situations, the relocation of the gift contract depends on the court decision or free will, therefore, the gift does not return to the owner who gave the gift just by his retraction, but unless the receiver agrees to give it back or the through the court judgment when it ascertain there are no impediment of retraction.[286]

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[286] It should be noted that if the gifted property is a real estate and it was registered in the land register according to the procedural law laid down in the land law in Syria, this registration is not a hindrance for the person giving the gift to retract.

40/7 The third kind: contract which are binding, but there nature contain some elements of non-binding effect in limited situations.

This kind is the opposite of the second kind; generally there are two contracts of this nature; these are *ijārah* and *muzāraʿah*

Except recently in the High court of Syria *(maḥkamat al-naqḍ)* are of the opposite opinion; the court observed registering the gift in the land register is a hindrance from retracting, justifying their opinion by saying, the registration take the place of receiving, which is essential in concluding the contract in a gifted real estate, and registration of a real estate is deemed certain in the law, especially according to article 13 and 17 in the Act no. 188, which rule for maintaining the real estate rights which was acquired by registration to whom the registration entry was made by his name, and not allowing claims against the entry except in specific situations mentioned in the Land Law Act (see High Court Rule dated 1 Jamād al-Ūlā, 1368 A.H. (February 1949), no. 13/civil matter/99, and even the rule before it 10 Ṣafar 1367 A.H. (23rd Dec. 1947), no. 173/Civil matter/201).

It is clear that, this is not the right decision, because retracting from real estate gift in not infringing the register rules, but it's a new cause of which return the owner ship to the giver by the retracting right given to him by the law.

The two articles 13 & 17 which have been based on, refer to not recognizing the registered rights which are enter in register by questioning the authenticity of acquisition of these rights and registering them, there is no problem in appealing based on legal cause in the civil activities which oblige the transfer of ownership.

The right of the giver of the gift resembles the right of the buyer in *khiyār al-sharṭ* (option of condition), if a person buys a real estate and he gave a condition of option for a specific period of time in the contract, the ownership will be transferred to him, because the option given to the buyer does not stop the transfer of ownership to him (see *al-Majallah* 309), and it logic that the buyer is entitle to utilize his right to nullify the contract of buying the registered real estate, and this is not considered breach of rules of contract of real estate, because its not infringing this law, but utilizing a legal right of returning the ownership due to the *khiyār al-sharṭ* which allows nullification of the contract.

You should reflect, what is the difference an option which was obliged by an acceptable condition and an option which is legally recognized? and the registration of real estate is nothing but procedural rituals which are made by the law, in order to make the real estate contract in the power of enforceability the same as that of movable property contract, hence registration does not stop any legal right after the contract, for this reason, the sale of a real estate and registering it does not stop the buyer to utilize the right of [option of defect] *khiyār al-ʿayb* (option of features) in nullifying the concluded civil rules if the discover an old defect, or see in it features which are not stipulated in the terms and condition of the contract, and the was no impediment of implementing the right of option.

Due to considering the registration of the gift is like holding in hand the gifted real estate- as the high court justified in its rule in the issue- therefore, holding in hand the gift item does not stop the right to retract from the gift contract; hence registration should be the same.

1. *Al-Ijārah*

The original rule of it, is binding to both contracting parties, hence the parties are forced to execute it; though the jurists have allowed retraction and nullification of the contract due to [emergency reason] *al-aʿdhār al-ṭāri'ah*, and implementation of *al-ijārah* will result to lost of wealth or cause a sever damage.

For example, when someone rented a car for the purpose of traveling, then he cancelled his travel, or he rented a caterer for a function the he cancelled the function, or he rented a dentist to remove his teeth or surgical operation then the pain stops and he did not want to be operated anymore.

It is logical in Islamic jurisprudence, to force the person who rented to compensate the damage caused to the other party when he was dismay by the nullification of the contract after costing him a lot of money and time in preparation of it; this is what the idea of current law, and also our Islamic priuciple of causation *(qāʿdat al-tasabbub)* does not reject it even if our jurists did not mention it.

2. *Al-Muzāraʿah*

It is a kind of partnership in investing on the cultivation of land by agriculture, whereby the land will be of one party and the work will be done by the other party (*al-Majallah*, 1431)

It is allowed for the party who supposes to sow to retract from the *muzāraʿah* and nullify the contract, but that should be before sowing the seeds.

The observation of the jurists in this issue is, forcing him to continue with *muzāraʿah* implies forcing him to destroy his property, that is his seeds, and he is not sure if it will produce crop or not! Another situation is when someone [employed] rented another person to demolish his house then he changed his mind about demolishing it, it is allowed for him to do so.

But after sowing, the *muzāraʿah* becomes binding even on the part of the owner of seeds (*al-Durr al-Mukhtār wa-Radd al-Muḥtār* 5/177).[287]

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[287] It should be noted, if the owner of the seed wants to nullify the contract before he sows, not because of he does not want 2 do *muzāraʿah*, but he got a better offer than the one he contracted with, or he want to work for himself, he is not allowed to nullify the contract, but he must fulfill his contract to the specified time agreed upon.

It is noted that nullification in these non-binding contracts does not have retrospective effect, therefore the discharge of an agent does not nullify his previous activity under the contract, and the retraction of the giver of the gift after the cattle has gave birth does not entitle him to take back the calf with him, but will remain with the other party because it was begotten in his ownership (see *al-Majallah,* 869) this should be noted in the remaining issues.

Those are the eleven contracts, which are non-binding totally or partially in different degrees of binding.

There is a twelfth contract which we shall discuss separately in this context. It was considered in the original Ḥanafī school as not binding but it turns to binding according to its stipulation in *al-Majallah,*[288] that is the *istiṣnāʿ*.

40/5 *Al-Istiṣnāʿ*

Al-Istiṣnāʿ- it the purchase of something which will be manufactured by giving an order – there is a unanimous opinion according to the principle of the schools of Islamic law *(madhhab)* that any of the party can retract from the contract as long as the subject matter has not be manufactured. While after manufacturing and presenting it, according to the stronger opinion *(al-ra'y al-rājih)* the person for whom it was manufactured will have the right to nullify the contract in the sense of [the option of seeing] *khiyār al-ru'yah.*

Even though according to article 392 of *al-Majallah,* the contract will be binding for both parties from the time of contracting, except when the manufactured is different from specified feature in the contract.[289]

The same applies in the case of employing a person to demolish house and any related issues, if someone wants to retract from the contract; if he retract by himself is permissible, and if its due to change to another worker its not permitted (see *Radd al-Muḥtār*).

That is based on the legality of the cause of retraction if its allowed or not as mentioned before (see para 29/4 foot note)

288 It is also binding according to the Civil Law Act *(Aḥkām Qānūn Madanī),* which replaced *al-Majallah.*

289 It was stated in the introduction the reason which necessitate codification of *al-Majallah,* that this is based on the opinion of Abū Yūsuf, that there is no *khiyār* for the person who ask for manufacturing *(al-mustaṣniʿ),* if the manufacturer produces the goods as per the condition stipulated in the contract, and this is based on what is nictitated by the timely interest.

What is reported in the books of the school of Islamic law, is that Abū Yūsuf does not refuse the *khiyār* for the person who ask for manufacturing *(al-mustaṣniʿ)* except

Hence, the person who ordered has the right to nullify the contract due to non-compliance with a stipulated condition and not due non binding of the *ʿaqd al-istiṣnāʿ*.

THE SECOND BRANCH: REMOVAL OF BINDING EFFECT IN BINDING CONTRACTS

40/6 All contract save the eleven contracts elaborated here before, are binding in all normal circumstances, hence its not permitted for a party to retract without the consent of the other party as mentioned *inter alia*.

Never the less, there are some general causes which may interfere with the binding effect of the contract and give both parties are one of them the right to nullify, hence whenever such causes occurs in the binding contract they obliterate the binding effect as long as the cause of right of nullification exists.

Some of those causes have been mention in some occasions before; it might be due to necessity of honoring the condition stipulated by the *Sharīʿah* for validation of contract, or due to necessity of honoring the intention of the contracting party and protecting his rights which were established by the contract. Hence

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after the manufacturer produces the goods and brings it as per the condition stipulated in the contract, but before finishing the production or after finishing but before bringing it to the one requested, there is no dispute among the scholars that the *al-mustaṣniʿ* has the option to terminate the *khiyār* contract as mentioned in *al-Badāʾiʿ* and *Radd al-Muḥtār* and others.

However, Article 392 of *al-Majallah* provides clearly that there is no *khiyār* for either of the contracting parties after the conclusion of [the manufacturing contract] except when the manufactured is not as per the stipulated conditions. We can understand from the generality of this article that *al-mustaṣniʿ* is binding to both parties before manufacturing but after contracting and it is not an opinion of any scholar of the schools of Islamic law.

Does the above article contains the elaboration of the saying of Abū Yūsuf based on what is stated in the introduction that they followed his opinion, or it should be said that the clear text is the forcible law that rule for the binding of the contract even before the work? This is because the text is not ambiguous creating a room to anticipate that it is an elaboration of the opinion of Abū Yūsuf.

The issue needs to be looked at closely, because it is obvious that *al-Majallah* they base on the opinion of Abū Yūsuf and it expanded in it and altered some of its aspects according to the timely interest, which is in line with the intention of the ruler *(al-irādah al-sulṭāniyyah)*, which made it a law, hence consideration should be on the text and not on where it was deduced from. After writing the above I discovered that the opinion which *al-Majallah* adopted is another opinion of Abū Yūsuf which was stated in *al-Muḥīṭ al-Burhānī*, and this book is among the basic references in the Ḥanafī school, therefore, there is no problem with regard to *mustaṣniʿ*.

obliteration of the binding effect from binding contract is clear in the following three situations;

40/7 (a) In the Situation of Invalid Contract

Both parties and even the judge have the right to annul a *fāsid* contract as long as there is no legal hindrance which stops the nullification; as long as it is possible to nullify, then the contract is obliterated from the binding effect (see *al-Badā'iʿ* 5/300).

We shall see the meaning of *al-fasād* and its rule in the theory of legal sanctions *(naẓariyyat al-mu'ayyidāt al-sharʿiyyah* (see para 156/1 and 56/5).

40/8 (b) In the situation of coercion

A coerced person has the right to nullify or validate a contract which he was coerced to contract when he is free from the coercion, as mentioned in its place, in sequences it is a contract which is obliterated from the binding effect in his part, regardless whether the coercion is considered as a cause of invalid or pending, based on deference of opinion among the scholars as mentioned *inte alia* (see para 34/4).

40/9 (c) In the situation of *al-khiyārat al-ʿaqdiyyah*

When one of the contracting parties has the option to nullify the contract it means it is an obliteration of the original binding effect of the contract.

That is why the jurists considered lack of the party the option of nullify the contract is among the conditions of it to be a binding contract (*al-Majallah,* 114-116)

Some of these options are established by agreement of both parties on it; hence it never exists unless they stipulate it as a condition in the contract, and it is considered as a contractual condition; these are *khiyār al-sharṭ* and *khiyār al-naqd* which were elaborated in the topic of *al-qiyās* (see para 11, eitght).

While some of these options are established by the law in the interest of one the parties in protection of his rights, which is as a result of defects of consent mentioned *inter alia* in the topic of impediments of the intention such as *khilābah, tadlis,* etc. (see para 35/1-37/1).

The party which has the option can either nullify the contract or validate it, as long as there is no any cause of removal of the option or legal hindrance which stops the practice of the right,[290] which can be found in there respective places in the books of *fiqh* and in article 300-360 of *al-Majallah.*

Some of the contractual options relay on the judicial order, hence a party can neither have the right to exercise the option nor can nullification of the contract be accepted from him before the decision of the judge, as in the cases of *khiyār al-ʿayb,* because this kind needs a judicial investigation and an expertise to determine the defect which will establish the right to nullify the contract.

While other contractual options does not require court decision, but the party which has the right of option can excises it at the moment he realizes its causes, and the nullification will be valid even before the court rule for it, as in the case of *khiyār al-sharṭ.*

40/10 It should be observed in these three situations which remove the binding effect of binding contracts, that is because of *al-fasād* (invalid contract), *al-ikrāh* (coercion) and *al-khiyār* (the options), the nullification will be basing on and not confine, that is, it will have retrospective effect which nullifying the contract *ab initio,* making the contract as if it did not exist at all, which is deferent from the nullification due to non-binding contract as discussed before (see para 40/7).

40/11 These contractual options which remove the binding effect of the binding contract due to situations which affect the intentions of the party by defects in the consent are a lot and can not be limited as explained in the topic of impediments of intention.

The scholars have counted them to more than twenty options, among them is the *khiyār al-kammiyyah, khiyār kashf al-ḥāl* etc.[291] and there rule are explained in detail in there respective areas in the

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[290] For example, when the party discovers there is an old defect in the sold goods, and new defects occurred in the possession of the buyer, this will be a cause for removal of the option of nullifying the contract due to the old defect.

[291] *Khiyār al-kammiyyah*; it is when someone buy a thing by the amount of money in his pocket or in his bag without specifying, then the seller have the option when he knows the amount.

Khiyār kashf al-ḥāl, as in the sale of goods involving scale or stone weight which is not among known in the measuring unity in the custom of the area, the buyer will have the option when he knows the measuring units (see *Radd al-Muḥtār,* 4/22 and 27)

books of *fiqh* (see the first topic in the chapter of *khiyār al-sharṭ* in *al-Durr al-Mukhtār wa-Radd al-Muḥtār,* 4/45-46; and *al-Ashbāh wal-Naẓā'ir* by Ibn Nujaym with the commentary by al-Ḥamawī in the beginning of *Aḥkām al-Fusūkh,* v. 2, pp. 194-195).

The *Majallah* discussed seven basic kinds of *al-khiyārāt,* these are; *khiyār al-sharṭ, al-wasf, al-naqd, al-taʿyīn, al-ru'yah, al-ʿayb, al-ghabn bil-taghrīr;* there are rules discussed in detail in specific chapters in *al-Buyūʿ* in article 300-360, and *al-Ijārah* in article 497-521, and other different occasions like *al-Qismah* and others.

The contemporary jurisprudence is moving towards expansion of the causes of nullifying binding contract in emergency cases, especially in situation when one party does not fulfill his contract in the time agreed upon, as explained before, and this is complying with the spirit of Islamic jurisprudence.

SECTION 41

THE AUTHORITY OF THE CONTRACTUAL INTENTION: A GENERAL VIEW

41/1 Preliminary

It is clear from the previous topics that contracts have general effects, and each of them has its own subject and effects which distinguish it from others.

We have also observed that there are specific contracts among the contracts which the legislation preceded the enactment of it rules and effects on the contracting parties, making the effects be the main results of the contract without the need for the parties to stipulate them in the contract and make them conditions.

The principle of the Authority of the Contractual Intention (*sulṭān al-irādah al-ʿaqadiyyah)*, it covers the free will of the contracting party in the core of contract and its effect, and limitations of its freedom, that is, to what extant does the *Sharīʿah* consider it.

41/2 The Four Dimensions of the Freedom of Contract

This principle is connected to four freedoms in the following four contractual dimensions:

1. The freedom of the contracting party to contract with another person.
2. His freedom to institute contracts and obligations by just agreeing, without adhering to the specific ritual procedures which his contract can not be considered valid if he does not follow them.
3. His freedom to institute whatever kind of contracts that he wishes in his personal capacity without confining himself to kinds of the *ʿuqud al-musammā* permitted by the *Sharīʿah*, and stipulated specific rules for each of them.
4. His freedom to define the effects of *ʿuqūd al-musammā* and deviating from its original effect on the contracting parties by making conditions of their choice.

These are the basic aspects which are connected to the the Authority of the Contractual Intention.

41/3 The contractual intention has passed stages in history where it did not have any authority, but it was a confined paralyzed thing, people were not looking at the free will which the *Sharīʿah* made it a constitution of contract, and affirmed the authority of the intention of the contracting parties and honored it in every thing which is not against the public interest, even though there are different opinions of the Muslim jurists in its limits as we shall see.

a. Regarding the first aspect, the Islamic legislation banned all forms of contractual coercion, and gave freedom in signing a contract. The *Qur'ān* and *Sunnah* made free will as a basic constitutional right in every binding contract, even for the women in marriage which people took it as custom that the consent of marriage is not theirs, but it is the right of the house holder, Islām established that a mature girl *(bālighah)* even if she is a virgin she has the right to consent and to chose in her marriage.

   Islām does not validate a contract which is forcing someone to perform a duty which he did not express his will to do it, except what the principles of justice and public interest demand, which is exercised by the government authorities in the name of establishing justice, such as selling of a debtor property who delays to pay back in order to recover the debts, selling of hoard property against the will of the hoarder if the hoarding is causing harm to the public and like owning for the public interest. Such coercive contracts are among the necessary sanction of a just legislation, and the purpose of having government in the country; the modern positive law which is fully applying the contractual intention has recognized it.

b. In the second aspect, which is the ritual procedures, there had been no society which had the history of established legislation *(tashrīʿ thābit)* before Islām - be it the Roman legislation are others - which knew just an agreement can constitute a binding contract without under going different ritual procedures, till the coming of Islām which removed all the procedural setbacks and difficulties connected to contracts, and made just agreement in any form from the contracting parties can constitute a contract, and it did not exempt any except one contract which enforced a

certain procedure which is publicizing by having witness on it, that is the marriage contract as mentioned *inter alia* (see footnote para 27/6)

All the modern positive law which lastly recognized the principle of the Authority of the Contractual Intention in the east and the west which passed through long stages of the cumbersome procedures for instituting a contract, except the *Sharīʿah,* which instituted the principles of contract in a new form freeing the people from the tedious procedure which were imposed by the custom in the dark era *(jāhiliyyah)* of Arab and laws of the surrounding people; this was a strange trend which was not known in the history of legislation. This is the uniqueness of the *Sharīʿah,* which is based on one important factor which is the religious source in it.[292]

c. While the 3rd aspect, i.e. the freedom of the contracting parties to institute contracts which are not in the sphere of the *ʿuqūd al-musammā* established by law, iu their subject and obligations, we shall see in the beginning of the topic classificatiou of the contracts, that the *fiqh* allows contracting new contract, then it was not so long till the Muslim jurists gave the name hence felt in the category of *ʿuqūd al-musammā,* and establish specific rules for them.

   There is nothing in the *Sharīʿah* that limits the kind of contracts aud force people to abide by them. Therefore, any subject that the *Sharīʿah* did not forbid in a clear text and even the principle and basis of *Sharīʿah* do not forbid, it is allowed for the people to coutract, and abide by, them; hence, the contract will rely on the general principles and conditions of contract, such as the capacity of the contracting parties, the legality of the subject matter...etc.

d. The fourth aspect, to what extent does the *sulṭān al-irādah* of the contracting parties cau define the effects of *ʿuqūd al-musammā* and

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292 This is the observation of the learned Professor al-Sanhūrī in justifying the strange character of *Sharīʿah,* and it is the reality (see *Naẓariyyat al-ʿAqd* by al-Sanhūrī, para 92, p. 94, footnote no. 1).

Professor ʿAbd al-Razzāq al-Sanhūrī also said in his research, contract by mailing: The contract in *fiqh* is based on the agreement of two intentions without any restriction, so it is of free will to the point that it surpasses the law which adopts the principle of free will of the contract (see see *Naẓariyyat al-ʿAqd* by al-Sanhūrī, para 303).

deviating from its original rules in their personal rights by making conditions of their own choice, that is to establish what ever obligations and limitations they wish in the contract, this is every important in the *sulṭān al-irādah* of the contracting parties in the recent theory of rights.

The stand of the *fiqh* in this area defer in wide and narrow scope according to the scholars opinion of [juristic opinion] *ijtihād*, but the widest among them are in line with the modern law theories.

We shall highlight in the following section the principle of *sulṭān al-irādah* in the *fiqh*. Later, in section 44, we shall highlight the digest of the topic in the foreign jurisprudence.

Sulṭān al-Irādah **al-'Aqdiyah in the Texts of the** ***Sharī'ah***

41/4 The texts of the *Qur'ān* and *Sunnah* which are the bases of *ijtihād* have reached the peak of flexibility and generality in the authority of the contractual intention. Texts can be classified in regards to its subject into the past four aspects mentioned before.

41/5 **(a)** and **(b)** in the contracting freedom and its total free will: Allāh say: *"O ye who believe! Eat not up your property among yourselves in vanities: But let there be amongst you Traffic and trade by mutual good-will: Nor kill (or destroy) yourselves: for verily God hath been to you Most Merciful!"* (al-Nisā', 4:29).

Allāh also mentioned pertaining to women [dowry] and not engulfing any of their financial rights: *"And give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, Take it and enjoy it with right good cheer"* (al-Nisā', 4:4).

These texts and others implies, the bases of getting someone else property or some of his rights is by the owner's free will either in form of trade and exchange or in form of grant and give up one's right and good free will and choice.[293] That is, the factor in it is the

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[293] Shaykh al-Islām Ibn Taymiyyah said in his *Qā'idat al-'Uqūd* in commenting on this two verses: *"In the grant, the rule (ḥukm) depends on free willingness, and in trade the ḥukm depends on convincing which is agreement from both parties, because both of the parties wants what is in the other party's possession and he is convinced with it, which is the opposite in case of a person giving grant, he is not given something in return which pleases him, but permits himself to give it out, which is ṭayyib al-nafs* (see *Qā'dat al-'Uqūd* by Ibn Taymiyah, chapter on *al-Riḍā* in contracts and who is permitted to nullify it if he is not pleased).

intention of the owner of the property how has legal total freedom to trade or contract.

41/6 **(c)** In initiating kind of contracts, and the binding effect of the contract and promise. Allāh says in relation to this: *"O ye who believe! fulfill (all) obligations"* (al-An'ām, 5:1); and also *"and fulfill (every) engagement, for (every) engagement will be enquired into (on the Day of Reckoning)"* (al-Isrā', 17:34).

It is clear that contract in implication has a promise in it; to respect it resnlts and to be bonded with them, these texts comprehend all kinds of contracts and what will be new in kind of contract withont being bonded to what was known before, as long as they are not in contrary to the *Sharī'ah* texts and its objectives and its general principles.

These texts and others which are similar to them indicate that a person is bond by his contract and promise which he made by his free will, in order to give confidence and stability in the results of economic activities, and make a person know how to structure his activities, because this is the basis for the parties to stick to the outcome as stated before[294] (see para 40/2).

The meaning of binding is the total respect to the freedom of the contracting party, and the right which resulted from his contract to another, hence, a person binding himself is free man.

The generality which is in these texts include the *'uqūd al-musammā* and *'uqūd ghayr al-musammā*,[295] which means not confining to limited kind of contract.

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[294] Its should be noted that all contracts are equal in this sense, be it, what is known in the terminology of the Muslim jurists as binding *(lāzimah)* or non-binding *(ghayr lāzimah)* contract, because the meaning non-binding in their terminology is the possibility of a party to retract from the contract according to the kind of nature and the subject of the contract, but before retracting he is oblige to it consequences; the activities of an agent before he knows the termination of the agency is binding and enforceable to the person who has appointed the agent, and the benefits of a borrowed thing before returning to its owner is on the free basis and is not allowed for the owner to claim any amount from the borrower, and the award given by the arbitrator before one party retracts is binding to both the parties, and so on...that is, non-binding contract do not have retrospective effect as mentioned *inter alia* (see para 40/7).

[295] We shall see in the topic of characterization of contracts, the latest theory of contract, that *'uqūd al-musammā* is the one which the *Sharī'ah* gave it a specific name and made for it specific *ḥukm* such as *al-bay'*, *al-ijārah* and *al-rahn*.

41/7 (d) In freedom of contractual conditions and its extent of recognition:

There are a lot of texts in the *Sharīʿah* from the *Qur'ān* and *Sunnah* in form of words and actions which proves the rule and effects of *ʿuqūd al-musammā* which are permitted by the *Sharīʿah* and there binding effect on the parties according to the subject of each contract.

For example, the marriage contract allows each of the spouses to enjoy with the other, the woman to follow the man, a man to maintain his wife, it establishes the linage, the rights of custody *(ḥaḍānah),* and it establishes the hindrance of marriage due to in-law relationship, inheriting each other and their children...etc.

The same applies to the contract of *al-bayʿ*, *al-ijārah, al-rahn, al-kafālah* and others, each of them have a specific *ḥukm* in the *Sharīʿah;* some are explained directly by the *Qur'ān* and *Sunnah* in form of words and actions, and some are added by *ijtihād.*

The Extant of Authority of a Party to Alter the Effects of Contracts

The authority of the parties to alter these effects which are established by the *Sharīʿah*: in form of reducing some of them, or increasing some of the effect which are not necessary in the contract itself, by one of the parties, by making it a condition during the contract. There are general and specific texts in regard to this issue:

1. There are some general verses in *Qur'ān* on this issue; among them are the two verses we mention in the previous paragraphs.

2. In the *Sunnah* there is a *ḥadīth* which the Prophet (s.a.w.) said: *"The Muslims are bound by their conditions"*;[296] and he (s.a.w.) also

[296] See in the citation of these two *ḥadīth* in the footnote of the para10/2. The word *al-Kitāb* in this narration is from the root, *kataba,* which means ordained, that is, any condition which is not in the *hukm* of Allāh an his *Sharīʿah* it is void; that is, if the condition is against the principle of *Sharīʿah* or it objectives this is according to great scholars *(muḥaqqiqūn)* (see *al-Mughnī* by Ibn Qudāmah al-Ḥanbalī, 8/448 and *Kashshāf al-Qināʿ*, 3/53).

Here, *Kitāb Allāh* does not mean *al-Qur'ān,* because the *Qur'ān* gave general principle of the *Sharīʿah*, it does not contain detailed contractual conditions which are accept or rejected as mentioned.

The word, *kitāb,* is mostly used to mean what we have just mention as in the Qur'ānic verse: *"For such prayers are enjoined kitāban on believers at stated times"* (al-Nisā' (4):103), that is, obligation at has stated times. Allāh says, in regard to forbidding

said: *"Any condition which is not in the Book of Allāh, it is void"* that is any condition which contradict the objective of the *Sharīʿah.*

3. It is reported that the Prophet (s.a.w.) (prohibited the sale with condition) this is how it was narrated in [basic without details] *mujmal* in a narrative form, and there is no unanimous opinion on the authenticity of this text and its chain of narration, as we shall see (see para 42/4)

   Apart from this, there is practical *Sunnah* that the Prophet (s.a.w.) bought a camel from Jābir in journey and he made a condition he should ride it till Madīnah, that is, Jābir made a condition to the Prophet (s.a.w.) on the right of riding after the sale till they reach Madīnah (*Bidāyat al-Mujtahid,* 2/132; and *Fatḥ al-Qadīr Sharḥ al-Hidāyah,* the chapter on *al-Bayʿ al-Fāsid,* 6/76).

4. The Prophet (s.a.w.) established a rule on trust in the contract of borrowing *(al-ʿāriyah)* (what is borrowed should be insured and returned).[297]

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marring a lady in waiting period *(ʿiddah)*: *"Nor resolve on the tie of marriage till the term kitāb prescribed is fulfilled"* (al-Baqarah, 2:235), that is, till the term prescribed for the *ʿiddah* of previous marriage is fulfilled.

The cause of this *ḥadīth,* is that, Barīrah was a slave, and ʿĀ'ishah (may Allāh be pleased with her) wanted to buy her and set her free, and according to the teaching of the prophet whenever a master free his slave the *wala* is his, that is, he has the right to inherit him when he dies in a certain stage of inheritance, in order to encourage freeing of slaves, the owner of Barīrah wanted to make a condition for sale her; that the *wala* will still be theirs even after ʿĀ'ishah buying and freeing her, ʿĀ'ishah told the Prophet (s.a.w.) the issue, the he said: (How can it be some people are making condition which are not in *Kitāb Allāh,* any one who make a condition which is not in *Kitāb Allāh,* it is not valid even if they make hundred conditions, the condition of Allāh have more rights and are stronger) reported by al-Bukhārī in the chapter of *buyūʿ* and *mukātabah* (see Footnote 20/2)

The way this condition contradict the objective of *Sharīʿah,* from what can be observed is that, *Sharīʿah* encourage people to free slaves, and it opened gates for it, and made freeing of slave in some situation is compulsory while others it is optional, hence it made the right to inherit by freeing a slave before the right of inheriting by *ʿaṣabah* in order to encourage freeing the slaves. If the seller make a condition for the buyer that the *wala* remains with him, this might make the buyer retain the slave and not freeing him after buying him causing the lose of the objectives of the law giver and policy of *Sharīʿah* in the subject and the wisdom for the objectives of *Sharīʿah.*

297 This is what open the opportunity for some *ijtihād* that the character of [trust] *amānah* in *ʿaraya* is the presumption, but it must be paid back if the lender made it a condition, this is a trial to combine the two evidences; and this is a better *ijtihād* in regard to the character of *ʿaraya,* even though it is not a famous opinion, it is one of the two opinion of Ḥanafīs (see *al-Mughnī* on *ʿaraya;* Ibn Qudāmah, 5/354-356; *Bidāyat al-Mujtahid,* 2/263; and *Kifāyah Sharḥ al-Hidāyah fī al-Fiqh al-Ḥanafī,* 7/467-469).

41/8 These texts and other of its kind which are narrated in the *Sunnah* on recognizing contractual conditions implies:

1. There are some conditions which are deem to be arena for the parties to exercise the freedom of their intentions, which the *Sharīʿah* left it as part of their rights in rules and obligations which is initiated by the contract, and the contract *al-ʿaqd al-musammā* will be deemed existing between the parties on it basis as long as they do not put conditions which are against the original contract.

2. There are conditions which are prohibited by the *Sharīʿah*. Hence, the intention of the contracting party has no authority in it, because they interfere with the fundamental rules which are regarded as objective of Islamic law and its public policy.

The second *ḥadīth* is reported by Abū Dāwūd from the narration of Ṣafwān ibn Umayyah, that the Prophet (s.a.w.) borrowed from him some shields during the Battle of Khaybar, and he ask the propbet is it by force? He answered, "No, but *ʿaraya* which will be return to you". It was also reported by Aḥmad and al-Nasā'ī and al-Ḥākim from the narration of Ibn ʿAbbās, in as "But, *ʿaraya* [which be return] *madā*" and Aḥmad and al-Nasā'ī added, some of the shield got lost, then, the Prophet (s.a.w.) wanted to pay for them, and he said: *"Oh Prophet of Allāh, today I like to convert to Islam"* (*al-Talkhīṣ al-Ḥabīr*, 3/52-53).

SECTION 42

IJTIHĀD IN THE AUTHORITY OF THE CONTRACTUAL INTENTION

42/1 The researcher observes, on the large number of texts which discuss on the four aspect of freedom of contract which were explained in the beginning of the previous section the *ijtihād* agree in some aspect and disagree in others:

a. In the first two aspects the *ijtihād* unanimously agreed on the principle of freedom *(ḥurriyyah)* of contract and its freewill *(riḍā'iyyah)* and binding effect of a valid contract.

b. In the third aspect, on the effects of the contracts, there is nearly an unanimous agreement of *ijtihād* on the general principle, that is, implementation of the effect and rules of the contract is the right of the law giver *(al-Shāriʿ)* and not the right of the parties, *al-Shāriʿ* is the one responsible to organizes these contract and their effect on people rights, and makes for every contract a way to attain specific results which are the outcome of that particular contract.

The *ijtihād* has a completion role in this issue in branching rules which the *Sharīʿah* texts have established in a way that the *Sharīʿah* itself has open up for *ijtihād*, in issues which there are not direct text on them, that is, in form of analogy *(qiyās)* or juristic preference *(istiḥsān)* or considering the public interest *(istiṣlāḥ)*, blocking the way to *ḥarām (sadd al-dharīʿah)* in different form of *ijtihādāt* in some of these ways as elaborated *inter alia* in the topic of *al-istiṣlāḥ* in the beginning of book.

The basis of juristic observation on the establishment of the effects of the contract is the right of *al-Shāriʿ* is that, the contract is a legal cause, it is a course which *al-Shāriʿ* made for a person following it to achieve rights which are recognized by the *Sharīʿah* among the contracting parties, hence, its upon *al-Shāriʿ* to define these result; therefore, the authority of the intention of contracting parties is derived from the *Sharīʿah* according to the limits which are laid by it. *Al-Shāriʿ* has a system which protect it, hence it has the ability to keep the limits of personal rights *(ḥuqūq*

al-khāṣṣah) and the intention of the parties in a side, and the public interest and the intention of *al-Shāriʿ* in another side, also *al-Shāriʿ* is the custodian of organizing those *ḥuqūq al-khāṣṣah* among the people if they follow its course, which protects the equilibrium and curbs tyranny and controlling the mode of relationship.[298]

c. In the fourth aspect, which is the extent of freedom of contractual condition or the extent of *sulṭān al-irādah al-ʿaqdiyyah* in defining the effect of contract between the contracting parties, the *ijtihād* have fundamental diversity differences in the issue.[299]

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[298] This is the summary of what can be gained from the words of the *fuqahā' al-uṣūliyyīn* in regards to the effect of contracts and returning it to the intention of *al-Shāriʿ* (see *Kashf al-Asrār Sharḥ Uṣūl Fakhr al-Islām al-Bazdawī*, 2/358, and 4/171; *al-Mustaṣfā* by al-Ghazālī 1/93; *al-Muwāfaqāt* by al-Shāṭibī 1/131 and 151; *Fatāwā Ibn Taymiyyah* 3/236). And I have referred a lot to the words of prominent scholar like Shaykh Muḥammad Abū Zahrah, in his *al-Milkiyyah wa-Naẓariyyat al-ʿAqd fī Fiqh al-Islāmī*, para 135-136.

[299] The principle of the effect of *Sulṭān al-Irādah* on the contract according to the contemporary legal terminology is the theory of contractual conditions *(shurūṭ al-ʿaqdiyyah)* in the terminology of our classical Muslim jurists. The intention of the contracting parties to change the original effect of the known contract between them, are based on the conditions they stipulate in the contract, the parties can add some conditions which will increase the result of the contract on rights and obligation which the contract does not require them if they had not imposed them in it.

For this, the learned researcher Abū Zahrah (may Allāh have mercy with him): According to positive law the free intention of the contracting parties is what constitutes the effects of contract base on the law principle. Contract is the law of the contracting parties, hence, whatever rules that the party agrees becomes valid and force able, while in the *Sharīʿah*, the intention constitutes a contract only, but the rules of the contract and its effect is constituted by *al-Shāriʿ* and not the parties (see *al-Milkiyyah wa-Naẓariyyat al-ʿAqd fī Fiqh al-Islāmī*, para 135).

My opinion: It is not right to state in an legislation that rules of contract and its effect are constituted by the intention of the party and not the intention of the legislator, but in all the legislations it should be regarded as the responsibility of the legislator and not the parties, because leaving the rules of contract, its effect and binding the party with it, its deemed to be purely legislation view, and every binding activity for the party as a result of his contract never exist if it is not for the enforcement of legislator and his strict intention. This is the opinion of our *fuqahā'* as explained before, and it's not valid to consider it going against the legislation of the positive law. A contract is considered as a specific law of the contracting parties in the Islamic law also as long as the contract has a legal binding force for its parties.

There is no great difference between the two legislations in this topic except the extent to which the legislator delegated to the contracting parties the power to amend the rule which were established by the legislation in every contract. This is to mean what extent is the freedom of contractual condition can amend those rules, and it does not mean the parties are the ones legislating the effect of the contract and enforce it between them, a contract can be free from any conditions, and in that case, there is no doubt that the rule which are applied are those enacted by the legislator on the effects

The *ijtihād,* which are related to this topic, can be classified into two groups:

i. The *ijtihād* which regard limitation is the actual legal rule on freedom of contractual conditions; these are *ijtihād* that clinch to the theory of "implication of the contract".
ii. The *ijtihād* which regards no limitation is the actual legal rule on freedom of contractual conditions.

First: *Ijtihād* that clinches to the theory of implication of the contract *(muqtadha al-ʿaqd)*[300]

42/2 These *ijtihād* are of the opinion that every contract in *al-Shāriʿ* has a basic rule known as implication of the contract (*muqtaḍā al-ʿaqd),* which *al-Shāriʿ* addresses them directly or being deduced on the basis of the *ijtihād* and established them in order to balance between the right of both parties. The parties cannot set conditions which contradict them, and if they stipulated a condition contracting them, it will invalidate the contract. i.e. if a general worker like a painter or a tailor makes a condition that he is not responsible to pay for the damage he causes by his work (see para 4/6).

This is based on the *ijtihād* of the Ḥanafīs in the contractual conditions, and close to it, is the unanimous opinion of Mālikīs then the *ijtihād* of the Shāfiʿīs.

These *ijtihādat* initially adopted the principle of *muqtaḍā al-ʿaqd,* and it members hold to this opinion generally, and they differ in the details and their views branched up. The *ijtihād* of the Shāfiʿīs is the most stringent and narrowed the freedom of conditions.

In their view all implication of contract must be established by legal evidence *(dalīl al-shāriʿ)* and the party is not allowed to go against them or add anything or limit it except with legal evidence which permits its obligation and demand its implementation; like delaying the payment of price in sale *(bayʿ)* and delaying the payment of dowry *(mahr)* in marriage.

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of this contract. Is it logic to say the effect of a contract sometimes is constituted by the parties between themselves and sometimes by the legislation?! And we shall see some of the deferent *ijtihād* in the *fiqh* confine the freedom of contractual condition, while others expand it widely to reach what the principle of contemporary positive law have.

300 See the meaning of *muqtaḍā al-ʿaqd* in para 39/6.

Imām Mālik had his own opinion in the conditions which invalidate the contracts, that is, the condition which is against the *muqtaḍā al-ʿaqd* and it will invalidate it, if the person made that condition retract from it and he never hold to it, then the contract is valid and the condition is neglected; and base that on the theory of hindrance *(al-māniʿ)* (see para 28/7) the condition which is against the *muqtaḍā al-ʿaqd* is deemed hindrance for a valid contract, whenever the hindrance is removed then the hindered returns (see *Bidāyat al-Mujtahid,* 2/135; *Naẓariyyah al-ʿAqd* by Abū Zahrah, 149).

42/3 The Stand of Ḥanafī *Ijtihād* in This Issue

Ijtihād of the Ḥanafīs, deems every condition which contain extra benefit on the *muqtaḍā al-ʿaqd* is against the contract and it invalidates it and it is a cause to return the payment; for example, a condition in the sale and purchase contract, that the transportation of the goods will be at the cost of the seller, or one of the contracting parties giving a loan to the other and so on.

If that condition it is not in the contract of [financial transaction] *muʿāwaḍat al-māliyyah,* like marriage the condition becomes void by itself without affecting the contract. But, the *ijtihād* of the Ḥanafīs exempt from hindrance three kinds of conditions which are deemed valid and binding:

1. The condition which *al-Shāriʿ* permits, like stipulating the condition to delay the payment of sale contract, and stipulating the condition of [option] *khiyār* for one party which is known as option of condition *(khiyār al-sharṭ),* and other which are like it in analogy like *khiyār al-naqd* and *khiyār al-taʿyīn.*[301]

2. Condition which is inline with the contract such as a seller make it a condition for the buyer to have a guarantor *(kafīl),* or pledge *(rahn)* in the future payment contract, because it is surety for the contract (see para 37/5).

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[301] The meaning of *khiyār al-sharṭ* and *khiyār al-naqd* have be given before (see para 3/7, issue no. 9). With regard to *khiyār al-ta'yin,* it is when *bayʿ* or what has the same rule in *ʿuqūd al-muʿāwaḍah,* like *ṣulḥ* and *ijārah* contracted on unspecified thing among a lot of things, with the condition that, a contracting party has the right to identify what he chooses from them (see *al-Majallah,* 316).

3. Condition which is in a custom and is recognized by the *Sharīʿah*, custom validates conditions which initially are considered to invalidate a contract. If it is a custom of people in a certain area, transportation of sold good is on the expense of the seller, or a condition that the buyer will repair the sold item if it is damaged, this will be a valid contract.

Ijtihād of the Ḥanafīs some how exaggerated their stand on the contractual conditions and they broadly hold to the principle of equilibrium of rights of the contracting parties which is established by the contract; they are of the opinion that, making a condition that will only give gain to one party deform the necessary equilibrium and lead to dispute, because it is extra benefits on the *muqtaḍā al-ʿaqd* without any exchange in return, which will be like [usury] *ribā al-faḍl*, that is prohibited by *al-Shāriʿ*. If the customs makes it as a condition the party should be careful with it, and should calculate what he should give in return in order to return the equilibrium, so the custom should not be a cause of dispute (see *Radd al-Muḥtār*, 4/123).

It is clear that, this is a weak structured reasoning; the reality is a sound minded person does not set condition or obligation except he has calculated in return be a custom or not. Anyways the exception of condition which is much known from the wide sense of hindrance which narrows the freedom of condition in the *ijtihād* of the Ḥanafīs, because the custom of condition is already spread (see the introduction of *al-Majallah*).

According to the Ḥanafīs, if it was said to base on the theory of custom, that stipulating condition in contract in general it's a valid contract, is like people are familiar with a specific form of condition in some contract, but is better *fiqh*, hence we can say the invalid conditions have disappeared from people activity by the act of time, and made all the condition in this era valid in accordance to the *ijtihād* of the Ḥanafīs who allows it except when it is contradicting specific *Sharīʿah* texts which forbid it, or is against the principle of *Sharīʿah* and its general objective; people nowadays are used to attach to all of their activities with conditions which they agree upon on each contract, especially after the law has given them sanctity.

There is nearly a unanimous *ijtihād* save the Ḥanbalīs that marriage is the furthest contract from the *sulṭān al-irādah* of the parties on the *ḥukm* and its effect, because the rules which are set by *al-Shāriʿ* are only the right of the contracting party alone, but they

are rights of the family and social organization. This is also what the legislations recognize and it is the theory in the contemporary law.

Second: The *ijtihād* which regards no limitation is the actual legal rule on freedom of contractual conditions

42/4 These *ijtihād*, view that, according to the implication of the evidences *(dalīl)* of the texts of the *Sharīʿah* and practical *Sunnah*, there is a total freedom of contracts in terms of kinds and conditions; and it is an obligation to implement and abide to what the parties agreed upon and made it condition in their contract, as long as there is nothing that in the text of *Sharīʿah* or its principle that disallow the contract or the condition; hence, the condition will not be applicable, because of that particular reason which is against the principle, and the agreement on it will be void, for example, agreement based on *ribā* or conditions which makes what is unlawful lawful and the lawful unlawful.

This is the basis of the *ijtihād* of the Ḥanafīs according to the texts of their different scholars, and it is the widest *ijtihād* in Islamic jurisprudence and the most embracing to the principle *sulṭān al-irādah,* and the core of its theory is inline with theories of contemporary positive law in the foreign jurisprudence, as we shall see later on.

The likes are the opinions of Shurayḥ al-Qāḍī (see para 42/18) and ʿAbdullāh ibn Shubrumah al-Kūfī[302] and this is also the opinion of some the Mālikī jurists.

According to this *ijtihād,* this freedom is the actual general rule in contracts and conditions, basing their opinion on verse: *"O ye who believe! fulfill (all) obligations"* (al-Mā'idah, 5:1) due to the generality of

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302 ʿAbdullāh ibn Shubrumah ibn al-Ṭufayl is among the prominent scholars *(mujtahid)* of Kūfah. He leaved in the same era with Abū Ḥanīfah. He narrated from Anas ibn Mālik and Amīr ibn Ṭufayl. He died in 144 A.H. See his biography in *Akhbār al-Quḍāt* by Wakīʿ, 3:36-60, and also *Siyar Aʿlām al-Nubalā'* by al-Dhahābī, 6:347.

I never come across the details of his opinion about the *sulṭān al-irādah wa-shurūṭ al-ʿaqdiyyah,* as it was narrated from the opinion of Ibn Ḥanbal; but this is what other schools narrate and what was in the introduction of *al-Majallah* in his general principle in it. It shows that his opinion is like the *ijtihād* of the Ḥanbalīs (see *Fatḥ al-Qadīr,* 6/76 and the introduction of *al-Majallah*).

It is worthwhile to search for what can be found about his *fiqh* opinions in the book of the *fuqahā'* with regard to the differences of opinion in *fiqh.* We gave how he differs in opinion with Abū Ḥanīfah in the *fatāwā* on analogy *(qiyās)* on the issue of losing share money *(danānīr al-mushtarakah)* (see para 19/4).

its terms; and on the saying of the Prophet (s.a.w.): *"The Muslims are abide by their conditions"*.

The tool of exception is the hindrance, which is from the saying of the prophet (s.a.w.) in the *ḥadīth* of Barīrah: "Any condition which is not in the Book of Allāh is void" in the meaning we gave in translation of this *ḥadīth* (see footnote para 41/7); and also in the letter of ʿUmar ibn al-Khaṭṭāb to Abū Mūsā al-Ashʿarī: *"al-Ṣulḥ* is allowed among the Muslims, except *ṣulḥ* which legalizes the unlawful or forbids what is lawful" (see footnote para 3/6) and these words of ʿUmar are the correct translation of the condition which is not permitted, which the Prophet (s.a.w.) called it "which is not in the Book of Allāh" and they challenged the authenticity of the *ḥadīth* "the Prophet (s.a.w.) forbid sales and condition"[303] that its chain of narration is weak according to scholars of *ḥadīth*; and if we assume its authentic, it will only be applying to what is against the Book of Allāh and His *Sharīʿah* as in the *ḥadīth* of Barīrah which is authentic.

42/5 In these *ijtihād* they do not consider contracts having narrow effect which is confined by the strong limits which controls the conditions of the contracting parties, but they see *al-Shāriʿ* in the *Sharīʿah* has delegated to the intention of the parties to define these effects as part of their rights in every thing that does not contradict the text of the *Sharīʿah* and it does not go against established fundamental principle.

Ibn Taymiyyah says, in justifying that it is an obligation to fulfill the contract, because *al-Shāriʿ* made it obligatory except what it has exempted it by evidence. Fulfilling of contract is among the obligations which all the religions and the wise men agree ou it, and even to those who say there is logic obligation[304] considered it as an obligation. And the actual rule governing contracts is the freewill of

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303 The *ḥadīth* whereby the Prophet (s.a.w.) forbids transaction and condition is reported by al-Ṭabrānī in his *al-Awsaṭ* by al-Zaylaʿī who narrated from al-Qaṭṭān that it is a weak *ḥadīth* (see *Naṣb al-Rāyah*, 4/18; *Badāʾiʿ al-Ṣanāʾiʿ*, 5/175; and *Fatḥ al-Qadīr*, 6/76).

304 Those who say the logic obligation (*wājib ʿaqlī*) are the Mu'tazilites. Their opinion in the issue is that, things which are good in their nature, such as believe in Allāh, truth and justice, people consider they are oblige to them by the rule of their brains, and they will be accounted for them by Allāh without depending on the relation of the *Sharīʿah* from Allāh and preaching of the prophets. This is contradicting to what the entire *fiqahā'* who base the opinion of the verse: *"nor would We visit with Our Wrath until We had sent an apostle (to give warning"* (*al-Isrā'* (17):15). This is well-known issue in *ʿilm al-kalām* and *uṣūl-al-fiqh* for which it is known as the issue of the logic of good and bad (*al-ḥasan wal-qabīh al-ʿaqlīyīn).*

the contracting parties, and its effect is what they have obliged themselves by the contract.

Then, he gave the texts of *Sharīʿah* which shows this principle which we mentioned in the beginning of the topic (see *Fatāwā Ibn Taymiyyah*, 3/239).

42/6 The Stand of *Ijtihād* of the Ḥanbalīs in the Theory of *Muqtaḍā al-ʿAqd*

The Ḥanbalīs did not neglect this theory of *muqtaḍā al-ʿaqd,* which clinches to it those who oppressed themselves from other schools. The *fuqahā'* of Ḥanbalī School disallow some conditions in some contracts by the reason that the condition is contrarily to *muqtaḍā al-ʿaqd.*

But they have broader view of translating *muqtaḍā al-ʿaqd* and its limitations. They do not consider, like other schools, any benefit which one party makes it a condition for his purpose which the contract does not requires it by its nature will be contradicting the *muqtaḍā al-ʿaqd*; but they consider the interest of a party is the interest of the contract as long as it is permitted by *al-Shāriʿ*, that is, is not prohibited by *al-Shāriʿ*. According to the *muḥaqqiqīn* a condition is not considered contradicting to *muqtaḍā al-ʿaqd* except in fundamental aspects which the condition is against it, the objective of the *Sharīʿah* will be hampered in that particular contract; hence, the contract can be void because of the condition, or the condition could be void and the contract still be valid, and this is according to the position of the condition and the degree of its contradiction to the objective of the contract. Based on this, they said:

- If a party stipulated a condition in a marriage contract stating that, it should not be lawful for parties to enjoy the marriage relationship but not having sexual intercourse *(al-mutʿah al-zawjiyyah).* The marriage contract will be void due to this condition, because the marriage will have no meaning, but it will be like moot marriage *(al-ʿaqd al-ṣūrī).*

- But if the condition stipulates that, they should not enjoy the marriage relationship but not having sexual intercourse *(al-mutʿah al-zawjiyyah),* the contract will be valid and the condition will be void, because it is against the *muqtaḍā al-ʿaqd*, it will be not

logic for *al-istimtā*ᶜ to be lawful by the contract and forbidden by the condition.

The contract was not void in this case, because the objective of *al-Shāri*ᶜ in this issue, that is *al-mut*ᶜ*ah,* exists and both parties agree on its existence, and the mention condition, is an extra thing which is not permitted, hence it will be rendered void and the contract will still be valid.

- In this principle we can say, if the woman has a condition in marriage contract that her husband should not travel with her during her travel, the condition is mulled because legislation does not permit her to travel alone.

  If they have a condition not to let her husband to travel and takes her with him, her condition is right, because it is a permitted interest and does not violate the purpose of marriage condition and confirm will be right her right to null the contract if her husband does not fulfill it.

42/7 They answered those who thought condition is not a contract interest, as to decide important jurisprudence control to determine and distinguish between their forgivable view and other serious view, in contract purpose limits. They said the speech here about that condition which has no interest is false because it keeps the woman's interest. The holder's interest is the contract purpose as when they have a condition to perform mortgage in sale contract.

They admitted that mortgage cannot be performed when they obligate not to sell mortgaged thing at debt payment. Their evidence is "They all are false condition which violate the contract purpose because mortgage contract, they had fulfill that condition and the purpose will be lost". They are different in considering whether that will null mortgage contract or violate the condition only (*al-Mughnī* 4/429) this is also done in a lot of cases of Contract distinguishing among correct and false conditions, their evidence of its falseness that it violates contract purpose.

They widen the prevention sometimes to prevent not only conditions that violate contract purpose but those contracts which each contract does not indicate as wheu the mortgager conditioned that he should manipulate the mortgaged thing (*al-Mughnī*).

It is apparent that they prevent that condition in mortgage because it is similar to usury- or their rules and texts in sale and other

contracts will allow the stipulation to the increasing of interests more than contract purpose.

42/8 Speech is differently informed about Aḥmad to correct contract purpose main condition of warranty to honesty and *vise versa.*

Shams al-Dīn ibn Qudāmah al-Maqdisī said in *al-Sharḥ al-Kabīr*: "If the borrower has condition not to grantee borrowed things, this condition does not null that guarantee".

Each thing is under honesty for saving is not warranted as they conditioned its guaranty, if they diverse their guaranty it should not be negotiated because of its reason as if the stipulated guarantee of deposit or property in its owner's hands.

Aḥmad ibn Ḥanbal said, *"Believers are responsible for their conditions"*. It indicates negation of guarantee according to condition the first thing is the apparent matter of this Islamic school (see *al-Sharḥ al-Kabīr: Kitāb al-ʿĀriyah,* 4/366-377).

We find here concerning the main holder's responsibilities of contract, Ḥanbalīs independent reasoning accepted its violation through condition

42/9 The Merits of the Ḥanbalīs about General Will Power

This Ḥanbalī independent reasoning, its essentials and main results to understand texts in legislation about contract intent power that does not keep embracing the imaginer; and it is the *ijtihād* which deserve to be everlasting. In the chapter of contracts and conditions, it is like the wide horizon, but its limit is the nature itself!! Especially when we know the principle *sulṭān al-irādah al-ʿaqdiyah* which was established by the Ḥanbalīs since 12 centuries back, deducing from the fertile texts of the *Sharīʿah*, and its established clear principles which the international legislation and the Roman Jurisprudence did not know or they did not understand, and the legal and social minds of Europe could not think of it except just before two centuries as we shall see, even though al-Imām Aḥmad ibn Ḥanbal is considered as the *fuqahā'* from the School of *Ḥadīth (madrasat al-ḥadīth)* and not from the School of Thought *(madrasat al-ra'y)* (see footnote para 53/1).[305]

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[305] It is noted the *ijtihād* of the Ḥanbalīs in the matter of the worship *(ʿibādāt)*, and cleaning *(najasāt)* is most avoiding what is permissible in fear to do the prohibition *(al-*

Ibn Taymiyyah is of the opinion that school of Imām Aḥmad is lineate in transactions rule due to his deep knowledge in the authentic practices from the *Ḥadīth* and *Sunnah,* he said: "There is nobody in the four Imāms that is validating the condition more than Aḥmad, and generally what he validates in contracts and conditions has evidence from *al-Shāriʿ* especially the practice of the Prophet or analogy, it does not contradict that he is opposing *muqtaḍā al-ʿaqd,* he got a huge number of *athar* of the Prophet and companions in transaction and condition that the other Imām could not get".

Shaykh Abū Zahrah is of the same opinion, he observed in his book, *Ibn Ḥanbal:* "The knowledge of Aḥmad in *āthār* used to help him in opening the doors of conditions which some of those who are not much acquainted with *Ḥadīth* to his level thought that those doors can never be opened. The study of Aḥmad in *athar* made him understand the logic of *fiqh al-atharī* calls for permissibility until there is evidence which limits, or forbid" (see *Ibn Ḥanbal,* para 228-229).

42/10 *Ijtihād* of the Ḥanbalīs consider conditions stipulated in the core of the contract and conditions agreed upon before the contract are of equal value, even if they did not made them clear during the contract as long as the party enter into it based on it; this is due to the command to fulfill the conditions, contract and promises has two situations.

And this is obvious opinion in the School of Aḥmad, and he emphasized it in the book, *al-Muntahā,* and he said in *al-Inṣāf*: "It is the right which has no doubt in it" (see *Kashshāf al-Qināʿ*, 3/52).

Aḥmad considered a condition which can be noticed is equal to the condition that has been uttered by mouth *(al-sharṭ al-malḥūẓ kal-sharṭ al-malfūẓ),* and he also considered what is known by custom is like what is made a condition *(al-maʿrūf ʿurfan kal-mashrūṭ sharṭan).*

Places Where the Features of the School of Ḥanbalī is Clearly Observed on *Sulṭān al-Irādah*

42/11 Among the *ijtihād* of the Ḥanbalīs in freedom of condition are six important aspects from the principle *sulṭān al-irādah,* which its

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warāʾ) and is narrower than other Schools, which made him before the people to be the title of stringent in the religion, which is totally the opposite in the rules of dealing with contracts and conditions he is so lineate than any other School.

values are appreciated in the scale of the contemporary laws, these are:

42/12 First Aspect

The *ijtihād* of the Ḥanbalīs did not differentiate between the marriage contract and other contract in the freedom of conditions and its binding effect in its general limits as explained before. He made it possible for the spouses to stipulate what ever they want; rights, interests, and situation which do not contradict to the marriage and *Sharīʿah* policy as conditions in the marriage contract. Based on this principle, Imām Aḥmad allowed a woman to make a condition that her husband should not travel, or make her move from her house or he should not marry another lady while with her, or one of the spouses can make a condition that, the other party should be reach and so on.

Breaching of any valid condition made by a spouse make it possible for the other party to invalidate the marriage.

The conditions which are not allowed in marriage contract are those forbidden by *al-Shāriʿ* by a specific text, or it reduces rights and responsibility which is regarded as *Sharīʿah* policy in marriage, such as, a condition to have a time limit for the marriage, or no dowry *(mahr)*, or no maintenance for the wife, or no sexual relationships and so on. The detail of these can be found in the books of the Islamic law (see *al-Mughnī, al-Sharḥ al-Kabīr, Kashshāf al-Qināʿ, Kitāb al-Furūʿ: Bāb al-Shurūṭ fi al-Nikāḥ*).

42/13 The *ijtihād* of the Ḥanbalīs on the saying of the Prophet (s.a.w.) *"the conditions which you are more oblige to fulfill are which the private part were made lawful by them"*.[306]

He did not differentiate between the financial conditions of *mahr* and other such as; the lawful interests of the spouses that depend on their intentions, but it consider the conditions in marriage are more binding must be fulfilled more than any other conditions.

The Ḥanbalīs based their opinion on what is reported by Imām al-Bukhārī in his *Ṣaḥīḥ* in the Judgment of ʿUmar ibn al-Khaṭṭāb, that a person married a lady and made it a condition he should leave in her house, then he wanted to move her, they went to litigate to

[306] Reported by al-Bukhārī, 5/323 in *Kitāb al-Shurūṭ*, and (9/217 in *Kitāb al-Nikāḥ*. Also reported by Muslim (4/140) from the narration of ʿUqbah ibn ʿĀmir.

ʿUmar where he said: 'She is entitle to her condition' the person said: 'It means the ladies are giving us divorce!!!' ʿUmar answered in those words which become eternal constitution: 'the cutting points of rights are the conditions, and you deserve what you made as a condition (*maqātiʿ al-ḥuqūq ʿinda al-shurūṭ, wa-laka ma sharaṭat*)[307] (see *Iʿlām al-Muwaqiʿīn*, 3/338; and *Kashshāf al-Qināʿ*, 3/53).

The *ijtihād* of the Ḥanbalīs has also permitted, even though there is difference of the *fuqahā'* opinions, condition of option in marriage contract of specific time frame as in *al-ʿuqūd al-muʿāwaḍāt*, if the time elapses without nullifying the marriage the marriage will be consider concluded (see *Kitāb al-Furūʿ*, 3/60).

42/14 The Second Aspect

As we have just finished the first aspect the Ḥanbalīs have brought us a new principle which is very important in principle of contractual conditions, that is, a condition can be itself and its nature non-binding to the person who it was set for, this kind of condition is like the non-binding contract in the contracts, nevertheless it is allowed to stipulate it and is not neglected. The consequence of its validity even though it is not binding is that, the party for his interests this condition was imposed can invalidate the contract when the other party cannot fulfill it.

In this kind of condition both the parties have the option; the party to whom it was imposed has the option to implement it or not, and the other part has the option whether to let the contract continue or invalidate it in case the condition is not fulfilled.

- If a lady impose a condition in the marriage contract to the man; 'he should not travel or he should not marry another lady while she is with heim', it is better for the man to fulfill the condition as much as possible, but it is not a must for him to fulfill and he cannot be forced legally to implement it, because *al-Shariʿah* gave him the freedom to travel and migrate as he knows best where to get his bounty and go for his necessities, as it gave him freedom to marry more than one wife, but in the limit prescribed, but if he does not implement the condition and he traveled or married

[307] Al-Bukhārī suspended its chain of narration twice in his *Øaḥīḥ* in *Kitāb al-Shurūṭ: Bāb al-Shurūṭ fī al-Mahr ʿinda ʿUqdat al-Nikāḥ*, 5/322, and in *Kitāb al-Nikāḥ: Bāb al-Shurūṭ fī al-Nikāḥ*, 9/217; al-Ḥāfiẓ Ibn Ḥajar said in *al-Fatḥ:* Saʿīid ibn Manṣūr joined the chain.

another, she will have the option of whether to invalidate the marriage or retain it.

- The Ḥanbalīs in this way have permitted condition which are *makrūh* in *Sharīʿah* and which affect a third party, as long as the condition is not a must to be implemented, but it gives the right of invalidating if the are not implemented. For example, the second wife made a condition that he should divorce the first wife. There is difference in opinion in the validity of this condition, and the *muḥaqqiqūn* are of the opinion that it is a valid condition.[308] Because it is of the interest of the wife even if it is not a must for the husband to fulfill it, hence she has the right to nullify the marriage if the husband does not implement it (*Kashshāf al-Qināʿ Sharḥ al-Iqnāʿ*) on *Shurūṭ al-Ṣaḥīḥah fī al-Nikāḥ*.

42/15 The Third Aspect

Ijtihād of the Ḥanbalīs allows to limit ownership when contracting by protective conditions which hinder some activities of the owner, or it limits the way to use, or exempt some right, or it impose to the owner some obligations.

- It allowed for a person who is selling a slave to give a condition not to sell her, but use her to procreate, it might be she is so worthy to the seller, so he wants to protect her honour.
- They also allowed the seller to make a condition to the buyer; if he wants to sell the goods then the first seller will buy from him. Hence, the buyer can not sell to another person except him.
- The allow selling real estate on the condition that, the buyer will make it [endowment] *waqf* and selling a slave with the condition the buyer should free him.

These conditions and like other *ijtihād* does not permit them except the *ijtihād* of the Ḥanbalīs, because to them, these are against *muqtaḍā al-ʿaqd,* and what ownership requires to use it any how the owner wants, the fruit and the right of ownership are not created by

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[308] Imām Ibn Qudāmah al-Maqdisī mentioned that this condition is invalid, but most of the Ḥanbalīs validate it. See *Taṣḥīḥ al-Furūʿ*, 3/56.

the party; but it is established by *al-Shāriʿ* in a way that will deter people from encroaching to others rights.

But the view of the Ḥanbalīs in these issues is that, these conditions are intentional and effective on the result of authority delegated to the parties by *al-Shāriʿ*, and it delegated it to them so they can achieve their interests. Hence, the ownership can not be transferred fully by the sales contract with these conditions, but ownership will be limited.

42/16 The Fourth Aspect

The *ijtihād* of the Ḥanbalīs validate the *al-bayʿ bi-mā yanqaṭiʿ ʿalayhi al-siʿr* that is, selling goods by the price which the market has for the product at the time of purchasing, without fixing the price in the contract. This kind none of the three Imāms accept it except Aḥmad, due to the ignorance of the price during the contract.[309]

But the *ijtihād* of the Ḥanbalīs in this agreement view that they had a condition which gave the good basis for knowing the price, and it removes the ambiguity and ends the disputes.

Ibn al-Qayyim defended the theory and supported it according to the *Sharīʿah* and reality interest with ample support (see *Iʿlām al-Muwaqqiʿīn*, 4/3).[310]

This is the peak which the current positive law has reached in the condition of contracts and it is stated in the article 96 of *Qānūn al-Madanī al-Jadīd*: When contracting parties agree in core issue of the contract, and delay in detail study of its branches and they did not make a condition that the contract will not be concluded if they do not agree on it, then, the contract is deemed concluded. If they

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309 The late followers of the Ḥanafīs permitted this kind, which they call *Bayʿ Istijrār* due to the need of it, and they differ in its justification. See *Radd al-Muḥtār*, 4/12): *Bayʿ al-Istijrār* is someone taking his daily use from a butcher, or grocer or others without agreeing on the price at the time of taking, then, the seller will be calculating every time, this is what is known nowadays as flowing account (*al-ḥisāb al-jārī*).

310 Ibn Taymiyyah said in his book, *Qāʿidat al-ʿUqūd:* "Aḥmad said that its permissible to take by the price, it is allowed to buy with a known consideration, and renting with a know consideration, also marring with known consideration, but equal consideration in sell and rent is better, because there are a lot of the sold and rented items, and its consideration is know by using a lot; in contrary to a lady, finding the one resembles her in all her characters and in all aspect it impossible". See *Qāʿidat al-ʿUqūd* on *Ḥaqq al-mar'ah fī al-faskh idhā lam yusallam la-hā al-ṣadāq al-mashrūṭ*. We mentioned before that this book was a manuscript which was printed recently (see para 44/1).

dispute in those branches the judge will settle the dispute by custom and rule of justice.[311]

42/17 The Fifth Aspect

The *ijtihād* of the Ḥanbalīs permitted *taʿlīq al-taṣarruf bi-sharṭ muʿallaq* in all kinds of contract and invalidation; *bayʿ*, *ijārah, wakālah, ʿiqālah, ibrā'*, etc. even marriage contract; there are different opinions in regarding this generalization. *Taʿlīq al-ʿaqd* is instituting a contract in a form which indicates its existence is depending on another thing which is known as depending condition *(al-sharṭ al-jaʿlī)* as explained before (see para 28/6).

It is like saying: If my specific goods come today I have sold it to you in specific amount, and like a lady saying; I have married myself to you on specific amount of *mahr* if my Father or brother accept.

The other jurists *(fuqahā')* close the door of *taʿlīq* in all contracts especially in marriage contract, and they deemed the *taʿlīq* as void. They just permitted *taʿlīq* in discharging matters like, divorce and freeing a slave. The Ḥanafīs permitted *taʿlīq* in contract of obligation and discharge, like *kafālah* and *wakālah* with only a suitable condition, as we shall see (see para 43/14).

The basis of Imām Aḥmad in permitting *taʿlīq* in contracts in general is the generality in the *ḥadīth* saying that the Muslims are bounded by their conditions.[312] It did not exempt any condition except a condition which is against the Book of *Allāh*, or a condition which legalize the unlawful or forbid the lawful; hence, it is equal *sharṭ al-taʿlīqiyyah* and *sharṭ al-taqyidiyyah.*[313]

Ibn al-Qayyim says in giving reason to that: *taʿlīq* contracts, invalidating them, contributions, obligations and others, a thing which necessity can give rise to it, or need, or interest, a *mukallaf* can never do without it. Imām Aḥmad permitted *taʿlīq* on marriage with a condition as *taʿlīq* in divorce, and permitted *taʿlīq al-bayʿ* and *ibrā'*) (see *Iʿlām al-Muwaqqiʿīn*, 3/237-238).

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[311] Abū Zahrah said in this issue: "We have observed Aḥmad is expanding in contracts we did not think he was spearheading the *Fiqh al-Ḥadīth*". See *Ibn Ḥanbal,* p. 223.

[312] Reported by Abū Dāwūd (3594), al-Dāraquṭnī (300), al-Ḥākim (2/49), al-Bayhaqī (6/79) who narrated from Abū Hurayrah, and ʿĀ'ishah, Anas ibn Mālik, and ʿAmrū ibn ʿAwf, Rāfiʿ ibn Khadīj, ʿAbdullāh ibn ʿUmar. Complaining all the other chains, the *ḥadīth* rises to *Ṣaḥīḥ li-Ghayrihi*

[313] The differentiation of the *al-sharṭ al-taʿlīqī* and *al-sharṭ al-taqyīdī* shall follow (see para 43/1 and 43/2).

Permission of *ta'līq* contract with condition is the same as the principle *sulṭān al-irādah* in the current laws, and according to article 265 and 266 in *al-Qānūn al-Madanī* (Syrian civil law).

42/18 The Political Aspect

The *Ijtihād* of Ḥanbalī permitted *ṭarīqat al-'urbūn*, which is selling of goods and take from the buyer certain amount of money call *al-'urbūn* in order to insure connection between them, on the basis, if the buyer executes his contract, the *'urbūn* will be part of consideration, and if he turn it down, the *'urbūn* goes to the seller.

All other schools of thought do not permit *al-'urbūn,* because there is a condition which entitles the seller to get money with out any due. This is the *ijtihād* of the Ḥanafīs, Mālikīs and Shāfi'īs.

But Aḥmad, Muḥammad ibn Sīrīn and Nāfi' ibn al-Ḥārith permitted it based on what is narrated by Nāfi' and he was a worker of 'Umar ibn Khaṭṭāb in charge of Makkah, he bought for 'Umar a jail in Makkah from Ṣafwān ibn Umayyah, and made a condition if 'Umar does not like it he will be entitle to a certain amount, and 'Umar accepted this (see *Sharḥ al-Kabīr, bāb al-shurūṭ al-bay',* 4/58-59, *Bidāyat al-Mujtahid,* 2/135).

It is known the method of *'urbūn* is a general engagement document in trade transactions nowadays, the commercial law and trade customs relay on them, as a basis for a promise to pay damages for interruption and waiting.

Ibn al-Qayyim supported that by what is reported by al-Bukhārī in his *Ṣaḥīḥ.*[314] Narrated by Ibn 'Awn, from Ibn Sīrīn, he said, "a person said to *karayyah*; move your caravan, if I will not go with you in such a day you have hundred Dīnār from me, he did not show up, Shurayh said: 'whosoever made a condition for himself by freewill without being coerced, he must abide by it'[315] (see *I'lām al-Muwaqi'īn,* 3/339).

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314 Reported by al-Bukhārī in *Kitāb al-Shurūṭ, Bāb mā yajūz min al-ishtirāṭ* (5/354).

315 *Al-Kurrī* is a person who rent animal for traveling. Shurayh is Shurayh ibn al-Ḥārith ibn Qays al-Kindī. He is very famous judge, and among the *fuqahā'* who exercised *ijtihād* in the early times of Islam. 'Umar ibn al-Khaṭṭāb made him governor of Kūfah. He worked there till he resigned during the time of Hajāj. He was *thiqah* (reliable) in *Ḥadīth,* reliable in Judgement. He is well acquainted in literature and poem. He leaved a long life. See *al-A'lām* by al-Ziriklī.

This kind of condition which is narrated from Qāḍī Shurayh in paying damages for interruption and waiting which is known in the western jurisprudence as *al-sharṭ al-jazāʾī* (see para 57/6).

The Summary of situation of condition in the school of the Ḥanbalī:

42/19 It is clear from the previous discussion, that condition in this school has four situations which make up four kinds:

A condition which is valid and binding: this is the core in the *ḥukm* of condition which does not go against *muqtaḍā al-ʿaqd*.

1. A condition which is valid, but non-binding, this is the one which hinder the contracting party from a right which the *al-Shāriʿ* is eager to maintain it, for example, a woman making a condition for the man in the marriage contract he should not divorce her, and he should not marry another one with her. The consequence of its validity is that, the contract can be invalidated if the condition is not fulfilled.

2. A condition which is void, this is when it is against *muqtaḍā al-ʿaqd* like a wife makes a condition that her husband should not stay with her.

3. A condition which is void and it is nullifying, that is, it nullifies the contract; this is when the aim of contract is lost by the presence of that condition, for example, she make it a condition that she will not be *ḥalāl* for the husband after the marriage contract.

42/20 We have shown the six fundamental aspects *sulṭān al-irādah* in the effect of contract and contractual conditions which are available in Ḥanafī *ijtihād* and are narrated from its Imām.

The Ḥanbalīs are unanimous agreement in its basic, but there are a lot of difference of opinion in its branches on the limits and details, i.e. *khiyār al-sharṭ* in marriage contract, and validating *taʿlīq bil-sharṭ* which is against the popular opinion in the school.

Also doing *taʿlīq* in *ʿuqūd muʿāmalāt al-māliyyah* and the method of sale by an agreed price as aforementioned are not agreed npon by the Ḥanbalīs as some of them validate, while others invalidate them.

The opinions and *fiqh* theories which are reliable in the school, even though some of them are *rājiḥ* and some are *marjūḥ*, all of them

are precious treasures of the *Sharīʿah* which are needed. There can be development of the time and looking back to the opinion which were *marjūḥ* in the past to be considered *rājiḥ* and that time, and what was thought to be weak in structure, but in reality is stronger, but the eye of it owner was fore sighting what the other could not see, so it stay dormant until it reaches the time and generation which are leaving what was foresighted and to them his idea will be the best at that particular time.

And in all the schools, there are different sights of *fiqh*, for this reason a school can have views which the other school could not get.

42/21 Ibn al-Qayyim and he is among the top prominent scholar in the Ḥanbalī School, he has very precious ever lasting words in this topic. After he presented some texts of *Sharīʿah* in his *Iʿlām al-Muwaqiʿīn,* and *Āthār al-Sunnah* which are related to principle of *shurūṭ,* and authentic narration from Imām Aḥmad in *taʿlīq* of contract and bonding them with condition he said: The objective is that the conditions have importance in the *Sharīʿah* which is not known to most of the *fuqahā'*, for some they neglect a condition which the *Sharīʿah* did not neglect, and they make contract invalid by it without any reason which causes invalidation, and contradicting in what accept *taʿlīq* with a condition and what it does not, they don't have steady parameter which they can be basis of evidence, while the right stand is, the principle of *Sharīʿah* which texts stand as its evidence, there are two general issues;

1. Every condition which is against *ḥukm* of Allāh and contradicting His Holy Book, such condition is void.)

2. Any condition which does not contradict *ḥukm* of Allāh and does not go against His Holy Book, and it is allowed to leave it without conditioning, it is binding by condition. There is no exemption in these two issues, the *Qur'ān,* the *Sunnah* and unanimous of the companions have pointed them. And don exhaust youself trying to bring them down by issues of the school and words of opinions, for those can never break principle of the *Sharīʿah* (*Iʿlām al-Muwaqiʿīn*, 3/339-340).

42/22 In relation to the words of Ibn al-Qayyim, let us go back to the constitutional phrase of Shaykh al-Islām Ibn Taymiyyah which has been cited before (para 42/5) he said: The actual rule governing

contracts is the freewill of the contracting parties, and its effect is what they have obliged themselves by the contract".

This phrase is important and it is the one which need to be recognized in the constitution of *Fiqh al-Islāmī* in the principle *sulṭān al-irādah al-'aqdiyah.*

We took initiation to give details in the opinion of Ḥanbalis, because its principles suit the subject of *sulṭān al-irādah al-'aqdiyah* and the modern law theories which can be a basis of comparative study between them.[316]

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[316] Muḥammad Abū Zaharah wrote in his book, *Ibn Ḥanbal* after explaining the school of Aḥmad ibn Ḥanbal in regards to contractual freedom and conditions of contract: This is how you can see the Imām who took the *āthār* of the past to be his teacher, he graduated from them and guided by them, ended up in contracts and in most of the human activities widening scope and not narrowing it, and permitting without stopping.

This is the evidence against those who claims returning to the path of the past that the right guided people will strangle people. They do not know the reality of these *āthār* and how the companion followed the path, and how they solved the problems which appear to them using the spirit of the religion which come as a mercy to the people, and not to cause difficulties to them.

The contracts which are found in the world market nowadays were engulfed in the *fiqh* of Imām Aḥmad, and it was clear that he was guided by the guidance of the past right guided people may Allāh be pleased with them. See *Ibn Ḥanbal*, p. 233.

SECTION 43

TYPES OF CONDITIONS OF CONTRACT

Suspension, Restriction, and Addition

43/1 These oral behaviours as contract have two general cases of release& restriction:

a. It is produced by the spoken man absolutely and void of any condition and restriction, hence, the behavior or contract is existed in legislation consideration to arrange its provisions& and results since its ratification as we said that one of the two parties said to the other, I shall sell you my she-horse or I shall rent you my house for a year on for certain Dīnārs, the other party accepted the deal, contract is ratified and currently put its provisions, the purchaser will own the she-horse - the least will manipulate the house for the alternative thing, here contract is called executed and absolute.

b. Contracts may be produced from the spoken man but linked with a condition which means suspension.

   - Suspension of contract: It means suspending contract execution on a condition without which the contract cannot be ratified.
   - To restrict its provision and effects
   - To late its holding& execution to a certain period

      i. If the seller said, I sold to you my portion of this house if my partner accepted so, the purchaser would accept that the two holders did not intend to execute sale, they suspended its performance on the partner's satisfaction. So the contract was possible to be existent or non-existent.

      ii. If the seller said, I sold to you this car provided that use it for a month, before handing or I shall I will guarantee repairing it during two days and the purchaser accepted

that, the two parties intended to execute the contract, to adjust their effects and to keep for the seller a right to use the car for a month after it become under other person's property or to repair any new ruin. If it were not for this condition the car ownership of would be related to the purchaser and the seller would not be responsible for repairing any emergent ruin which would occur after handing.

iii. If the lease said, I rented you my house for a year from the first days of next month. The leaser accepted that, they would delay the least to the future. But for this restriction, its judgments and rights of that who rented it would be proved

43/2 These three examples indicated that conditions will by which the contractor restricted his contract diversing from method of execution and absoluteness were three kinds:

1. The condition that delay holding the contract and so on in oral behaviours to keep it linked with another case. This is called condition suspending as in the first example.

2. The condition that does not violate holding the contract but it indicates restriction of the provision, to adjust its origin effects with obligations between the two parties, who they will not be obligated if the contract is free from the condition. This is called restricting condition.

3. The condition that has no delay of contract or adjustment of its origin provisions and purposes but it intends to postpone time of holding the contract to a certain period. This is called addition or attachment to the future as in the third example.

We shall indicate the following requests of this research:

1. All jurisprudence views and considerations concerning all these three kinds: Suspension, restriction and addition.
2. The differences among purposes of these kinds.
3. The acceptances of all these kinds of behaviours & contracts of these conditions.

THE FIRST THEME: GENERAL JURISPRUDENCE VIEWS ABOUT SUSPENSION, RESTRICTION AND ADDITION

First: Suspension on Condition

43/3 Suspension on condition as mentioned in jurisprudent's definitions means to link the existence of something with another thing. This is the opposite of execution to free contract whose provision is available from the issue. When someone says to another: if your debtor travels, I shall pay his debt, the speaker has in this case tied the contract of guarantee with the debtor's travel. This is called *ta'līq lil-kafālah.*[317]

43/4 Suspension is often formulated with one of conditional preposition link two verbs as (if, unless, when, as) and so on, because the which suspended matter is suspended on verbs or real events, and conditional preposition come into the verbal statements to make the event as a condition to perform the suspended affair or contract. We should have two statements linked with conditional preposition to achieve suspension.

The first statement is called conditional statement, while the other statement is called the reason of the condition to indicate the performed and the intended matter, the suspended matter of contract and so on.

There is no difference when, you proceed any of these statements before the other or not as when you said, "If I received them today, I shall authorize you to sell my goods".

43/5 In order to make speech real suspension according to jurisprudents' terminology, the condition would be non-existent and could be achieved.

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[317] Scholars define *al-ta'liq* as "binding result of the content of a clause to the result of another content of another clause" or "an arrangement of un-existed matter to another un-existed matter" (*Al-Ashbāh wal-Naẓā'ir bi-Ḥāshiyat al-Ḥamawī,* 2/422). Therefore, in the previously mentioned example the speaker has arranged *al-kafālah* (guarantee contract), i.e. the result of the content of the second sentence, on the travel of the debtor *(al-madīn),* i.e. result of the content of the first sentence. The existence of both matters, i.e. the travel and the guarantee, has not been established at the time of contract, but the speaker is obliged to guarantee when the act of travel occurred.

If it was existed as suspension, the speech will be an execution in the form of suspension as when someone said, "If you are alive, I shall pay or sell you this thing".

If its existence is impossible, suspension will become invalid or an exaggeration to express prevention& unwell as when someone says, "If your debtor is alive after his death, I shall pay the bail instead of him (see *al-Ashbāh* by Ibn Nujaym, part three, 2/224).

43/6 Besides, suspension allowed the delayed matter after achieving the delayed condition. It is considered continuing its impossible existence when the condition is impossible. The stipulate affair is related to the existence or non existence of this condition which becomes as a reason through the will of the reasonable one.

On this basis, there is a rule that states "what is suspended by condition, should be permitted and confirmed when condition is confirmed (*Majallah* 82).

If the creditor said to the debtor: *"If you pay today half of the debt, I shall exempt you from the rest"*, or when he says to another person: *"If the judge said that I should have the debt from my debtor, I shall authorize you to receive money from him".*

This suspension indicates clearing the debtor safe keeping only he plays the determined sun in appointed time.

That does not assert Guarantee wheu he received the debt before the judge said the sentence, because the creditor who had behavior and performance right chose payment or judgment as an intellect to achieve excitation from the rest of money. So, this condition is called delayed condition or suspension condition instead of *"legislative condition"*, as we mentioned before (para 28/6).

Second: Restriction through Condition *(al-Taqyīd bil-Sharṭ)*

43/7 Restriction through condition: is implementing the oral behavior and which is not obligation in absolute or free.

As when someone sells his goods on condition to pay the loading from his budget to the purchaser's shop, the seller implements this condition and obligate to pay the loading price. This implemeutation is not mentioned in contract sale and is out of any condition- because free sale obligates to move possessiou for by compensation. The new

ownership, the purchaser was responsible for transporting his goods.[318]

Also, when someone authorized a deputy to pay price by installments for a certain period of time, the deputy's delegation is restricted with that condition, he is obligated to do so not to buy except by instalments. If he contradicted it, he would have the property for himself. But if deputyship was free he would have a competence to pay cash or by installment it is the similar case for every similar example.

The restricted thing here is the resulted contract and the restriction is the condition obligating the holder to do more than what was mentioned in the original provision of contract.

We can notice here contract with restriction is executed and we not suspended delay its execution on anything.[319]

Since the meaning of restriction makes one feel the existence of restricting affair, it is formed when we say, *"as to"*- *"in the condition that"*- *"we have a condition that"* and so on to indicate the abovementioned restriction as I shall provide you this thing if you give me that thing as a gift, and etc.

Third: Attribution to the Future

43/8 The addition is to delay the oral behavior to a certain future such as saying: *"I have rented to you this house for a year for the next month"* or to say to the deputy: *"I shall authorize you to do all my affairs from the beginning of next year"*.

The future period is obvious here, the behavior will be added without declaration the addition as be quest when he said to the recommend or (the guardian): *"I shall provide on third of my money for*

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[318] Scholars define *al-Sharṭ al-Taqyīdī* as "an obligation of an un-existed matter in existed matter" (see *Ḥāshiyat al-Ḥamawī 'alā al-Ashbāh*, 2/422). In the previously mentioned example, the seller has obliged on an un-existed matter, that is the delivery of purchased merchandise on his own account, and the obligation occurred in an existed matters, i.e. the contract of sales.

The definition is contrary to their definition on *al-Sharṭ al-Taqyīdī* as "an arrangement of un-existed matter to another un-existed matter" as discussed earlier (see the footnote of para 43/3). The definition which we gave here is more detail on *al-Sharṭ al-Taqyīdī* and more clear.

[319] Therefore, we outweigh the designation of this kind as *"taqyīd"* just as the Ḥanafi's definition and not *"iqtirān"* like the other definitions (see para 43/2), because the meaning of *iqtirān* applies on both *al-ta'līq* and *al-iḍāfah*, and is not indicate the feature that distinguishes this form from others.

this person, or this family" the be quest revealed the addition to death, but to add behavior without permission (mentioning that Donation in life is called gift or charity.

Postponing is often established by mentioning the time to indicate the resulted performance as in the previous examples.

If addition was formulated by delaying condition to time, and some of abovementioned conditional and conjunction prepositions were used it would be considered a pure suspension not addition as he said, *"if a certain month is come, I shall rent you my house for a sum of money"*. In this case, it will take delay provisions, not addition, because the principal of delaying contract through certain time is to link that performance with a condition. Not done immediately but is delayed to the future time as we mentioned before in discussing the concept addition (see *al-Ashbāh wal-Naẓā'ir* by Ibn Nujaym in the second part of *Kitāb al-Ṭalāq*, 1/255).

THE SECOND THEME: THE DIFFERENCES AMONG IMPLICATIONS OF SUSPENSION, RESTRICTION AND ADDITION

43/9 We find in suspended contract, that suspended behavior was linked with condition to be done or not.

a. Suspension purpose indicates that a conditional contract is non-existent till achieving the condition.

b. Restriction purpose indicate that the restricted contract is executed between the two parties, to implement them with an increasing provision of the original holder and cause- Restriction meaning indicates the existence of restricted contract as before mentioned (para 43/7).

In this case, sale is suspended as when someone said to another person, "If I receive my car today I shall sell you this car with this price". If the purchaser agrees, the deal is asserted between the two parties if they did not create this suspension, uone of them is the seller especially if the car isn't be received in the certain time, and the condition on which sale is suspended will uot be achieved.

But any who delayed sale and restricted it with obligation as when he said to the other owner, "I shall buy this car with that sum of money in the condition that you would teach me driving".

If the second party agreed to close, the two parties would hold this restricted contract, and sale is executed and agreed between them, the seller is obligated to teach him driving.[320]

c. Addition is similar or to suspension from one side, that the additional contract provision will appear recently during a certain time in the future and it is similar to restriction from another side because the additional time will be come, there is no possibility to do so or not as the case of contract suspended on condition.

   But, its similarity with restriction is more than with suspension, because the delayed time is origin of contract as we mentioned before in suspension and took only its provision.

43/10 Addition purpose is that added a contract is immediately ratified according to the future provision in pursuant to jurisprudents views, it is ratified contract between two parties since create addition as in restriction case, it isn't non- existent as the case.

According to all that they decided from releasing the slaves that any one wants to free his slave in the future as when he said: "You are free tomorrow". He is not allowed to sell him again although the period is not expired because the slave is provided freedom cause through the additional condition, but its provision is only delayed to tomorrow. In contrast to when you say: "If my son returns back safely from his travel, you are free". Here, the provision is delayed and the owner had the right to sell the slave before his son's return, because here a suspension condition is not existed before achieving the condition.[321]

43/11 It is clear through previous discussion that if the condition on which the contract was suspended was achieved, the suspending

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320 And then the scholars discuss the separation between *al-ta'līq* on a condition and *al-taqyīd* with a condition that the first is "an arrangement of un-existed matter to another un-existed matter" and the second is "an obligation of an un-existed matter in existed matter" as discussed earlier in the definition of *al-ta'līq* and *al-taqyīd*.

And they said that *al-sharṭ al-ta'līqī* is what suspended on the original act; and *al-sharṭ al-taqyīdī* is what affirmed with the original act but stipulated as another matter (see *Ḥāshiyat al-Ḥamawī 'alā al-Ashbāh*, 2/225 quoted from al-Zarkashī's *al-Qawā'id*).

321 An example for that, if *al-iḍāfah* is formulated in a *ta'līq* way on future time such as, a sire said to his slave: if tomorrow comes you are free; the sire has the right to sell the slave before the day of tomorrow settled. This is because, in this case, *al-iḍāfah* is considered as *al-ta'līq* which binds the subject of the contract with the future time (see para 46/20).

judgment would be confined and not reclined. It would not be existent if the condition was existent it would not be since suspension, if the condition was achieved in retroactive effect, the contract would precede the condition and it would be contractive to reasonability.

If a person delayed delegation when he said to another person: when you received my goods, I authorized you to sell it, if the deputy sold it before receiving it, sale would not executed because this man delegation would not be is not confirmed before receiving the goods before this ,he would be officious.

THE THIRD THEME: TYPES OF CONTRACTS AND THEIR RELATIVE CONDITIONS

43/12 Not all contracts and oral behaviours kinds are acceptable to all three contract conditions: suspension, restriction and addition. Some of these contracts behaviours will accept these condition, we can suspect, restrict add these conditions. And some of these conditions are accepted by some of them these contracts and behavior.

Legal judgments Islamic schools are different about these requirements, the most widen one is Hanapli independeut reasoning as we previously mentioned.

We shall indicate these Ḥanafī independent reasoning rules in general as follows as a mediator to other legal judgments.

43/13 We can abstract Ḥanafī legal judgment concerning contracts acceptance of conditions in the following rules:

Ḥanafī jurisprudents divide contracts and all oral behaviours of this field according to the conditional acceptance form to the eight following divisions:

1. *Al-Muʿāwaḍāt al-Māliyyah*: sale, division, reconciliation with money and lease.
2. *Al-Nikāḥ*: they which consider unfinancial compensation it is best to consider it as an independent kind.
3. *Al-Tabarruʿāt*: possession without alternative, as gift and charity, be quest and stay, excitation of debt as through donation meaning even if it is a form of forfeiting it is a pure forfeiting, it has the meaning of possession.

4. *Al-Iṭlāqāt* as in delegation and permission of the young distinguishing boy[322] to perform commercial deals because it allowed the behavior power to the deputy and young boy.
5. *Al-Wilāyāt* as assigning the judges workers and all employees of the all management authority.
6. *Al-Taqyīdāt* as to dismiss the deputy & the employee or to interdict the permitted person.
7. *Al-Iltizāmāt*: Bail with all its kinds.
8. *Al-Isqāṭāṭ al-Maḥḍah:* divorce-release of slavery & forfeiting of the preemption.

43/14 According to that they decided to accept these contracts and actions with condition in details as follows:

1. The financial compensation, donations, marriage, which do not accept suspension addition, but they should be performed, if it is delayed by a condition or is added to future time, the contract will not be.

   For example, when someone said to another person: "If my she-horse gave birth, I would sell to you", or "I shall give you", or to said to a woman: "I shall marry you from the beginning of the next month", and she accepted, the she-horse is not considered for selling or gift when it give birth to the young horse- and woman is not considered as a wife from next month.

   Bequest (*al-waṣiyyah*), leasing (*al-ijārah*) and borrowing (*al-iʿārah*) are, however, exceptions from the general rule.

   a. Bequest (*al-waṣiyyah*) and endowment (*al-waqf*) accept suspension after death, and addition after death to simplify donation and charity actions to encourage them.

   b. Renting (*al-ijārah*) and borrowing (*al-iʿārah*) accept addition to the future without suspension because addition meaning is existed in their form as time contracts mean: the future time is an essential element to execute them, but lease and borrow are executed through added contracts new power with the

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[322] And the child, as in this case, is called *ma'dhūn* (authorized or licensed). The custodian of the child, from whom the authorization is issued, may have the child quarantined. The details on this matter will be discussed in the section of the Theory of Legal Capacity and Legal Authority (see para 62/11-17).

continuous future time according to the new future interests as we shall discuss in contracts classification (the item 11).

2. Release *(al-iṭlāqāt),* guardianship *(al-wilāyāt),* restrictions *(al-taqyīdāt)* and obligations *(al-iltizāmāt).* They accept delay for a suitable condition and not the opposite except restriction with a condition, and addition to the future.

   The suitable suspension condition and the suitable is that which has suitable relation to the suspend affair, this relation calls for its existence.

   As when someone says to another person: If I receive my goods, I shall authorize you to sell it or if your debtor is travels, I shall be his deputy. Suspension here is right and the other man is a deputy and the spoken man is the bailer to achieve the suspending condition as to receive goods or to travel.

   If someone said: "If the wind blew or rain fell, you would be my despite it would not be right suspension as the condition was not suitable.

3. Pure forfeiting accept suspension by condition either it was, suitable or unsuitable also it accepts addition to the future.

4. The financial compensation: as sale, lease and other accept restriction through a right restricted condition, resulted from this condition must be fulfilled obligations.[323]

5. To null contracts is the apparent thing of jurisprudents' statement that each contract is nulled as contract origin and its acceptance to all these conditions of suspension, restriction & addition, they permitted that sale and lease contracts cancellation accept these conditions as as their ratification accept them (*al-Durar* 2/202).

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[323] The explanation on the correct *al-sharṭ al-taqyīdī* in the Ḥanafī's *ijtihād,* that is the condition which stipulated by the law such as the stipulation of option in the contract of sales, or executed by the customary practices, or compatible to the nature of contract such as the stipulation of guarantee or pledge by the seller on the purchaser in the deferred payment sale. In this kind of conditions, there is an authentication on the commitment and obligation towards the contract; and the authentication is well-suited the nature of the contract (see para 42/3). See further discussion in the Concept of Custom in para 73/4-10.

It is apparent that this is general jurisprudence view of each contract - it is not a special one to cancellation of sale and renting contract.[324]

43/15 This is an abstract of conditions effect on contracts and behaviours kinds in Ḥanafī legal judgments. We discussed them briefly because they don't have any practical value. There are legal provisions in our civil law and before that the article 64 of the Ottoman legal trial origins law we applied before. They required correcting suspension, restriction and addition in all behaviours contracts.

This legal generalization is agreed with the views of other schools of Islamic law as did by the Ḥanbalī school as mentioned before (para 42/4 onwards).

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[324] What we have discussed earlier on the capability of contracts to contain conditions *(al-shurūṭ)* should be referred to *Radd al-Mukhtār, al-Durar Sharḥ al-Ghurar, al-Baḥr al-Rā'iq,* and other sources of the Ḥanafi's classical literatures in chapter *"Mā Yufsidu bi al-Sharṭ al-Fāsid wa-Mā Lā Yaṣiḥḥu Taʿlīquhu bi al-Sharṭ"* (What is void with the annullable conditions and what cannot be subjected to conditions) from *Kitāb al-Buyūʿ*.

SECTION 44

AUTHORITY OF CONTRACTUAL INTENTION IN FOREIGN JURISPRUDENCE

THE FIRST THEME: THE ORIGIN OF THIS THEORY AND ITS DEVELOPMENT

44/1 The legal principal lastly determined in Europe modern foreign jurisprudence about contract will power, is abstracted as follows:

"The original power of creating contracts and to determine their obligations is the holders will in pursuant to certain restrictions defined by legislation according to political, economic, social and individual interests".

If the intent of the contract is still restricted with obligations and narrow measures during old ages, for several centuries of the middle ages, it began to be free and gradually had power during the last days of the middle ages.

Since the last ages of intent power principal with all its fields has sovereignty in social and legislative ideas especially French Revolution that is affected by Revolution philosophy in all social affairs and widespread the "social contract" theory by Rossaw, the age was full of individual freedom, and stability of individual intent and was considered as a source of all fields of social life, that was an attempt to get out the darken ages obstacles in Europe.

These ideas of revolutionary extremist freedom resulted in legal theory of intent power principal in which the person's intent is the only source of all rights and duties- we would return to them and to determine and explain all contract obligations even the obligations of law source of family affairs and general interests, because the individual is considered to accept optional these obligations with his will when lived in legal society obligated its people and members to all duties and restrictions.

The branches of this law are the holders' will that ratifies in contract without suspending on anythimg else and it should determine its effects and provisions.

44/2 This theory is attacked with powerful and huge reactions of capitalism school's men and social school's men and other men of

apposition schools of revolution any "individual" school (party) the contract intent power among social and legal schools' men especially free will power retreated theory that is determined without deciding the young boy and insane man's responsibility principal and financial responsibility principal when modern legal laws directed to the main side of justice order.

Principle of will authority restored its consideration quickly on new basis. So that will power principal was different, is encouraged and refused, refreshed and exhausted, lastly, it settled on the adjusted theory that we mentioned before.

44/3 The two articles 1134/1135 of French Civil Law are legally persisted by all people:

- the extremist team persisted concerning theory of contract will authority in the principle which indicated the contract is the law of contractor's right.
- the other team persisted in the second article which indicated that obligation resulted from the contractor's contract was restricted by justice, tradition and lawful judgment according to the nature of obligation.

We do not have now any room to say that the holders will only is creates obligations and or determines their effects, but they are submitted to limits defined by the legislator.

44/4 These limits and restrictions created through the obligator in according to will power principal are different according to difference of rights, contracts and their subjects.

a. In general rights and existed obligations aren't resulted from will authority of the contract and they are resulted from law alone.

b. In marriage contract and its outcomes we declined the holders' will power and acceptance in contract origin accepting or refusing the contract in according to their freedom.

   In formal restrictions of marriage, its effects and obligations between the two couples a are determined through law as arranging family affairs and social interests that are estimated by the legislator.

c. In property and real estate rights, we widened the scope of the holders' will power of contract effects to subject them to formal ceremonies in registration are obligated by law because they linked to legislation policy in arranging real property and regime customs, and also other considerations.

d. In personal rights obligation is the widespread scope of the contract will power in according to general morals and restrictions or the special main legal texts that have the order of an obligatory provision - we cannot hold renting contract to rent someone to kill another person or to commit a crime, or to perform any actions that violate the social morals.

- In this field and these limits and restrictions, man intended what he preferred from contracts and determined their effects.
- The holders had the right to refuse or to abstain any of the named contracts provision, because they are not originally obligatory contracts but are created by law when there is difference between the holders about its contradictive judgments except order law text or which have evidence of illegitimacy of contracting contradictive ones.[325]
- According to these groups of legislative restrictions, we shall apply the general legal principal indicating: that contract is the parties law, it obligates them to all agreements, as law obligates all people (see *Naẓariyyah al-ʿAqd* by al-Sanhūrī, para 94-113).

[325] For example, our new civil law, in the discussion on guarantee on defect in the contract of sales allows the contracting parties to agree upon the seller not guarantee the hidden defect of the purchased item. The purchaser therefore purchased the item on his own risk and responsibility. The guarantee of defect in the purchased item is established legally unless the contracting parties agreed otherwise. The law, however, states that the agreement on non-guaranteed defect is allowable in hona fide or in good faith cases, that is when the seller sells the item without knowing any defect occurred at the time of contract. If, however, the seller intentionally sells with fraud by keeping the defect from the purchaser's knowledge, then the stipulation of non-guaranteed defect in the contract is void. The seller in this case remains liable to the guarantee. This is to prevent any party of the contract from fraudulence and cheating. See also what has been discussed in the chapter *ʿUyūb al-Riḍā* (para 35/5).

This is an abstract in general about will power in European legislation through out old modern ages to reach the last principal of and modern subjective legislation and legislative jurisprudence

As we mentioned before this power in this last path about modern right is the base on which ʿUmar ibn al-Khaṭṭāb's legal judgment also Shurayh, Ibn Shabramah, and the Ḥanbalīs legal judgments in Islamic jurisprudence depended on we mentioned before in the previous research.

THE SECOND THEME: CONTRACT CONDITIONS IN FOREIGN JURISPRUDENCE

44/5 Legal condition definition

Legal and law scientists in foreign jurisprudence divided contract conditions with a differeut form of Islamic jurisprudence division.

They identified condition, as relating existence of obligation and its negation to a future a possible event. A possible event that is not sure to be occurred iu the future. As we shall see the suspeuding conditiou iu Islamic jurisprudence terminology (see para 43/3-5).

44/6 The division of condition

They divided this condition into two main kinds had affiliated forms as:

1. **Suspending Condition**: to hinder obligation till occurring a future event as the employee said: I shall rent you my house for a year if you move my job to another country, the lease is not executed between the two parties before the condition of transporting occurs.

2. **Invalid Condition:** that elimiuates any current obligation as wheu you say: I shall rent your house but if I move to another country, I shall null lease, the lease is executed but we would null it when the spoken party travels.

The main differences of these two kinds of provision that obligation in the suspending coudition is not existed, but it is possible. However, in the invalid condition, it is existed but acceptable to eliminatiou.

We will find here details of French legal books and they were transferred by Egyptian law scientists.

See *Précis de Droit Civil*, v. 2, para 415-426; and *al-Mūjiz fī Naẓariyyat al-Iltizāmāt* by al-Sanhūrī, para 366-480.

44/7 Foreign theory of conditions criticism: as for obligations theory of foreign jurisprudence, its explanatory did not indicate or distinguish between delayed and restricted condition as our jurisprudents did in according to the difference of conditions kinds as we mentioned previously.

They divided condition into two kinds: Suspending (*mawqif*) and invalid (*fāsikh*). It is not in fact a division of the condition but the division of the conditional matter. If the obligation origin is linked to condition, the condition here is called suspending, if negation of obligation was linked to a conditions it would be called canceling one but if in the two cases the condition is one as suspending condition that caused no obligation between the two parties before achieving the suspending condition of suspending negation of obligation obligates continuing obligation till is nullment.

That made them think that condition in itself is divided into two different kinds but results difference is caused by the difference of conditional matter to create obligation or its elimination, not the difference of condition nature and its kind.

We can also notice that concerning arranging these conditions they do uot discus condition according to contract theory as obligation source but they discus it in another part as a special &single case of general cases of obligation, although condition is a contract element, it has its suitable special positiou in contract theory. The German civil law has followed that as conditional provision in discussing legal behavior in contrast to the commou arrangement of general obligation theory in law.

SECTION 45

DECOMPOSITION OF THE CONTRACT

45/1 Decomposition of the contract *(inḥilāl al-ʿaqd)* means removal of relation of merits which related the two contractors to the topic of the contract. Decomposition can come only after ratification.

So, the difference between decomposition and invalidity of the contract becomes clear. Invalidity *(buṭlān)* is the case in which the contract has material existence only without legally considerable existence. It means the contract is not originally ratified in the case of invalidity as an embryo born dead.

As for decomposition, it is the case in which we deal with ratified contract leading to its results for its two parties but it is removed after existence and cancelled due to voluntary or destined reason. It is like a person who is exposed to death.

If the contract is removed by voluntary reason, it will be called cancellation *(faskh)* as we will see later.

If the contract is removed by emergent destined reason, it will be called decomposition *(infisākh)*.

45/2 (First) Cancellation

Cancellation *(faskh)* is the removal of contract relation (*al-Ashbāh* on *Aḥkām al-Fusūkh*, 2/195).

The general theory takes cancellation right from the idea of obligation:

a. Obligatory contracts *(ʿuqūd al-lāzimah)* for the two parties as *bayʿ*, *ijārah* and *ṣulḥ* can be achieved by two parties only as we will see concerning contracts classification. Hence cancellation is called reversal of sale (*iqālah*).

   This reversal of sale has two considerations in jurisprudence point of view:

   - It is considered a pure cancellation which cancels the reversal of sale contract for the two parties who return to their origin state before this contract.
   - As for the third person other than the two contractors, it is considered as a new contract to protect his acquired rights

from conspiracy of the two parties who want to waste by reversal of sale.

If a real estate was sold and the right of preemption was proved but the two contractors agreed on reversal of sale so that the sold real-estate could be returned to the possession of the seller, it would be considered one contract in which the seller would be considered a new buyer by reversal of sale, and consequently there would be a new right of preemption.

It would be also the same when the buyer sells the sold thing and agrees on reversal of sale with the other buyers and gets back the sold item and he finds an old defect on it. He has no right to give it back to the first seller for the defect as reversal of sale is like a new purchase for the first seller. It is recognized concerning rulings of defect fraud that the sold thing, after it is out of its buyer's possession, cannot be given back for an old defect to his seller if it is returned to the buyer by a new contract. The change of possession reason is considered as the change of the possessed thing, so the sold item must be purified from the previous right (see para 81/76 and *al-Majallah*, 98).

The modern law's point of view and Islamic jurisprudence agreed on that rule.

Every contract is agreeable to reversal of sale except marriage contract.

There are legal conditions illustrated in its chapter of jurisprudence book.[326]

b. Optional contracts *('uqūd ghayr al-lāzimah)* for the two parties as company and agency are cancelled by their wills when its ratification is not related to another person's right as delegation of mortgaged sale as we previously illustrated (para 40/6).

c. The obligatory contract for one party other than the second one as mortgage can be cancelled by the person who does not obligated as the creditor who made mortgage.

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326 Jurisprudents mentioned reversal of sale in subsidiary chapter of sales book as reversal sale occasionally occurs in sale. But it is suitable to specify it an independent book at the end of contracts due to what we illustrated that it can occur in all contracts except that of marriage.

It is the same case for the contracts which are originally obligatory for the two parties when there is an emergent defect of consent which remove obligation description for one of the two contractors as option of defect and other options which we previously mentioned. It is cancelled by the party whose will is disgraced and consent has defected[327] (see para 40/6-9).

d. When the behaviours of individual will are not obligatory, they are cancelled by the will of their doer such as a will for charity which is cancelled by the will of the person who makes testament.[328]

45/3 Second: Cancellation for a Reason

Every contract is cancelled by itself when it is impossible to be executed. The continuous contract[329] is cancelled when it loses its continuance base:

a. Sale is cancelled by the damage of the sold item before handing due to impossibility of contract execntion by handing after its position damage.

   Sale is not cancelled by the death of the seller before handing and the heir becomes responsible for handing as long as it is existent in the inheritance.

b. The *sharikah*, *muḍārabah*,[330] and *muzāraʿah* and *musāqāh* are cancelled by the death of one of the two contractors as those

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[327] Law scholars differentiate the termination of contract in two conditions:

a. In the case of being defected at the signing of contract. They name this termination of contract by existence of consented defects: *Ibṭāl* and describe this contract as a subject to terminate.

b. Case of existence any reason that prevent implementation of contract not its formation. They name this termination *"faskh"* according to situations. This is a good term.

[328] Obligatory like *Waqf* and *Ṭalāq* would not repeal. Ultimately, it can go under the rules of termination *(qawāʿid al-buṭlān)*.

[329] We will see in the chapter of Categorization of Contracts *(taṣnīf al-ʿuqūd)* (*al-Ṣanf*, 11) that the continual contract that takes a long time to implementation like *Ijārah* and *Iʿārah*. Achieving contracted benefits is gradual, and continual contract are like renewable contracts with the time.

In its opposite, it is a direct contract *(al-ʿaqd al-fawrī)*. That one does not need time to implementation to be continually. But it is implemented in once like *bayʿ* and *ṣulḥ*.

[330] See the meaning of *muḍārabah* (para 46/14).

contracts lead to practical obligations with renewable effects including continuance and withdrawal. Their continuance depends on the life of the contractor in addition to contract position.

According to the Ḥanafīs, *ijārah* is cancelled by the death of the two contractors.

Our laws today consider the Shāfiʿīs view that *ijārah* is not cancelled by death. Public interest needs it today.

45/4 Result of dissolution of contract, and reliance and dependency in it:

The general point in results of repealing contract or being repealed makes both contractors turn to their previous condition before contract.

Ibn Nujaym says in regard to principle of repealing in his book (*al-Ashbāh wal-Naẓā'ir*): *"The repeal made contract as it did not exist"*.

If contract relates to financial contracts i.e. *bayʿ*, *ṣulḥ* and *qismah* and it implemented, than contract is repealed by any reasons that will be mentioned soon. The returning or repealing will be compulsory on seller when hewill be bound to return the price to the buyer, as well as the buyer will return the sold product to the seller. It will be applied on all contracts.

If repealing is not possible, neither completely nor partially in which is implemented, the repealing would be cancel. If undoing and withdrawal are possible in some object of contract unless in other, the repealing would be permissible whether the withdrawal is possible or otherwise.

On this basis, many cases of repealing and not repealing branch out and, cases of basing and briefing are included in:

a. Scholars stipulate in immediate contracts if contract is about to object, it will be repealed. If it is (sold product in contract of sale) perished or consumed after implementation, there is not possibility to repeal, therefore, not ability to return object. If some of this is perished, repealing of what is remaining is allowed.

b. If contracts are related to long time and implemented completely, it cannot be repealed like leasing after having all benefits and elapsing of time. It will not be accepted because

withdrawal is not possible in this case, whenever time is a part in it due to time cannot bring to back.

c. Continual contracts before its implementation like leasing when a part of it has been passed and the second part is remain. In this case, what is remain can be repeal unless what is passed. The passed time will be treated according to contract, and the lender will receive rent of past time as agreed before.

45/5 When we summarize the previous speech, we find that contract deposition is suit with the following two forms:

- It may be reclined which means reversal effect and withdrawal to the past and it obliges retreating from the executed obligations of the contract.

  Abrogation of sale after execution obliges returning the sold thing and the price.

  Cancellation of the contract due to the damage of the sold thing before handing obliges restoring the received price as the price is in return of nothing.

- It may be confined without inclination or reversal effect. Its ruling is applied for the future after its date of occurrence. This is applicable for continuous contracts such as *sharikah* and *ijārah*. Abrogation and cancellation interrupt the effects of these contracts in the future but the past period submits to the rulings of the contract.

  Decomposition of delegation through retirement does not cancel the previous behaviours of deputy.[331]

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[331] This explanation which we presented concerning reclamation of cancellation or confinement effects can be known through referring to rulings of every contract. It is clear that some contracts cancellations have reclamation and inclination which mean reversal effect with drawn to the past canceling executed judgments. Some contracts cancellations are confined.

We transformed previously about Ibn Nujaym concerning the rulings of abrogation in his book, *al-Ashbāh wal-Naẓā'ir* that he said: "It makes contract as if it was not existent". Many scholars explained that it would cancel the contract in the future other than the past. If the contract was considered non-existent by cancellation, its cancellation would have to be considered non-existent too. There is no cancellation for nothing but existent contract. Consideration of non-existent contract in the past obliges not to cancel this contract which is restored (see *al-Ashbāh* and *Ḥāshiyah al Ḥamawī*, v. 2, pt.3, pp. 195-196).

It is advisable to distinguish between the two cases of reclination and confinement concerning naming the contract decomposition. In the case of reclamation, decomposing and decomposition are called abrogation (*faskh*) and cancellation (*infisākh*) and in the case of confinement they are called finishing (*inhā'*) and being finished (*intihā'*).

45/6 The right of one contractor of abrogation when the other contractor does not excuse

If the contract was obligatory for the two contractors as sale, renting, reconciliation and all compensation contracts and one of the two contractors refused to testify or did not execute his obligation through the contract as if the seller refused to hand the sold thing or as if the buyer refuse to hand the price in its proper time, most of Islamic legislation jurisprudents in the Ḥanafī belief and others would not give the contractor a right to cancel the contract as long as the contradicting contractor could be forced to execute his obligation by the force of judgment. The judge duty is to deliver rights to their owner so there is no a must of abrogation.

The lawful principals and the theories give the contractor who does not contradict the contract a right to ask for cancellation of the contract by judgment in addition to his right of asking for actual execution. There is an option for the contractor to ask the judge for forcing the other contractor to be execution or to ask for cancellation of the contract and release of its obligations and returning execution in addition to asking for compensation of harm which hurt him according to this contradiction.

The evidence of scholars of law is that the interests of contractors differ according to time concerning execution of contract obligation. The interest of the contractors may be missed by late actual execution due to the contractor's delay or refusal of execution in its proper time. The rigbt of contract decomposition must be given to the

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It is obvious that jurisprudence works for interests and considerations which their reasons oblige other than these theoretical generations and abstract theoretical obligations are often decomposed according to application interest.

This theoretical prohlem does not contradict what we mentioned about the reversal effect of some contract cancellation according to a greed aspect that retreating from executed contract obligations as returning the sold thing and restoring the price.

contract if there is an interest. This involves the meaning of punishment for the contradicting contractor.

We consider that the law perspective is considerable and the principles of legislation are wide enough to include and accept it. Some scholars of the four schools of Islamic law recognized it frankly in some contracts and did not deny it in other contracts.

a. As for rules and principals of jurisprudence, the following *ḥadīth* proves the right of abrogation *"lā ḍarar wa-lā ḍirār"* (see para 10/2 B and 81/18). The delay of contract executions due to the other party's refusal or contradiction may harm the other contractor badly and harm is prohibited and judgment cannot restore time.

b. In Islamic law, the Ḥanbalīs declared that if a woman stipulated a legal conditions on her husband in marriage contract and he did not keep it, she would have right to cancel marriage.

Al-ʿAllāmah Muwaffaq al-Dīn ʿAbdullāh ibn Qudāmah al Maqdīsī said in his book, *al-Muqniʿ* concerning stipulation of marriage:

"The conditions are two kinds: A correct stipulation as that of increasing dowry or certain criticism or that he does not take her out of her house or country or that he does not marry another woman with her. It is correct and obligatory, if he does not keep it, she will have right of cancellation".

We see that all these conditions can be forced upon the husband by the judge who makes husband respect and execute them but the woman is given the right of cancellation.

If giving her the right of cancellation for this reason in marriage which is the least agreeable contract to cancellation is correct, jurisprudence accepts this right concerning pure financial contracts deservingly.

The following quotation was issued in the chapter of the seventh option of the Book of Sale in *al-Muqniʿ'* by Ibn Qudāmah himself:

"If the price was a debt, the seller would be forced to hand the sold item and then he would force the buyer to pay the price. If he was existent and if the price was non-existent or the buyers could not pay, the seller would have right to cancel etc.".

For the Mālikīs, there are texts from which the follower gives right of cancellation to one of the two contractors when the other did not execute his obligations in their time, was not accepted by some scholars for which their principles of Islamic legislation would be wide enough to include it.

45/7 At the beginning of contracts theory that the contract

Is one of the obligation arising resources and it is not obligation itself as obligation is a result of it (see para 27/5).

So, it is clear that execution of obligation differs from contract decomposition. The difference between them is like removal of effective factor and finishing the result, receiving of the two contractors of the sold thing and the price is the end of obligation through contract execution. It is not contract decomposition to illustrate it.

We say that contract decomposition allows the two contractors not to submit to the contracting link between them.

This decomposition obliges ending obligation resulted from this decomposed contract. Decomposition of sale ends the buyer's obligation of paying price and it is also ends the seller's obligation of handing the sold items.

Hence, every contract obligations resulted from its ratification ends due to its decomposition. But ending of the previously generated obligations of the contract before its decomposition does not prevent from generating new obligation according to this decomposition.

If a contract abrogation occurred after handing the two compensations, it would oblige a new obligation namely returning the two compensations. The seller would be obliged to pay back the price and the buyer would be obliged to give back the sold thing.

The cancellation of *ijārah* after receiving the rented thing and fare obliges the renter to pay back the fare paid in advance for the rest period of renting. It also obliges the person who rents to give back the rented property after restoring the rest fare, as the right position arising from the contract between the two contractors does not have legal reason after the contract cancellation. The two contractors must be returned to their position before contracting.

45/8 According to the previous points, the ending obligations may be through the main aspect to which all its kind refesee it occurs by:

- execution of obligation when every one takes their own rights.
- Forfeiting the duty of obligation according to removal of obligation factor as in the case of contract decomposition concerning contract obligations.

Every contract decomposition leads to finishing previous obligation and the opposite is not correct; finished obligations don't oblige contract decomposition as finishing obligation by execution other than decomposition of obligatory contract.

Judgmental and actual execution

45/9 Thus, the execution which leads to finish obligation may be:

- Actual execution as payment of debt and receiving the two compensations of contracts of compensation as sale and others.
- Judgmental or considerable execution through the occurrence of execution legal substitutes as in vengeance and safekeeping union.

a. Vengeance *(al-muqāṣṣah)* is that the debtor proves that he had a debt on the creditor equal to his debt for the creditor and claim is prevented between them due to useless result. If someone of them asked for his claim, the other would ask his own. Every one of the two debts cancels the other (see *al-Miṣbāḥ al-Munīr*).

   It is stipulated that the two creditors and the debtor should be the same kind and deserve payment in the same time. If one's debt is Dīnārs and the others was wheat and if one debt was soon and the other's was delayed there would be no vengeance between them.

b. Union of safekeeping *(ittiḥād al-dhimmah)* is the union of the two descriptions: creditor and debtor in one person as if the creditor died and the debtor were his heir. The debtor would inherit the right of the creditor in his possession, he would become a creditor of himself and the debt would be finished by safekeeping union.

   The difference between the safekeeping union and vengeance is that the debt of safekeeping union is one debt and it gathers the description of creditor and debtor in one person. As for vengeance, there are two debts equal for the two persons who are debtor and creditor in the same time.

SECTION 46

SUMMARY OF THE MOST IMPORTANT NAMED CONTRACTS[332]

46/1 Nominate contracts and Innominate contracts

There are a lot of contract which differ in names and rulings due to the differences in topics.

Legislator or scholars choose the distinguished name for the contract to which there is a need. Hence, contracts are divided into two groups:

- **Nominate contracts** *(al-ʿuqūd al-musammāh)* are that which legislation named and issued special judgments.[333] They are called also determined contracts *(ʿuqūd muʿayyanah).*
- **Un-nominate contracts** *(al-ʿuqūd ghayr al-musammāh)* are that which are not called by special distinguishing name and to which legislation did not issue special judgments.

46/2 As for named contracts, there are twenty five famous contracts in this jurisprudence books. Justice judgments magazine included eighteen contracts whose order is different from those which are in jurisprudence books which also are different concerning their orders.

These named contracts which are mentioned in *al-Majallah* but not discussed are (1) *al-bayʿ* (2) *al-ijārah* (3) *al-kafālah* (4) *al-ḥiwālah* (5) *al-rahn* (6) *bayʿ al-wafā'* (7) *al-īdāʿ* (8) *al-iʿārah* (9) *al-hibah* (10) *al-qismah* (11) *al-sharikah* (12) *al-muḍārabah* (13) *al-muzāraʿah* (14) *al-musāqāt* (15) *al-wakālah* (16) *al-ṣulḥ* (17) *al-taḥkīm* (18) *al-mukhārajah* (19) *al-qarḍ* (20) *al-ʿumrā* (21) *al-muwālāt* (22) *al-iqālah* (23) *al-ziwāj* (24) *al-waṣiyyah* (25) *al-īṣā'*.

The first seventeen contracts are mentioned in *al-Majallah* and the contract of reversal of sale neglected the quota and loan a lot although they are financial contracts which *al-Majallah's* aim includes.

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[332] Our presentation about contracts is mostly based on the Ḥanafī school of law.

[333] It is not enough to consider any contract one of the mentioned contracts which are not approved by the *Sharīʿah*.

As for the rest five contracts are not researched by *al-Majallah* as they are personal status.

It is noticed that some contracts include a lot of contracts involved in them and mentioned in their researches as sale, company. They include a lot of contract kinds which have different kinds as branches of them.

We will illustrate these known named contracts in the Islamic jurisprudence and we will confine to their definition and show their terminological nouns, the most important prosperities which give the student a general idea about them. We will follow the order of *al-Majallah* except for two contracts namely reversal of sale and Mortgage of conditional sale which we will point mentioning *al-Majallah*'s articles in which there are researches of them.

46/3 (1) Sale (*al-Majallah,* 101-403)

It is a contract based on exchanging money for money. It indicates exchange of prosperities forever which means there is no time of exchange properties.

It is the head of all financial compensation and its judgments as bases of syllogism in a lot of contracts judgments *al-Majallah* began with it concerning the named contracts and searched for it in three hundred and three articles after general rules directly from article 101 to 403.

This contract is originally called *bay*ʿ and *shirā'* according to every one of its two parties.[334]

However, most people and jurists specified the words *al-bay*ʿ and *al-bā'i*ʿ to the person who give the product related to the benefit and use; and to specify *al-shirā'* and *al-shārī* to the one who gives financial compensation to the other known as *mushtarī* and *mubā*ʿ.

The product or the thing which is contradicted is called "sold" and the agreed financial compensation which the buyer gives in return of possessing the sold is called "price". It is almost currency.

334 Since the two parties are in similar two position concerning exchange and compensation, the word *bay*ʿ is considered one of contradictive nouns. The word of *shirā'* is the same referring to the two parties called seller and buyer in the origin of language. It is said he sold the goods or bought them if he contracted its possession or possessed it by compensation. See *al-Miṣbāḥ al-Munīr* and the *Qur'ānic* verse on the story of Prophet Yūsuf: *"They sold him for despise price as little Dirhams and they did not care for his price".*

There are subsidiary contracts involved in sale such as *al-salam* (receiving) and *al-salaf, al-muqāyaḍah, al-ṣarf, al-istiṣnāʿ, buyūʿ al-amānah* (i.e. *al-murābaḥah, al-tawliyah, al-waḍīʿah*)[335] and *bayʿ al-wafā'*.

All these contracts are considered special branches of sale contract and all of them are often mentioned in a chapter in the Book of Sale where their judgments are dealt.

Al-Majallah mentioned three kinds of these subsidiary ones at the end of sales book which are *bayʿ al-salam, al-istiṣnāʿ* and *bayʿ al-wafā'*.[336]

We see that mortgage of a conditional sale must be considered an independent contract. It must not be considered one of the sale subsidiaries because it is modernized contract a mixture of sale and mortgage. We will illustrate it after mortgage as its properties is near to those of mortgage.

46/4 (2) *Al-Ijārah* (*al-Majallah*, 404-611)

It is a contract whose topic is exchange for an interest for determined period. It means possessing through compensation in benefits sale.

The owner who sells benefits of his possession called *mu'ajjir* (renter) and the other party is called *musta'jir* (lease holder) and the thing whose benefit is contradicted is called *ma'jūr* (rented property). The substitute which must be paid for this benefit is called *ujrah* (fare) (see the comparison between *al-Ijārah* and *al-Iʿārah* in the following para 46/20).

46/5 (3) *Al-Kafālah* (*al-Majallah*, 612-672)

They define it as "join safekeeping to another concerning demanding". It means a contract which involves person's obligation for an obligatory right which is obligatory for another one and share responsibility for it towards the seeker.

The new obliged person is *kafīl* (guarantor) and the original obliged one is *makfūl ʿanhu* (guaranteed) and the obliging seeker is

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335 See the previous discussion on *Buyūʿ al-Amānah* on *ʿUyūb al-Riḍā* (in the footnote of para 35/2).

336 *Al-Majallah* also mentioned another kind of subsidiary contract called *bayʿ al-marīḍ* (sick sale) and our civil law did the same.

But, to me the suitable position is in the search of sales conditions as the kinds of contracts differ according to the kinds of their topics or methods other than lack of capacity of the contractor.

makfūl lahu (the person of guarantee) and the thing is called *makfūl bihi* (guaranteed topic). This guarantee has distinguished kinds concerning some judgments according to its different topics.

a. Its topic may be financial obligation and its called *kafālah bil-māl* (payment guarantee).

b. Its topic may be obligation of the guarantor to bring the originally responsible person. It is called *kafālah bil-nafs* (performance bond).

Payment guarantee is of three kinds:

1. It may be an obligation of debt payment related to safekeeping of another one. It is called *kafālah bil-dayn* (payment bond).

2. It may be handing a determined existent property as returning the usurped thing to its owner, handing the sold thing to the buyer and it is called *kafālah bil-'ayn* or *kafālah bil-taslīm* (property guarantee).

3. Its topic may be refining the sold money from other's right other than the seller. It is a guarantee for the buyers when a person appears to be deserving a part of the sold thing or as if the sold turned out to be possessed by another one or mortgaged. This is called *kafālah bil-dark* (guarantee for risk of pending delivery). It means guarantee for dangerous which may affect the sold thing because of a reason before selling.

Since guarantee is based on participation and consolidation with the guaranteed person, not on transforming this responsibility from the safekeeping of the guaranteed one to that of the guarantor, the seeker can ask one of them for his right or both of them.

Self guarantee has no financial result but its result is forcing the guarantor to bring the original responsible person.

According to force of judgment, suspending responsibility on money other than execution of guarantee by self makes it payment guarantee also as if someone said, if he did not bring the debtor for the creditor in the determined time, he would burden his debt. He would guarantee the debt if he did not bring the debtor in the appointed time (*al-Majallah* 642, 651)

46/6 **(4) *Al-Ḥiwālah*** (*al-Majallah*, 683-700)

It is a contrast whose topic is to transform responsibility for debt from the original debtor to another one.

The debtor *(al-madīn)* is the person who exchanges (*maḥīl*), the creditor (*dā'in*) is the exchanged person (*muḥāl*), the third person is the one to whom the debt is exchanged (*muḥāl ʿalayhi*) and the debt is the exchanged position (*muḥāl bihi*).

In bill of exchange, the creditor's right to ask for exchanged position is confined to the person to whom the debt is exchanged. Hence, in Bill of Exchange transforming responsibility for the debt is clear to be transformed. This transformation makes it differ from guarantee which is based on union of guarantor's safekeeping to that of original guaranteed in authorized way in which the seeker asks both the guarantor and the original guaranteed person as we previously mentioned.

46/7 **(5) *Al-Rahn*** (*al-Majallah*, 701-761)

It is a contrast whose topic is confinement of money in return of a right which can be paid through it.

The right owner or creditor who takes mortgage is mortgage creditor and the one who gives mortgage debtor.

Mortgage is authorized as guarantee but it is more authorized than guarantee as it assures payment through confinement of money paid by the debtor under the possessiou of the creditor. The debtor has right to take his right if the debtor bankrupted and he did not have any mouey except for that money which the creditor's possession. All other creditors should have no right to share him with this money. The mortgage creditor has right to take his right from mortgaged money. If there were extra money other than the creditor's right, he would pay it for them to share according to proportion of their debts other thau guarantee which is assuring safe keeping by auother concerning responsibility. If the guarautor and the guaranteed bankrupted, there would be no financial guarantee to pay.

46/8 **(6) *Bayʿ al-Wafā'*** (*al-Majallah,* 118-119 aud 396-403).

It is documeutal contract in the form of sale based on the two contractor's right to compensation reversal.

It is a contract mixture of sale and mortgage but judgments of mortgage are more dominant.

a. It includes the meaning of *bay*ᶜ and its rulings. The most important one is that the buyer by *bay*ᶜ *al-wafā'* possesses the benefits of the sold thing due to the contract. He can make use of it or rent it out to the seller himself or to another person other than mortgage which obliges confinement of money mortgaged from any behaviour. If it was rented by the consent of the mortgage creditor, mortgage would be invalid due to the removal of confinement which guarantees the debt authorization.

b. It has rulings which have the meaning of mortgage *(al-rahn):*

   i. The buyer has no right to consume the sold or to transform its possession to another one for compensation or without compensation. He must not make it mortgage or suspend on it determined right for any one but he must keep it and preserve it.

   ii. The buyer is obliged to give the sold thing back due to *bay*ᶜ *al-wafā'* when the seller pays back the price and this is its meaning. The buyer has right to ask for restoring his money and giving back the sold thing as the creditor who asks for his debt.

   iii. The sold real-estate through *bay*ᶜ *al-wafā'* does not submit to preemption as it is exposed to restore to his seller.

   iv. If the sold thing wanted to be repaired or expenditure, his seller would be obligated to spend because it was still his possession.

   v. The sold thing in the hand of the buyer is guaranteed by him as guarantee of mortgage. This means that if the sold thing is damaged in his hand, he guarantees his value equal to the paid price as the mortgage creditor guarantees the value of damaged mortgage position equal to the amount of debt. Vengeance is applied between them on that base.

- If the value of the sold thing through mortgage conditional sale is equal to paid price, payment the price back due to damage is forfeited and the buyers have no right.
- If its value is less than the paid price, the value of the sold thing is taken from the price and the buyer has right to take the rest from the seller.
- If its value is more than the paid price and this is the most habit, the extra money was an honesty which is not guaranteed by the buyer, payment the price back is forfeited due to damage of equal sold thing through *bayʿ al-wafā'* at the buyer. The seller has no right to ask the buyers for the extra money of the sold thing value. He can do it if the sold thing damage was due to aggression of the buyers or his neglecting of keeping it.

vi. If the seller through *bayʿ al-wafā'* did not return the price and he wanted to restore his sold item, the buyer would have right to ask the judge to sell it on behalf of him. The judge would sell it on the seller's account and the buyer, through *bayʿ al-wafā'*, would have his right from the new price, namely the old price. If there were extra money, it would be returned for the seller. If its new price was less than the old price, the seller would be responsible for the rest.

It is clear that price and sold items have the rulings of mortgage position and mortgage debt due to *bayʿ al-wafā'* and they do not have ruling of the sold and the price in fact.

This contract is needed and Mortgage cannot compensate it as mortgage does not give to the mortgage creditor right to make use of mortgage position or renting it out in return of debt. If the mortgage debtor permitted that to the mortgage creditor, he would have right to retreat this permission on legally. They innovated *bayʿ al-wafā'* to mix the ruling of sale and those of mortgage with the right of benefit for the mortgage creditor through that contract. People restrained their money lending without interest. This contract is familiar in the form of purchase and interest in the meaning of mortgage (*rahn*) so that people can apply it other than usury as aforementioned (see footnote para 6/9).

This contract is applicable for real estate *(al-ʿiqār)* and the *ijtihād* of the jurists differed about its application for movable property (*al-manqūl*).

Consequently, it is clear that *bayʿ al-wafā'* must be considered independent contract, it is not subsidiary contract of sale. It must be mentioned after mortgage in the order of named contracts because understanding it depends on understanding mortgage and sale rulings together.[337]

46/9 (7) *Al-Īdāʿ* (*Al Majallah*, 762-803)

It is a contract whose topic is to ask someone to help with keeping your money.

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337 The law which was applicable for the rulings of *bayʿ al-wafā'* were articles 91-100 of real estate possession law numbered (3339). The article 95 stated that the interest of the sold real estate is according to the contract which the seller stipulated other than the buyer. The buyer would he responsible and guarantor for what he made use of interest and fruit of the sold item whose values would be subtracted from the origin of the debt except they stipulated other things.

Therefore, there is no difference between mortgage of real estate *(rahn al-ʿiqār)* and selling it through *bayʿ al-wafā'* in accordance with the rulings of this law. *Bayʿ al-wafā'* is vain and repetition of mortgage judgments under a new name.

This refers to the ignorance of those who legislated that law of the difference between *rahn* and *bayʿ al-wafā'*. According to the origin of this contract, *bayʿ al-wafā'* is innovated beside *rahn* to make the buyer deserve the interests of the sold thing according to this contract other than judgment of mortgage as we illustrated the mistake of those who issued this law depends on illusion of article 398 appearance from *al-Majallah* which says, "If it is stipulated in *bayʿ al-wafā'* that the buyer can take amount of the sold thing interests, it is correct it makes one imagine that the buyer does not deserve the interests of the sold thing through *bayʿ al-wafā'* except for stipulation". It must be understood as follows: If the seller stipulated that the buyer would take some benefits only without the other, his right would be confined to stipulated part".

If there were no stipulation, all interests would be submitted to the buyer according to the contract. The evidence is artcle 118 from *al-Majallah* itself. It stated that *bayʿ al-wafā'* was similar to correct sale and differed from mortgage from one aspect that the buyer through *bayʿ al-wafā'* possessed interests. This is the judgment recognized by jurisprudents concerning *bayʿ al-wafā'*, this is what my father Shaykh Aḥmad al-Zarqā (may Allāh mercy him) confirmed when he illustrated the general rules of *al-Majallah*.

The explanation of jurisprndence point of view concerning *bayʿ al-wafā'* and its rulings in *al-Majallah* can be seen in *al-Durar Sharh al-Ghurar* and *Radd al Muḥtār* and *al-Fatāwā al-Bazzāziyyah* at the end of the Book of Sales in chapter 18 from *Jāmiʿ al-Fuṣūlayn*. It is the most complete research on the civil law written in 1949 that prevented *bayʿ al-wafā'* and considered it invalid for which it can he substituted by *rahn* (see *Majallah* 433).

The owner of money is depositor (*muwaddiʿ*) and the other trusted who promises to keep money is trustee (*wadīʿ*) and the paid money is deposit (*wadīʿah*).

They may call the contract of deposition deposit (*wadīʿah*), the deposit money is a trust (*amānah*) and the trustee is honest.

According to the meaning of trust in the jurisprudence terminology, the trustee is not guarantor of this money. This means that he is not responsible for any damage or destiny which may decay it. The trustee is a guarantor of the deposit if he is aggressive or neglects to keep it till it is damaged or defected.

The deposition contract is considered the head contract of trusts. It is the only contract whose topic is trusting of keeping money other than other contracts in which the money is a trust in the hand of the contractor. Every contract of these ones has another topic as direct aim other than trusting as *ijārah*, *iʿārah* and *sharikah*.

46/10 (8) *Al-Iʿārah* (*al-Majallah,* 804-832)

It is a contract based on volunteering of the interests of property to be used and turned back for free without any return.

The owner of the property is lender (*muʿīr*) and the one who takes it is borrower (*mustaʿīr*) and the thing which is contract position is simple loan (*ʿāriyyah*).

The meaning of borrowing contract may be simple loan. The contract of borrowing opposes the renting contract which is based on possessing of interest in return of compensation. Concerning renting, interests are sold but they are volunteered in borrowing. Consequently, the difference is existent or non-existent compensation.

Consequently, determination of benefit duration is a must as the amount of interest in return of fare is determined by duration other than borrowing in which duration is noticed to a base of returning. Duration determination is not necessary as it is correct not to determine time as it is contribution of interest which the lender can retreat when he wants. There is no obligation of compensation which needs to be evaluated according to used interests along parts of time.

46/11 (9) *Al-Hibah* (*al-Majallah,* 833-880)

It is a contract whose topic is to make a person possess another person's money for free without compensation.

The one who gift money is donor (*wāhib*) and the one who accepts is donated person (*mawhūb lahu*) and the contract position is gifted thing *(mawhūb).*

Hibah is equal to sale concerning that both of them cause possession of financial properties, but sale is possession in return of compensation, and gift is volunteering without return as the case of renting and borrowing which opposes each other concerning the existence of compensation or non existence. Consequently, gift and borrowing are kinds of material contracts which can be executed by handing only as they are not obligatory contribution but their judgment is applicable as soon as it is executed. As we previously illustrated in material contracts (see para 30/13)

46/12 (10) *'Aqd al-Qismah* (*al-Majallah,* 1114-1191)

Al-Qismah is to sort common shares of common property and specify a part to every share. *Al-Qismah* has two categories:

- category of sorting concerning to one aspect
- category of exchange and sale concerning the other aspect.

This is because the common shares of common property is considered as the original sharing (para 24/65).

If the item was shared by half and it was divided two halves, every partner would possess half of the amount which assigned to him and the second half is his partner's own possession. So, every one of them took his share parts belonging to him through sorting and took the rest through exchange for what was belonged to him from his partner's share.

Qismah may be traditional through partner's consent (*riḍā'iyyah*) or it may be judgmental and obligation (*qaḍā'iyyah*) for the rest partners when someone claims it.

Qismah of satisfaction is considered on of frank contracts as for judgmental division, it is not frank contract but it is a removal of communiou through law.

It is considered to have implicated contract supposing the role of judgmental authority as we previously pointed out in the theory of possession (see para 23/7).

46/13 (11) *ʿAqd al-Sharikah* (*al-Majallah,* 1329-1403)

It is a contract between two persons or more to cooperate on acquired work and dividing its profits.

Company itself may be a company of shared possession among some person arising from natural reason as inheritance. It may be company arising from a contract among some people to fulfill investment business in which they help each other by money and work they share its profits.

Company or possession is involved to common possession other than contracts. Its reason may be a contract as if two persons bought something would be shared between them as company of possession. There is no a contract between them to make use or invest it in trade or renting or other means of profit as we previously illustrated in the theory of possession (see para 24/8).

As for company of contract whose end is investment and making profits, it is the one intended and considered one of named contracts kinds.

46/14 (12) *Al-Muḍārabah* (*al-Majallah,* 1404-1430)

It is a kind of company of contract in which capital is agreed to beer possessed by one party and the other party invests it for common profit.

The owner of the money is called money lord and the one who invests. It is called *Muḍārabah*. The contract of *Muḍārabah* is also called *qirāḍ* which gives the same meaning. It is said he speculated him when he was paid money to invest and work with shared profit according to determined proportion. The word *Muḍārabah* is common for the Ḥanafīs terminology but the word *qirāḍ* is common for the Shafiʿīs and Mālikīs.

46/15 (13) *Al-Muzāraʿah* (*al-Majallah,* 1440-1431)

It is agricultural company kind to invest the land in which the two parties agree that one of them shares with his land and the other shares with his effort and work and the crops are divided between them according to the agreed proportion.

The one who works in the land is called farmer (*muzāriʿ*) and the other the land lord (*rabb al-arḍ*).

46/16 (14) *Al-Musaqat* (*al-Majallah,* 1441-1448)

It is also agricultural company kind to invest trees. Someone has the trees and another one work with trees, and their service and irrigation. The fruit is shared according to determined proportion.

The one who works is the irrigation person (*musāqī*) and the other is lord of a tree (*rabb al-shajar*).

46/17 (15) *Al-Wakālah* (*Al Majallah,* 1149-1530)

It is a delegation contract in which someone is trusted by other person to work on behalf of him. The one who made delegation is delegating person (*muwakkil*) and the delegated one is called deputy (*wakīl*). The contract position is the delegated thing (*muwakkil bihi*).

The reality of delegation (*ḥaqīqat al-tawkīl*) is to give validity. Every person is originally interdicted to deal with something owned by other and if he behaved, he would be officious whose behavior cannot be executed or its rulings can be applicable for the owner of the right till the owner permits it through delegation, a person gives another one the authority of behavior in behalf of him and also his help because man may be disable to care for all his affairs and business himself.

Through this validity and allowance from the person who delegates, the behavior of deputy become executive as if the delegatiug owner performs it himself. This is the difference between officious person and deputy.

After the officious behavior is issued and permitted by the right owner, this later permission is like former delegation (it means its ruling is proved through reclamation namely reversal effect) the officious person's behavior has become executive since the date of its performance as if it is a deputy during behavior (see para 38/9).

Al-Wakālah may be general concerning every affair which is agreeable to delegation. The deputy takers are the place of the owner concerning every behavior. It may be specified concerning special affairs as sale, purchase, marriage divorce, hostility, reconciliation, exchange or receiving...etc.

Validity and freedom of deputy are confined to what the delegating owner determines and extra affairs will be officious because his authority is taken from his delegating person.

46/18 (16) *Al-Ṣulḥ* (*al-Majallah*, 560-1531)

Disputed it is a contract in which the two parties agreed to a thing which settle dispute about them.

Every one of the two contractors is peace maker (*muṣāliḥ*) and the disputed right is reconciliation position *(muṣāliḥ ʿanhu)* and the thing which one of them give to the other to settle dispute is called reconciliation substitute (*badl al-ṣulḥ*).

Reconciliation *(ʿaqd al-ṣulḥ)* has no determined topic which distinguishes it through special nature or acceptance. It exists in every dispute. It usually involves claimant giving up some of his requests. There fore the substitutes of the young person and underage person's right or endowment are not accepted from the leader, guardian if they are less than these rights. Those who undertake money of the uuderage or endowment are not allowed to volunteer or give up some of the under age's rights. It would be legitimate if the foe was oppressor and ready to swear and the guardian did not have evidence proving the disputed right. Hence, reconciliation of the foe would be legitimate as reconciliation was profit (*al-Majallah*, 1539-1540).[338]

Since reconciliation had no determined topic, jurisprudent recognized that reconciliation could be achieved through the most similar contract according to the form which it would undertake.

Reconciliation of money for money takes the judgment of sale. Reconciliation of money for interest is considered as renting for example when the dispute position was certain money and they reconciled that one of them would leave it in exchange for renting his house for a month. Reconciliation which involves that the claimant takes a part of his right and give up the claim is considered as taking some of the right and clearance of the rest right. Hence reconciliation is similar to a pot of clear white glass whose color is the same of its content.

The result is that reconciliation is submitted to the rulings of the contract which is considered similar including *bayʿ*, *ijārah* or others (*al-Majallah*, 1548- 1560).

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[338] See the pre-mentioned ʿUmar ibn al-Khaṭṭāb's letter to Abū Mūsā al-Ashʿarī (may Allāh bless them) including his saying "Reconciliation is legitimate except that which allows illegitimate affair or prohibits legitimate one" (para 3/6).

46/19 (17) *Al-Taḥkīm* (*al-Majallah*, 1841-1851)

It is a contract between disputing parties in which they make a third person a judge to settle their dispute. It may be among more than two parties.

Both of the two disputing parties are claimants and the person who is chosen to settle is called informal judge.

This informal judge differs from the official judge according to important affairs that authority of the judges and his privileges are obligation for all people in his area. Where as the authority of informal judge is confined to the two parties who asked him to judge. Their will makes him judge whose judgment is execution only for their rights and according to the limits by which they restrained him (*al-Majallah*, 1842).

We previously said that arbitration is not obligatory before judging, the two parties have right to cancel arbitration and dismiss informal judge as long as he does not issue his judgment (para 40/6).

46/20 (18) *Al-Mukhārajah* or *al-Takhāruj*

It is a contract in which one of the heirs sells his portion of *tarikah*, and thereby is disinherited and consequently replaced by the buyer of his portion. *Takhāruj al-warathah* means the heirs have traded their portions of inheritance with each other. The buyer of the portion of inheritance is known as *mukhārij* whereas the seller, who is disinherited after receiving the counter value of his portion, is known as *mukhāraj*.

If the counter value of *mukhārajah* is paid from the *tarikah* itself, the purchasing heirs will deserve the portion of the disinherited heir by a proportion equivalent to their allocations in the *tarikah*. But if the counter value is paid from other sources of their wealth, the portion of inheritance among them will be according to the amount that each of them has paid.

Mukhārajah may also occur between an heir and a stranger to the *tarikah*. In that case, it will be the same as the heir selling his allocated portion of inheritance to the stranger. Thus, the latter will take over the place of the former in his portion of inheritance among the rest of the heirs.

The *Majallah* however, did not discuss on *mukhārajah* in spite of being a purely civil contract, although it is related with succession

rights of the personal statutes law which is beyond the theme of the *Majallah*.

The *fuqahā'* normally isolate this topic in a special section under the Book of *Ṣulḥ* as it mostly occurs in a way of reconciliation between conflicting heirs. However, it is more appropriate to have it under the Book of Sales because its real essence is sale. In many occasions, it takes place without prior conflict among the heirs (see *Radd al-Muḥtār* 4/481-483).

46/21 (19) *Al-Qarḍ*

It is a contract in which one party takes from the other party fungible and consumable wealth such as money, oil, and wheat on condition that he later on returns the same to him.

Thus, the one who provides the wealth is known as *muqriḍ*, the receiving party is *mustaqriḍ* or *muqtariḍ*, the loaned wealth is *qarḍ* or *muqraḍ*. *Qarḍ* bears the meaning of two contracts:

- It initially entails *iʿārah* as it involves the provision of wealth on condition that it is returned to its giver.
- It also bears the meaning of *muʿāwaḍah* and *bayʿ* as the wealth is not taken on the basis of returning its essence after using it like in the case of *ʿāriyyah*, rather it is taken on the basis of being consumed by the borrower, then, returning the substitute of its kind to the lender. Thus, as soon as the borrower possesses the loan, he becomes its owner, and returning its substitute becomes a liability on him.

From this dimension, *qarḍ* implies commutation, which is the meaning of *bayʿ*.

Based on this, if the borrowed commodity is rendered needless to the borrower before consuming it, he is not obliged to return its essence even if he is holding it in his possession, instead he has the choice of retaining it and returning its equivalent.

For this reason, taking possession in *qarḍ* is a form of liability (*ḍamān*) and not a form of preserving and trust (*amānah*). Thus, by mere possession of the borrowed wealth by the borrower himself or his agent or messenger, the possessed wealth becomes a liability on the borrower, that is, from this moment on, any calamity that befalls on this wealth as in perishing, comes under his responsibility and

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accountability, similar to the responsibility of a buyer after taking possession of the goods bought.

From here, *qarḍ* differs from *'āriyyah* which remains in the possession of the borrower as *amānah*. He is not liable [for its damage] unless he misuses it or neglects its preservation.

This is so, but the *Majallah* however, did not discuss the *qarḍ* contract while it was important that it does not ignore it as pointed before. Some *fuqahā'* mentioned the contract as a subsection in the Book of Sales (see the section of *qarḍ* in *Kitāb al-Buyū'* in *al-Durr al-Mukhtār wa-Radd al-Muḥtār,* 4:171-176).

46/22 (20) *Al-'Umrā*

It is a common type of *hibah* among the Arabs where a person says to another, "I have bestowed you with this thing or it is a gift to you", which means, it belongs to the beneficiary for the rest of his life. Once he dies, it returns to the one who bestowed.

The one who bestows is known as *mu'mir* while the beneficiary is known as *mu'mar lahu.*

The Prophet (s.a.w.) has invalidated the idea of repossession after the death of the beneficiary. He thus declared the permanent ownership of the essence [of the bestowed object] to the benefactor, and upon his death, the ownership then transfers to his immediate heir, as mentioned before (see para 25/4).

46/23 (21) *'Aqd al-Muwālāh* (The Contract of Loyalty)

It is a contract between two persons one of whom has no hereditary heir, who would say to another, *"You are my supporter or walī, you [will] inherit me when I die, and [will] pay for my blood money when I unintentionally commit a death crime or what is below it".*

With this contract, the loyalty (*walā'*) is affirmed between the two contracting parties. Thus, the accepting party is obliged to financially cover any unintentional crime committed by the other contracting party, and is entitled to inherit his entire *tarikah* upon the partner's death unless he is succeeded by a wife in which case he will deserve the remainder after the portion of the spouse (depending on whether it is a husband or wife). This contract is valid upon the fulfillment of certain conditions stipulated in their relative places in the Book of *Farā'iḍ* and the Book of *Walā'*. This accepting party, who inherits in

return of his pledge of sponsoring unintentional crime(s) of his partner, is known as *maulā al-muwālāh*.

IMPORTANT REMARK

Comparison between the Contract of *Muwālāh* and the Contemporary Insurance Contract

46/24 The contract of *muwālāh*, as it appears to a contemplator, is suitable as a strong basis and analogical evidence for the validity of the contract of insurance, which is common in today's commercial transactions. Its theme and objective is to compensate against the losses incurred on commodities (due to reasons beyond human control). The insurer pays an amount agreed upon as compensation against specific type of loss in return of a small amount of money paid annually by the insured known as premiums.

Today, the scholars of *Sharīʿah* and its *fatwā* are hesitant regarding the validity of this type of contract or they declare its prohibition.

In my view, this contract is permissible, and there is nothing that prevents it in the principles of the Islamic law. The contract involves compeusation against losses and helping each other in undertaking them instead of diverting all the losses to the afflicted person only, especially with today's business of imports where distant places of the world have been linked by quick means of transport. The risks have increased with the increase in the speed. In such a situation, a trader cannot be assured of the safety of his wealth without insuring it against the risk of transportation, fire, etc.

Our *fuqahā'* have expressed in their texts the validity of guaranteeing against transportation risk in different forms. For example, when a person says, *"Use this path as it is safe, and if anything befalls you, I am liable [for any injury or loss]"*. If the other is affected by using that path, the guarantor is held liable (see *Radd al-Muḥtār*, *Kitāb al-Kafālah*).

Regarding the insurance contract, we do not need to find a clear evidence for its permissibility in the fundamentals of *Sharīʿah* and its *fiqh* as it is a modern contract, rather it is sufficient for us to locate analogical evidences that support it, and there is sufficiency in what we have explained. In spite of this, Ibn ʿĀbidīn has researched this contract in his *Ḥāshiyah Radd al-Muḥtār* who looked at it from a

different perspective. He came to a conclusion that it is not permissible (see *Radd al-Muḥtār, Bāb al-Musta'man* on *Jihād*).

46/25 (22) *Al-Iqālah* (*al-Majallah*, 190-196)

It literally means elimination. In the technical use of *fuqahā*, the term refers to a contract in which the two parties agree to cancel, annul or revoke a previons contract between them.

Thus, the two parties are known as *mutaqāyilān*. Each of them is *muqīl* or *muqāl* depending on the action of the other party, while the annulled contract is also known as *muqāl*.

The scope of *iqālah* is all the binding contracts except the contract of *nikāh* because a non-binding contract such as *wakālah*, and *iʿārah* can be annulled by the wish of one of the contracting parties without the need of agreement [with the other party] as previously mentioned (para 45/2).

The contract of *nikāh* on the other hand, after its correct formation, is not subject to *iqālah* and annulment, rather it is subject to dissolution by different ways as we shall see in the classification of contracts (see para 47/9).

Thus, the binding contracts *(al-ʿuqūd al-lāzimah),* if nothing happens to transform them into non-binding contracts, such that one of the two parties has an option in them, cannot be cancelled or annulled except by the very way of mutual consent by which they were established. This is because such an annulment is tantamount to cancellation of ownerships of rights confirmed by the previous contract.

It is necessary to have an agreement and all what appertains to it in terms of contractual conditions, whether verbal or its substitute, unity of place, and legal subject of the contract.

Thus, the *iqālah al-bayʿ*, for instance, after a commodity perishes in the hand of the buyer, is invalid for there is no chance of retaining ownership after the subject matter is displaced.

Similarly, the *iqālah* of waiving a right to claim a debt (*ibrā'*) is invalid because *ibrā'* involves elimination of liability of debt, which conflicts with the maxim that states, *"a given up right cannot be reclaimed as it is non-existent"* (see *al-Majallah*, 51). Thus, with the elimination of debt, there remains no subject matter for the contract of *iqālah* (see *Radd al-Muḥtār* 4:146 and 151).

The *fuqahā'* normally discuss the *iqālah* under the Book of Sales because it is a brauch of it as it mostly occurs in the sale contract. Also

because when a previous sale contract is annulled by *iqālah,* it is considered a new contract to a third party, as mentioned before under dissolution of contract (see para 45/2).[339]

The *Majallah* also considered *iqālah* a branch of the Book of Sales, and followed the definition of most of the *fuqahā'* that it is a displacement of a sale contract (*al-Majallah,* 163). This however, is a definition of the *iqālah* of sale, not of the *iqālah* in general.

It was relevant for the *Majallah* to consider *iqālah* as an independent contract which concludes the contracts of transactions because *iqālah* is not confined to sale, rather; applies to all types of contracts except the *nikāḥ* contract.

The appropriate definition of *iqālah,* after thorough examination, is that *"it is a contract that displaces a previous contract"* (see chapter of *iqālah* in the Book of Sales in *al-Jawharah* and *Radd al-Muḥtār*).

Thus, the same way *iqālah* displaces the contract of sale, it also displaces the contracts of *ijārah, kafālah, ṣulḥ, mukhārajah,* etc, and the two contracting parties go back to their initial situations and rights that were there prior to the displaced contract.

In fact, even *iqālah* itself accepts *iqālah,* thus when an *iqālah* contract is displaced, the previous consideration of the displaced contract is retained, and the two contracting parties retain the rulings and consequences of the contract as if it was not displaced (see *al-Durr al-Mukhtār* and its commentary, 4/150).

46/26 (23) *Al-Zawāj* or *al-Nikāh*

It is a contract between a man and a woman aimed at legalizing the intimate relationship between them, in their desire to reproduce and establish a family through a lawful way, and helping each other in their joint life.

Each of the couple is known after the contract as spouse to the other, and the woman may be termed as *zawjah* (ending with feminine *tā* letter) which is contrary to what is more eloquent literally.

It is necessary by law that a marriage contract has *mahr* (dowry), which is an amount of wealth that the husband is obliged to give to the woman, and is also known as *ṣadāq.*

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[339] It has been mentioned that this twofold consideration in *iqālah* (that is, being an annulment for contracting parties, and a new contract for a third party) is meant to protect the rights of other parties that have arose as a result of the previous contract.

The juristic opinions have differed with regard to the minimum amount of *mahr*, which according to the Ḥanafis, it should not be less than ten dirham of silver or its equivalent.

To be valid, a marriage contract must be witnessed for publicity purposes so as to remove doubts in the mingling of a man and a woman in their joint life, as aforementioned under the relevance of marriage contract (see footnote para 27/6).

In addition to the legalization of intimate relationship between man and woman, marriage contract also creates mutual rights and obligations between the ma and the woman, both financial and familial. These include the alimony within certain limits and conditions, the woman's obligation to obey and follow him in what is not sinful and illegal, and inheritance after the death of one of them.

The contract of marriage is dissolved and ended with *ṭalāq*, the death of one of the spouse, and other reasons. Once marriage is dissolved by one of the reasons of its dissolution, the woman is obliged to stay in *'iddah*: a waiting period in which she is not allowed to get married. This ruling is for the purpose of realizing the objectives of *Sharī'ah,* the most important thing is to ensure that she is not pregnant from the previous marriage to safeguard the lineage from any confusion or mingling. However, if a wife is divorced prior to sexual intercourse, she is not required to observe *'iddah*.

46/27 (24) *'Aqd al-Waṣiyyah*

Al-Waṣiyyah is [a contract] whereby a person, during his lifetime, obliges himself to donate part of his wealth to others after his death.

The donating person is known as *mūṣī* (legator), the beneficiary is known as *mūṣā lahu* (legatee), and the wealth meant for this purpose, *mūṣā bihi* or *waṣiyyah* (legacy).

Waṣiyyah takes effect upon the death of the legator, which is also the time when the rights of the heirs are associated with the *tarikah*.

The *Sharī'ah* has made this right autonomous within a third of a person's wealth to encourage him to do good by donating from his wealth while at the same time safeguarding the rights of the heirs.

Thus, if a *waṣiyyah* exceeds a third, only a third is executed, and the remainder is left to the endorsement of the heirs. Once endorsed by them, it is executed; otherwise the remainder becomes void and is combined with the *tarikah*.

If the *waṣiyyah* is meant for a particular person, it is then a two-party contract like *hibah*, except that its offer and acceptance is

delayed until the death of the legator since the ownership takes effect only after his death. Thus, if a legatee returns the legacy after the death of the legator, the legacy becomes void and remains in the *tarikah* of the heirs.

Not returning the legacy suffices as acceptance offer by the legatee as aforementioned in the discussion on the relevance of the *waṣiyah,* even when the legatee dies before his acceptance or rejection is known, it becomes property of the legatee's heirs (see para 31/8).

If the *waṣiyyah* is not for a particular person but rather for the beuefit of a general cause i.e. the mosques, the schools, the struggle iu the way of Allāh *(jihād),* aud the poor. It is not then considered as a bilateral coutract, instead it is a unilateral contract based on one's wish. It is thus executable upon the death of the legator, and is not subject to offer and acceptance.

46/28 (25) *'Aqd al-Iṣā'* or *al-Wisāyah*

It is a contract by which a legator, during his lifetime, obliges another person to carry out his *waṣiyyah* after his death, and to manage the rights of his minor children.

The person assigning the *waṣiyyah* is known as *mūṣī* while the person assigned with the execution of *waṣiyyah,* whether man or woman, is *waṣiy* (custodian).

The custodian is also entitled to accept or reject the *waṣiyyah* after the death of the legator like in the case of the contract of financial bequest, but his practice of *waṣiyah* activities signify his acceptance.

Once he accepts, he becomes a legal deputy, and he thus has the jurisdiction to execute the financial bequest, and manage the wealth of the minors, protect it and provide the necessary expenditure on them until they attain puberty.

Once the custodian has accepted to act on behalf of the legator, he has no right to resign after the death of the legator, nor is the *qāḍi* empowered to remove him if he is honest and competent as he has been appointed by the will of the deceased and not the will of the *qāḍi* (see the beginning of the chapter of *al-waṣiy* in *al-Durr al-Mukhtār*). However, if he is proven incompetent, dishonest or negligent in what he has been entrusted with, the *qāḍi* is entitled to remove him and hold him liable for any dishonesty or negligence in the rights of the minors or the *waṣiyyah.*

The custodian chosen by the deceased during his lifetime is known as the chosen custodian (*al-waṣiy al-mukhtār*), and he is the one

to whom the assignment of *waṣiyyah* by the legator becomes a contract as mentioned before.

If a person does not appoint anyone during his lifetime as a custodian for his financial bequest or his minors, then the *qāḍi*, based on his general jurisdiction, appoints a custodian to execute the financial bequest and manage the wealth of the deceased's children. In this case, he is termed as *qāḍi*'s custodian (*waṣiy al-qāḍi*). This appointment is among the administrative tasks of the judiciary, and not a contract in the technical sense of the context under discussion.

The legator-appointed differs from the *qāḍi*-appointed custodian in rulings which have broader jurisdiction for the former.

The management of orphans' wealth, since the Ottoman era, has a special system in our country, which has restricted the jurisdictions of the custodians. They have been compelled to abide by the legal procedures under the supervision of a council known as the Council of Orphans *(majlis al-aytām)* attached to the law courts. The purpose is to safeguard the rights of the orphans from being manipulated. Later, the personal statutes law was issued in 1953 which reorganized these rules afresh.

A detailed account of the rulings on *wiṣāyah* and the jurisdictions of the custodians and their responsibilities can be found in articles 435 to 481 of the book, *al-Ahkām al-Sharʿiyyah fī al-Aḥwāl al-Shakhṣiyyah* by the late Qadrī Bāshā al-Masrī. The rulings on *waṣiyyah* can be found in articles 530 to 558 of the same book while the rulings on marriage and its subtopics like divorce, lineage, alimony and custodianship can be found in articles 1 to 434.

These rulings can also be found in the articles 176 to 199 of the Personal Statutes Law of Syria, as they can also be found in their respect chapters in the books of *fiqh*.

This quick overview illustrates to the student [of *fiqh*] the essence of each contract, its theme, and features.

If these brief accounts would appear as obvious to the scholars of law, they are to a fresh student of law a necessity owing to the educational goal aimed by this book. The student would come across these contracts under different occasions and examples before reaching their main chapters. It is this important to equip him with a general idea and basic information about each of the contracts.

SECTION 47

CLASSIFICATION OF THE CONTRACTS

47/1 It is a common practice among legal writers on the theory of contract to discuss the classification of contracts before their discussion on the general rulings [of contract].

However, we have found it appropriate to delay our discussion on the division and classification of contracts until the end of the discussion on the general rulings of contracts so that the student is already equipped with adequate information that will assist him I understanding the classification.

47/2 Contracts in general differ from each other in the foundatiou on which they are based, the topic they aim at, the features that distinguish them, the attributes aud rulings pertaining to them, and other legal considerations.

A group of contracts may also share certain commonalities in some aspects and considerations even though there are also differences in other aspects.

For example, *īdā', iʿārah, ijārah* and *sharikah* share the feature of being contracts of *amānah* (trust). This meaus that their subject, that is, wealth which determines the contract and its execution, is considered in the hand of a depositary, borrower, lessee or partuer as *amānah*; he is not responsible for its damage as long as he has not misused it or neglected its preservation.

On the other hand, *bayʿ, qismah, ṣulḥ* and *qarḍ* for example, are considered contracts of *ḍamān* (liability). Thus, the moment they are concluded by delivery, the wealth becomes a liability on the recipient. Any damage to the property even by natural cause is under the responsibility of the recipient who has possessed the property.

At the same time, we find these two different classes [of contracts] in terms of liability, may lead to a combination of individual contracts from each category from a different perspective. In other words, *īdā', iʿārah,* and *qarḍ* are among the real coutracts (*'uqūd 'ayniyyah*) which are only concluded by execution and delivery, as aforementioned, whereas *bayʿ, qismah, ṣulḥ, ijārah* and *sharikah* are not real contracts, rather; they are concluded and rendered binding without their execution. Thus, a buyer owns the [sold] commodity, and the lessee

owns the usufruct [of the rented property] by mere offer and acceptance.

As a result, it is necessary to categorize the contracts using different considerations that distinguish each class from the other. Such distinction should provide a basis for variety of legal conclusions and rulings or a basis for arranging the contracts in a way that realizes the congruence and coordination between them in order to pave way for studying and analyzing their rulings. Therefore, the contracts are classified, with regard to various considerations, into several categories as follows:

47/3 (1) With Regard to Whether the Contracts are Named or Unnamed

Under this classification, contracts are divided into two categories:

a. Nominate contracts (*ʿuqūd al-musammāh*): These are contracts which the legislation has approved both the name that denotes their particular subject and original rulings that result from initiating them such as *bayʿ*, *hibah, ijārah, sharikah* and others which have been discussed before.

b. Innominate contracts (*ʿuqūd ghayr al-musammāh)*: These are contracts that have no specific term for their subject nor has the legislation approve specific rulings that result from their initiation. This type of contracts are many and uncountable because they can be modified according to the need of the contracting party, the subject matter agreed upon within the legal objectives, and are collectively known as *'aqd* or *ittifāq*.

Numerous new contracts have been created in the Islamic *fiqh* in different eras, and scholars have given them particular names and resolved certain rulings about them. Thus, they became named contracts, such as *bayʿ al-wafā'*, *'aqd al-ijāratayn,*[340] *taḥkīr*[341] in *waqf*

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[340] *'Aqd al-ijāratayn*: A contract in which a *waqf* manager agrees to pay a lump sum of money enough for the reconstruction of a near-collapsing *waqf* property, and another periodical (annual) payment in small amounts on condition the permanent decision on the property is to the financier.

[341] *Taḥkīr*: An agreement of selling the right of an empty *waqf* property to a developer for a large lump sum of money (nearing its value) as advance lease so that he develops the

properties, *bayʿ al-istijrār*, which is a form of what is presently known as current account (see *Radd al-Muḥtār*, 4/12).

Some contracts may remain unnamed for a period of time until a name is designated for them. For example, in the past, it was uncertain whether *bayʿ al-wafā'* is a form of sale or pledge as mentioned before (para 46/8). Similarly, it was uncertain whether *istiṣnāʿ* is sale, promise and lease.

The same thing applies to certain contracts in the present era such as the contract of publishing and advertising in the newspapers or other media. Likewise, the contract of *muḍāyafah* (boarding and lodging), which is made up of two contracts: leasing with regard to the place, and service and sale with regard to food and drink. Thus, it is a contract that has not yet been assigned a name despite its spread and necessity.[342]

The contract of engagement and obligation has also been researched by our former law of civil procedure, which is the Ottoman law, and remained under this general title, that is, engagement and obligation, irrespective of the subject of the contracts until the new Syrian civil law came and renamed it *Muqāwalah*.[343] Similarly, the contracts between certain countries and exploration companies to search for sources of oil and minerals in their lands, which today come under the "concession agreements".

The Islamic law has not limited contracts to specific subjects which should not be exceeded. There is nothing in the texts of law that dictates the specification of certain types of contracts or restricts their subjects. The only restriction is that they should not go contrary to what the *Sharīʿah* has prescribed of rules and general conditions of

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property at his own risk and using his own resources while he pays a small periodical (annual) rent to the *waqf* manager.

The *fuqahā'* resorted to these into two types of contracts to avoid the prohibition of selling waqf property. The contract rights emanating from them can be inherited and sold. Our civil law has prescribed detailed laws for determining the rights between the *waqf* property and owners of decision rights. We did not however, mention these two contracts among the named contracts that we have discussed as they are not among the fundamental contracts, rather they are sub-contracts that branch out from the contract of *ijārah*.

342 In the project that unified the civil laws of France and Italy, this contract was known in French as "*hotellerie*" which comes from the word "*hote*" meaning "*guest*" from which the term "*hotel*" originated.

343 This name is also not consistent as it does not signify the subject [of the contract]. The Civil Law has defined *muqāwalah* under article 612 as *"a contract in which one party engages to manufacture something or perform a task in exchange for reward that the other party promises to pay."*

contracts. The general principle applied in this context is the saying of Allāh the Almighty: "*O you who believe! Fulfill your contracts.*" The same has been established by the modern theory of law.

The distinction between the named and the unnamed contracts had significant outcomes in the ancient Roman law as the law approved the binding power of only the contracts named in the law. Those that were not named were not approved except under restrictions and strict conditions when one of the parties executes the subject of the agreement.

In the context of the modern laws today, there remains no legal outcome of this distinction as the contracting parties are entitled to agree on any subject within the boundaries of their personal rights, and the boundaries of morals and public order. Indeed, the formation and rulings of unnamed contracts are subject to the general rules that the law has prescribed on all the contracts.[344]

Based on this, the naming of contracts remains a product of pure simplification. To elaborate, the named contract is widespread among people in their transactions, thus, the legislation and *ijtihād* specifies it with the texts which explain its rulings to make it simple for the contracting parties so that they need not to refer to the details of the objectives of the contract and its basic obligations. Instead, they only rely on what has been set by the law regarding the rulings of the contracts (see *Naẓariyyat al-'Aqd* by al-Sanhūri, para 124-128).

Besides, the issue of named and unnamed contracts has a strong association with the principle of autonomy of will and freedom of contractual conditions (see para 41/1-3).

47/4 (2) With Regard to the Legitimacy and non-legitimacy of the Contracts

From this perspective, contracts are classified into two:

1. Legitimate contracts *('uqūd mashrū'ah):* These are contracts that the law has endorsed and permitted such as sale of fungible goods, *rahn*, and *hibah*.

2. Prohibited contracts *('uqūd mamnū'ah)*: These are contracts that the law has prohibited such as the sale of embryos in their

[344] This is the requisite of the rulings of the Syrian Civil Law, and prior to it, the requisite of article 64 of our law of civil procedures as mentioned before (see para 44/4).

mothers' wombs, *bayʿ al-malāqīḥ* (sale of fetus), and *bayʿ al-maḍāmīn* (sale of unborn), which were prevalent among Arabs during the period of ignorance and prohibited by Islamic jurisprudence. Similarly, the contract of *tabarruʿ* from minor's wealth, contracts that contravene the general morals or contravene the public order i.e. hiring [a person] to commit crime and *nikāḥ al-mutʿah*, are all prohibited and not legitimate contracts.

47/5 (3) With Regard to the Validity or Non-validity of the Contract

On this basis, contracts are also categorized into two:

1. Valid contracts *('uqūd ṣaḥīḥah)*:: These are contracts that fulfill all the general and specific legal conditions in its primary and secondary aspects such as the sale of fungibles at known price in cash or by deferment to a known period and the lease of specific object at specific rentals in a specified period of time.

2. Invalid contracts*('uqūd fāsidah)*: These are contracts which lack some conditions related to their secondary aspects such as the sale of an object at unknown or unspecified price or at known price but deferred to an unknown period. Similarly, lease that involves unknown rentals or period.[345]

We shall later look at the meaning of invalidity (*fasād*) and its ruling under the theory of "legal corroborations" *(al-mu'ayyadāt al-tashrīʿiyyah)*.

47/6 (4) With Regard to the Reality [of a Contract]

Under this classification, contracts are categorized into two:

1. Real contracts *('uqūd ʿayniyyah)*: These are contracts which come into effect upon the delivery of the subject matter, and these are the five aforementioned contracts (para 30/13).

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345 No classification has been made for void and non-void contracts because a void contract is legally non-existing, and thus is not considered a class.

2. Non-real contracts *('uqūd ghayr 'ayniyyah)*: These are contracts that take effect by their mere conclusion such as the remaining contracts.

47/7 (5) With Regard to Formality

Under this consideration, contracts are classified into:

1. Formal contracts *('uqūd shakliyyah)* which are subject to some formal couditions and ceremonies that are required by the law such as the contract of marriage in which witnesses for publicity is a condition for its validity as mentioned before.[346] Similarly,

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[346] In countries where their positive laws abide by the civil marriage such as France, Sweden, and other Western countries, the publicity of marriage contract is through registering the contract in the civil registry before the personal statutes officer. Without this registration, marriage is not considered even if it is witnessed and publicized.

In France, article 75 of its civil law necessitates the physical presence of the engaged couple before the officer of personal statutes in order to declare their marriage in his presence and to sign the marriage proceeding. Marriage by proxy is not recognized (see *Precis De Droit Civil*, v. 1, para 101).

Modern Turkey (after the announcement of its secular government) has also adopted the principle of civil marriage in its modern law. However, majority of the folk could not abide by the civil method since the *Sharī'ah* way of announcing marriage by witnessing provides the religious solution in this topic that has strong link with the creed. As a consequence of this, the Turkish government has been faced by a serious problem: The presence of a furious army of people who are neither considered legal in the sight of law and judiciary nor do they any proven lineage or enjoy the family rights that stem from the lineage. On the other hand, they are legal from the perspective of the *Sharī'ah* which is abided by the Muslim memhers of the Turkish nation.

This is among the outcomes of the blind imitation in adopting the foreign laws that are not suitable for the environment, people, creed and social affairs.

In our country like Syria, the family rights law issued during the reign of the Ottoman Turkish government, and the law of personal statutes requires that the marriage contract is made with the knowledge of the court and is recorded in the marriage register and personal statutes register. This is for the purpose of ensuring the absence of legal and health barriers; organizing marriage evidence and its related rights when conflict arises; and organizing the personal statutes and records of births and statistics in a precise manner. Nonetheless, marriage contracts that is contracted in accordance with the conditions of *Sharī'ah* but outside the supervision of the court, and without registration is recognizable as per the legal texts of our country. Such contract results into all the outcomes and the civil and family rights that stem from it when the couple announces the contract before a legal court or one of them proves it. However, conducting the *Nikāḥ* this way, without the intermediacy of the court is considered a violation that necessitates punishment on the couple, the conductor of the marriage, and the witnesses.

contracts initiated for real rights of properties such as ownership or pledge or easement etc, which the legal laws require that they are registered with the property registry. This is either for the purpose of concluding them or spreading its effects and using them as evidence for non-contracting parties depending on the direction of codification in this procedure as explained before (see para 31/5).

2. Consensual non-formal contracts *('uqūd riḍā'iyyah ghayr shakliyyah)* which require only the mutual consent of the parties involved as in most of the contracts.[347] We have seen before that a contract in the Islamic law was created purely by consent without going through the formal stages which the contractual system in the positive laws went through. This feature is owed to the religious origin of the Islamic law (see para 41/3).

47/8 (6) With Regard to Enforceability

Contracts under this regard are also categorized into two:

1. Enforceable contracts *('uqūd nāfidhah)*: These are contracts that do not contain the right of a non-contracting party which renders the contract dependent upon his will, and are free from all barriers that prevent their enforceability.

2. Restricted contracts *('uqūd mawqūfah)*: These are contracts that involve trespassing the rights of non-contracting parties, and are dependent on his consent and endorsement such as the officious contract (*'aqd al-fuḍūli*) or contains any other barrier that prevents its enforceability such as coercion as mentioned in the previous discussion on non-enforceability (see para 38/6).

This is what the personal statutes law of our country has approved, and is the most appropriate and fair procedure in this topic, and is acceptable by the *Sharīʿah*. With this, you will find that marriage contract in *Sharīʿah* is the simple and the least formal of all contracts compared to even the latest pure positive laws.

[347] Contract formality in legal law is presently an expanding subject in all that is related to the legal policy and judicial system or monetary taxes. Representation in litigation is not considered before the judiciary unless it is registered and its documents are certified through specific procedures. The legal contract of partnership can only be contracted by a written document according to Article 475 of the civil law.

47/9 (7) With Regard to Whether the Contract is Binding and Subject to Dissolution

Under this consideration, contracts are classified into four categories:

1. Contract that is binding bilaterally and is not subject to dissolution by way of *iqālah,* which is the contract of marriage as mentioned before (para 46/25). In other words, it cannot be annulled mutually, rather; it can be terminated through specific legal ways such as divorce, self-redemption (*khul'u*), judicial separation, and dissolution based on legal grounds as described in the relevant places in the *fiqh* literature, and in articles 119-130 of the former Ottomau family law, and in the section of marriage dissolution of our country's personal statutes law.[348]

2. Contracts that are binding bilaterally but are subject to dissolution and annulment by way of *iqālah* or mutual agreement such as *bay*ᶜ, *ṣulḥ*, and all other binding contracts.

3. Contracts that are unilaterally binding such as *rahn* and *kafālah* which are binding with respect to the mortgagor (*rāhin*) and sponsor (*kafīl*), but not binding with regard to the secured creditor and the sponsored because both are for their personal benefit to secure their rights. They are thus entitled to give up the security of their debts whenever they wish through dissolution of pledge or sponsorship.

4. Contracts that are non-binding to either of the parties, and they are the ones in which both of the parties are entitled to terminate and dissolve such as *īdā*ᶜ, *i*ᶜ*ārah, wakālah,* and the contracts that

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[348] Among the evidences that divorce and other causes of marriage dissolution are not a form of nullification of contract from the *Sharī*ᶜ*ah* perspective, rather; a form of termination as we have explained is that the marital prohibition as a result of *nikāḥ* does not disappear with the divorce of separation.

Thus, the mother-in-law for instance, remains prohibited for her son-in-law indefinitely even after the divorce. However, the saying of the *fuqahā* that "*Nikāh* is not subject to annulment" has been unclear to the author of *Jāmi*ᶜ *al-Fuṣūlayn* who said that *nikāḥ* is annulled by *Riddah* or when one of the spouses possesses the other by way of slavery (section 25 in the *Khiyārāt,* vol. 1, pp. 334).

This vagueness disappears with what we have explained of the distinction between termination and annulment. Thus, the meaning of their saying, *"marriage is not subject to annulment"* means is not subject to termination.

have been explained under the title: "binding is among the general implications of contracts" (para 40/3-5).

47/10 (8) With Regard to the Exchange of Rights

Under this consideration, contracts are classified into three categories:

1. Commutative contracts *('uqūd al-muʿāwaḍāt)*: These contracts are based on creating reciprocal obligations between the contracting parties where each of them takes something and gives something in return. An example is *bayʿ*, *ijārah* and *ṣulḥ* (related to wealth in exchange for wealth).

2. Gratuity contracts *('uqūd al-tabarruʿāt)*: These contracts are based on donation or help from one party to another such as *hibah* and *iʿārah.*

3. Contracts that initially contain the meaning of gratuity but end with commutative meaning such as *qarḍ* and *kafālah* by the order of the debtor, and *hibah* give on condition of exchange:

    - The creditor is a donating his wealth to a person in need (debtor);
    - the sponsor is a donator as he offers to take responsibility of paying the debt for the debtor;
    - the donor, who offers his wealth as gift on condition that he takes something in return, is also donating by what he gives.

However, when the creditor recalls his loan, the sponsor recalls from the debtor the amount he paid, and the donor takes something in exchange of what he gave to the beneficiary, the contract then goes back to being commutative.

The consequence of this distinction is to implement the conditions of donation at the beginning of the contract, and rulings of commutation at the end. Thus, in all the above contracts, the competency of the contracting party is a condition for donation, and therefore, sponsorship by a minor for instance, is not acceptable. Also, the ruling of *bayʿ* on the countervalue of *hibah* applies, and thus it is for instance, returned if found defective, and is taken by

preemption if it is a real estate (*al-Majallah*, 628 and 1022). Suppose the *kafālah* is made without request of the debtor, it then becomes a donation from all dimensions as the sponsor in this case is not entitled to return to the debtor for the refund of the debt he has paid on his behalf (see *al-Durr al-Mukhtār*, 4/271-272).

47/11 (9) With Regard to Liability and Non-Liability

Under this consideration, contracts are classified into three categories:

1. Liability contracts (*ʿuqūd ḍamān*): These are contracts which, when enforced, renders the transferred wealth from one hand to another a liability on the receiving party. Thus, whatever damage happens to the wealth, even by a natural canse, comes under his responsibility and accountability. These contracts are *bayʿ*, *qismah*, *ṣulḥ ʿan māl bil-māl*, *mukhārajah*, *qarḍ*, and the *iqālah* of all these contracts.

2. Contracts of trust (*ʿuqūd amānah*): These are contracts which, when enforced, renders the transferred wealth from one hand to another a trust in the hand of the receiving party. Thus he will not be responsible for whatever happens to the defect wealth or the like unless he misuses it or neglects to preserve it. These contracts are *īdāʿ*, *iʿārah*, all types of *sharikah*, *wakālah*, and *wiṣāyah*.

3. Contracts of mixed effects such that they result into liability from one side, and trust from another. These contracts are: *ijārah*, *rahn*, and *ṣulḥ* (related to wealth in exchange for usufruct).

In *ijārah*, the leased property is considered a trust in the hands of the lessee but the usufruct on which the contract has been made, is a liability ou the lessee from the moment he is able to obtain the usufruct. Thus, if the leased property is left without beuefitting from its usufruct until the lease period ends, the lessee is liable for rentals equivalent to the value of the usufruct (*al-Majallah*, 470).

The *ṣulḥ* related to wealth iu exchange for usufruct is considered under the ruling of *ijārah* as aforeuentioned under the classification of contracts (see para 46/18).

The *māl* whose usufruct is offered by one of the conciliators for a specified period as consideration for settlement (*badal al-ṣulḥ*) in the *ṣulḥ* contract, is treated like a leased asset in the hands of a lessee. Thus, while the usufruct of the *māl* is under his liability, the essence of the property is a trust in his hands, and by using the leased *māl,* he is considered as having obtained the consideration for settlement.

Likewise, a mortgaged property *(al-māl al-marhūn)* is under the liability of the mortgagee to the extent of the equivalent of his debt, whatever remains is a trust in his hands (see para 46/21).

47/12 Guideline for Distinguishing Between Liability-based Contracts and Trust-based Contracts

By exploring the rulings [of *Sharīʿah*] and their jurisprudential causes in different occasions, it is evident that the idea of liability in contracts goes in hand with the meaning of commutation even by considering the end or outcome [of the contracts]. In such a case, the contract becomes liability-based, and the receiving party becomes liable [for the subject matter] from this perspective. All other contracts other than these are considered trust-based and their enforcement by delivery renders the receiving party trustful for the *māl* he has possessed. By extrapolating this principle, we deduce that:

a. The contract of *bayʿ* is considered absolutely a liability contract, and so is the contract of *ṣulḥ* (related to wealth in exchange for usufruct) because the possession of the *māl* contracted upon in both cases is based on receiving what the possessor deserved in return for compensation. Similarly, the contract of *qarḍ* as the *māl* is possessed on the basis of returning its equivalent as its substitute. Thus, it is a commutative contract in both its conclusion and outcome.

b. In the contract of *ijārah*, the exchange takes place between the rentals and the usufruct, and not the leased property, although the submission of the leased property is necessary for obtaining the usufruct. Thus, the contract of *ijārah* is considered a liability contract with regard to the rent and the usufruct because they are the subject matter of exchange. The lessor is liable for the rent that he receives while the lessee is liable for the usufruct that is under his disposition. However, the leased property in the hands of the lessee is under the contract of trust.

Similarly, the contract of *rahn* where in the possession of the mortgage is on the basis of benefitting from the mortgage when necessary besides the meaning of authentication as previously mentioned (para 19/3).

Benefitting from the mortgage is in this case a commutation but from the *rahn* perspective it is limited to the amount of debt. The excess mortgage is a trust in his hands as it is not liable for exchange.

c. The contracts of *iʿārah, wakālah, sharikah*, and the like, are all completely free from the meaning of commutation, thus are considered contracts of trust. The *māl* of a principle in the hands of his ageut, the *māl* of a minor in the hands of his guardian, and the *māl* of a partner in the hands of his other partner, and *'āriyah* in the hands of the borrower; all these are pure trust and not liable by virtue of the contract like in *wadī'ah* contract.[349]

47/13 (10) With Regard to the Purpose of the Contract

Under this consideration, contracts are classified into five categories:

1. Contracts whose purpose is ownership of the object or usufruct, for example, *bayʿ, hibah, waṣiyyah, ijārah*, and *iʿārah*.
2. Contracts whose purpose is partnerships *(al-ishtirāk)* such as *sharikah, muḍārabah*, and *muzāraʿah*.

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[349] In the last part of the discussion on *sharikat al-'anān* in "*al-Hidāyah*", the following text appears: "The hand of the partner in the *māl* is a trustful hand as he possessed the māl with the permission of the owner, not by way of substitution or affirmation. Thus, it hecomes like *wadī'ah* (see *al-Hidāyah* and *Fatḥ al-Qadīr* 5/404).

It is understood from the text that the possession which is subject to liability is that which occurs on other person's property without his consent such as the possession of an usurped property or occurs as an enforcement of a commutative contract such as *bayʿ* or occurs as a way of affirmation snch as the possession of a collateral.

We have found in this text in particular, and in the rulings of all other contracts in general, the evidence for this rule that we have mentioned as a distinction between liability and trust contracts. Since our discussion is on liahility contracts and not on possession of liability, there is no need of mentioning or not mentioning the consent.

We have also found the possibility of replacing the *'illah* of commutation with affirmation because the purpose of mentioning affirmation is to show the effective cause of the liability of *rahn* and its related things, and this is possible to attain by considering the meaning of commutation found in *rahn* as a consequence as we have explained before.

3. Contracts whose purpose is authentication *(al-tawthīq)* such as *rahn* and *kafālah*.
4. Contracts whose purpose is commission *(al-tafwīḍ)* and deputization *(al-inābah)*, and these are *wakālah* and *wiṣāyah*.
5. Contract whose purpose is preservation *(al-ḥifẓ)* and this is the contract of *īdāʿ*.

47/14 (11) With Regard to Immediacy or Continuity of the Contract

Under this consideration, contracts are divided into two categories:

a. Instant contracts *(ʿuqūd fawriyyah)*: Those whose enforceability does not need a prolonged time, rather take effect immediately at the time chosen by the two contracting parties, for example, the contract of *bayʿ* even by deferred payment *ṣulḥ*, *qarḍ*, and *hibah.* These contracts are enforced once each of the contracting parties has received what the contract empowers him to obtain, and hence ending the obligations at one time.

b. Continued contracts *(ʿuqūd mustamirrah)*: Those which require a prolonged time to execute, depending on their subject, and the time factor plays an integral role in their enforcement. This is why they are also known as timed contracts such as *ijārah*, *iʿārah*, *sharikat al-ʿaqd*, and *wakālah*. Enforcement of such contracts needs ample time to allow the continuous flow of the ruling of the contract.

From the legal perspective today, the partnership contract in periodicals such as magazines and newspapers, and the agreement to supply food and beverage on daily basis to a restaurant, hotel or hospital for instance, is also considered a continuous contract even if it is actually a sale contract. In the legal terms, it is known as supply contract (*ʿaqd al-tawrīd*) (see *Naẓariyyat al-ʿAqd* by al-Sanhūri, para 147-148).

47/15 Outcomes of the Distinction between Immediate and Continued Contracts

The distinction between immediate and continued contracts has significant outcomes from both the *Sharīʿah* perspective and the

perspective of the modern law. The most important of the outcomes are the following two:

1. The dissolution of immediate contract such as *bay*ʿ, is based on the past, and therefore necessitates the dissolution of what has been implemented of the obligations of the two contracting parties. As for continued contract, its dissolution is not based on the past, that is, without a retroactive effect as aforementioned under discussion on dissolution of contracts (para 45/4).

2. Mutual obligations in a continued commutative contract are established gradually and consistently between the two parties. Whatever is concluded on one side is also concluded on the other.

   In the lease contract where the usufruct is parallel to the rent, the lessee's obligation towards payment is established gradually as he benefits from the usufruct by both type and quantity (see *Naẓariyyat al-ʿAqd* by al-Sanhūri, para 147-149).

   Even when there is a condition stipulating the advance payment of rentals, the lessee does not become liable for the payment except in portions in accordance with the gradual benefit obtained from the usufruct of the leased property.

   Thus, the contract is dissolved before the expiry of the lease period, the lessee gets the refund of what he has paid in advance for the remaining period of lease.

   Our scholars have declared that the original rule in *ijārah* contract is that the lessor is entitled to claiming the rentals on short timely intervals. But because of the difficulty in achieving this, he is entitled to demand the house rent on daily basis, and the rent of an animal on distance-basis, unless there is a condition or custom that stipulates otherwise (see *al-Hidāyah* and its commentary, 8/16-17, and *Radd al-Muḥtār* 5/9).

3. The continued commutative contract, from the *fiqh* perspective, is given the same consideration as renewed contracts within the time of their enforcement.

   Based on this, the lessee in the contract of *ijārah* is entitled to dissolve the contract due to the emergent defect on the leased property while in his possession the same way he is entitled to dissolve the contract due to previous defect. This is contrary to the immediate contract in which the buyer is not entitled to dissolve the contract due to emerging defect in the purchased

commodity after possessing it. He is rather entitled to dissolve the contract due to the previous defect found in the commodity prior to his possession (see *al-Majallah* 337, 339, 515).

Thus, by considering the aspect of renewal in the contract of *ijārah* throughout the period, the emerging defect in the leased property becomes a previous defect with respect to the future.

47/16 (12) With Regard to Principalship and Accessoriness

Under this consideration, contracts are also divided into two categories:

a. Principal contracts *('uqūd aṣliyyah)*: Any contract that exists independently not related to any subordinate item that contributes to its existence or disappearance. Examples are *bayʿ*, *Ijārah, īdā', iʿārah,* etc.

b. Accessory contracts *('uqūd tabʿiyyah)*: Any contract that is supplementary to another right and related to its existence and disappearance i.e. are *rahn* and *kafālah* which are both for documentation of other rights. Thus, they are not contracted in the absence of another permanent or anticipated right.

Rahn can be contracted for a promised deht like when a person promises to loan another person, and takes an advance collateral for his debt.

Kafālah can be contracted for a debt not yet real like when a person tells another trade with so and so and he will be the guarantor for whatever they will owe you (see *al-Durr* 2/252 and 298).

The above two contracts also disappear with the disappearance of the contracted right the same way how a subsidiary drops with the fall of its principal. Thus, if a creditor releases a debtor (of obligation to pay the debt), the guarantor's *kafālah* also drops as a consequence of the release. Similarly, in *rahn*, the collateral becomes void with the release of the debtor by the creditor.[350]

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[350] In *Naẓariyyat al-ʿAqd* by al-Sanhūri, an ancillary contract (*'aqd al-tabʿī*) has been defined as "a contract that is supplementary to another original contract found before it".

It is clear from what we have explained that this definition is not accurate because of the following observations:

i. *Rahn* and *kafālah* may be contracted to affirm a debt that has arisen from an action and not from a contract such as the *kafālah* and *rahn* against the liability of damage.
ii. For the debts created from a contract such as the cost of a sold property, consideration for settlement, and the rentals, *rahn* and *kafālah* against them are not considered ancillary to the contract that has created the right or obligation, rather; they are ancillary to the right created by that contract. For this reason, if the seller releases the buyer of the price [of the sold good], both the sponsor and the *rahn* are released too although the contract of *bay*ʿ remains enforceable.
iii. The subordinacy of an ancillary contract may be for a right that is to be established after a contract, and it is not necessarily that the contract must have preceded it. For instance, *rahn* against a promised debt and a *kafālah* against what may arise for the sponsored of rights and obligations as explained previously.

Thus, the correct definition of an ancillary contract is that "it is a contract that is supplementary to another right".

CHAPTER SEVEN

THEORY OF CORROBORATIONS IN ISLAMIC LAW

General Outline of the chapter

Section 48: The Origin of Corroborations, Its Definition and classification

Section 49: The Prescribed Punishment: The Ordained Punishment

Section 50: The Prescribed Punishment: The Mandatory Punishment

Section 51: The Concept of *Buṭlān*

Section 52: The Reasons for *Buṭlān*

Section 53: The Consequences of *Buṭlān*

Section 54: The Concept of *Fasād*

Section 55: The General Reasons for *Fasād*

Section 56: The Consequences of *Fasād* and the Related Things

Section 57: The Attitude of Law about Invalidity and Our Opinion on the Matter

Section 58: Null Theory in Foreign Jurisprudence, Illustration, Criticism and Comparison of Nullity and Annullability Theory in Islamic Jurisprudence

SECTION 48

THE ORIGIN OF CORROBORATIONS, ITS DEFINITION AND CLASSIFICATION

THEME ONE:
THE ORIGIN OF *AL-MU'AYYIDĀT*

48/1 Indeed, all the *Sharīʿah* injunction have been established to maintain the relationship among human being, to protect their general and specific interests, to establish justice and to prevent the aggression among them.

One of the most important characteristics of this practical legislation (*Sharīʿah*) is that it is coercive, all the *mukallaf* need obey to it, to respect its advices and prohibitions, to abide by the way that it has designed for them in their activities and transactions from which the rights among them generate.

- The meaning of activities is all kinds of physical activities which are being appeared from them like walking, talking, eating, drinking, riding on, utilization, consumption, possession and so on.... From what it is possible to grow up the right.
- The meaning of transaction is civilian activities which means by its practice it is wished to protect or violate the right between two persons or more. It is same in an activity of personal like divorce, release, endowment or it is one of the contracts among two parties like sale, partnership (see para 28/3).

48/2 So, in all activities and transactions, to maintain the order of legislation (*Sharīʿah*) and respect its regulations is compulsory:

a. So, in normal activities for example, when a person walks for his own business and necessity he should follow the regulation of walking and he should not take other's land as his way.

   And whosoever talks alone or talks with others, he should not offend others honor and dignity by insulting him or scolding or slandering.

   Whosoever eats or drinks or utilizes or consumes or possesses or takes over a throne, he should confine his activities within the sphere of his property and rights, or within his arena of authority

and ability. So, he will not touch others property or rights in those activities.

b. Also, in transactions, contracts and all other civilian activities, a person should comply with the method, protocol and pattern and all conditions determined and imposed by the legislation (*Sharīᶜah*) because it is not imposed but only for the benefit of human being determined by the legislator (Allāh) and for preventing problems which could be appeared if it is not taken care of.

So, for example, it is compulsory in a contract to have mutual consent both parties consents as a form of obligatory and clear, the contractor should be a competent person for making the contract, the subject matter should be known so that it is possible to realize the contract and to remove the conflict without any ambiguity, its objects should not be what the *Sharīᶜah* prohibits in action and order, it will run through the framework that the existing *Sharīᶜah* has imposed, the contract should be declared by the presence of witnesses wherever testimony is obligatory like marriage, it should be written down or registered whenever it is necessary to register or to write down like legal companies and attorney in dispute, Like selling real estate today in our countries, because these types of conditions are a form documentary and rituals. Indeed, the *Sharīᶜah* has imposed these conditions to make the contract organized and perfect, to protect from danger, to take care of human welfare. So, it is compulsory to for people to abide by the conditions whatever the Sharīᶜah has imposed for transaction.

48/3 In order to make the organized *Sharīᶜah* honored and abided by its orders and prohibitions, the *Sharīᶜah* should have some rulings and arrangements that ensure its honor and force the people to its obedience. And that would be possible, if the legislator (Allāh) makes for those who disobey His orders the opposite way as a difficult path and an unfruitful effort so that the person will not get the outcome that he wishes by his activities and efforts unless he follows the way that Allāh has prescribed. Otherwise, the *Sharīᶜah* would lose its characteristics of compulsion, and at that time, it would be most similar to the discourse of guidance. So, it will be easy for the people to disobey the *Sharīᶜah* when disobeying is similar to obeying in the

extent of consequences of achieving the outcomes of the actor that he tries for.

So, the rulings which are not enacted to arrange human relationships and uot for the welfare of the society but to support the basic rulings and regulations of those relationships and welfares they are called *al-Mu'ayyidāt.*[351] Because, it strengthens the legislation that means it yields the Sharīʿah the coercive power. It is also named as *Dawāmīn* (Guarantors), the plural of *Dāmin*, because it guarantees and ensures the obedience of the upright *Sharīʿah*. Islamic jurists named it as *Zawājir* (Deterrents), because it prevents from violating the path of the *Sharīʿah* and disobeying its orders.[352] It is related to the topic

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351 The law of Egypt adopted on naming it by reward. It is in our country's terminology called: supportive ruling. The literal meaning of "*ta'yīd*" is strengthening (*taqwā*) and based on this people's saying: "*May Allāh strengthen you verily*". It is derived from *al-ayd* that means power, also this meaning has been found in the holy *Qur'ān*: "*With power and skill did we construct the Firmament*" (al-Dhāriyah: 47) (see *al-Miṣbāḥ*, and *Mufradāt al-Rāghib*).

It is said that a "*rajulun ayd*" that means a strong person. So, the supportive ruling of the *Sharīʿah* is by which the sharīʿah achieved strength and makes it awesome and obeyed.

In the French language its opposite is the word 'sanctions' which means punishment and repayment which prevents violating the law and ensures its fulfillment.

352 Imām Abū Isḥāq Ibrāhīm al-Shāṭibī in his book, *al-Muwāfaqāt fī Uṣūl al-Fiqh*, has his individual discussion which has relation with this subject which we will summarize here for its benefit. He has divided the *maṣlaḥah* (interest) and likewise all the rulings which have been legislated for its protection into three kinds: *ḍarūriyyāt* (indispensables), *ḥājiyyāt* (necessities) and *taḥsīniyyāt* (perfections) or luxurious. Its discussion has been passed (see para 5/4-6), then, the summary of what he said: "Certainly, the *ḍarūriyyāt* are two types:

One of them is human being has share according to his immediate intention, like a man's getting up with his own interests and his family to live on and the things are required from the complementary things, i.e. sale, lease, marriage and other things from the phases of livelihood by which the structure of humanbeing meaning the existence will be established.

Secondly: Human being do not have share according to his immediate intention, like teaching, fighting, non-aggression of others right and like this from the matters which are legislated generally for public interest when its violation causes breaking down the system.

The policy of Islamic legislation to fulfill its obedience which it ordained to human being's burden to establish these interests are:

In the first type: which contains immediate intention, the *Sharīʿah* does not stress on ordering this regarding to his own self- meaning it does not result from the things which requires emphasize like the deterrent compensation for the violation. However, the *Sharīʿah* stands on the position which is near to permissible (*ʿibādah*) among the significant demands like Allāh's word: "*Allāh has Permitted trade and forbidden usury*" (al-Baqarah: 275); also His word: "*Eat from the purified things that we have bestowed upon you*" (al-Baqarah: 57) and so on, even though the living kingdom do not stand for except

of the philosophy of the legislation and counted as one of the most important topics.

THEME TWO: THE DEFINITION OF *AL-MU'AYYIDĀT*

48/4 In accordance with the above discussion we could define *al-Mu'ayyidāt* as follows:

All kinds of provisions which are legislated to lead the people obey the basic rulings of the *Sharīʿah*.

After having the above discussion of *al-Mu'ayyidāt*, this definition has become obvious that does not need to be explained. So, the complete *Sharīʿah* always contains two types of rulings:

- **The basic ruling (*aḥkām aṣliyyah*)**: from which the regulations of the *Sharīʿah* are fashioned for the welfare, relations and transactions. It is compulsory to protect its boundary from people's transgression.
- **The supportive ruling (*aḥkām ta'yīdiyyah*)**: it is for protecting those basic rulings.

So, *al-Mu'ayyidāt* of the *Sharīʿah* is the protecting rulings. So, comparing with the basics of the *Sharīʿah*, *al-Mu'ayyidāt* is like the army comparing with the country and its welfare: they defend the country, protect the boundary and punish the person who transgresses. When the defensive army is lost or its power is declined then the country becomes permissible for everyone to occupy and the sovereignty of that country disappeared. Likewise, when the *al-*

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by planning and earning. This attitude from the legislator (Allāh) is like the conveyance of what is inside the nature of human being from the driving motive for earning livelihood.

On the other hand in the second type, where human being do not have direct share, certainly the *Sharīʿah* has emphasized its demand here obligated greatly, as there is no motive in human nature that gives favour to it and bear people to do it. But it is opposite of that - meaning indeed a man's habit demands the opposite of this- therefore, the order is emphasized here and to abstain from the deterrents and disciplinary actions are imposed. This is like the prohibition of the murder of a person, adultery, theft, drinking wine, taking interest, eating up people's property illegally and so on, because the natural habit of people which is to demand his own portion, welfare, removing his own harms which requires to take part in these things, therefore, there need deterrents from it. *Al-Muwāfaqāt* summarized and modified from the first and forth types from the objective (*maqāsid*) of the *Sharīʿah*, v. 2, pp. 8-12 and 180-183.

Mu'ayyidāt of the *Sharīʿah* is lost then the honor of the *Sharīʿah* is taken off and its power does not exist.

THEME THREE: CLASSIFICATION OF *AL-MU'AYYIDĀT*

48/5 *Al-Mu'ayyidāt al-Targhībiyyah* (Corroborations of Hope) and *Al-Mu'ayyidāt al-Tarhībiyyah* (Corroborations of Fear).

Al-Mu'ayyidāt of the *Sharīʿah* is divided into two basic different kinds, and that is according to the intention of the *Sharīʿah* whether it leads the people to do the act or prevents them from it.

These two basic kinds are *al-Mu'ayyidāt al-Targhībiyyah* and *al-Mu'ayyidāt al-Tarhībiyyah* (supportive ruling of terrifying).

a. When the intention of the legislator (Allāh) is to motivate the people to an act which is desirable to attain and to inspire them to it and to lead them to bear its difficulty and burden and to commence it is rewarded then He inspired them to do that:

   That is like in the financial laws today the defined taxes are forgiven for the agricultural and the industrial companies for several years from its origin, also policies are being made to provide the married young men salaries or compensation for their families and also on the number of the children in some countries to motivate them to get married.

   Among this type of *al-Mu'ayyidāt* is lawful *tanfīl* in the field of battle. *Tanfīl* is the right of the emperor or commander to declare among the troops that whosoever kill the particular person from the foes he has rewards. It is to inspire the troops and to strength their intentions as the Prophet (s.a.w.) did this in the Battle of *Hunayn*. In this situation, every warrior has the right to get prize for the person he killed and it is a special reward for him.

   Also, another example of this is, the way Islām has obliged the amount of *Zakāt* for cattle as the tariff is charged here according to the ratio of the situation. As raising cattle consists of difficulty and it is beneficial for public, so this is required to be encouraged. So, the tax is reduced here in a suitable way that reflects the satisfaction of the person.

   As Islām is a system of remedy for three directions of life: spiritual, material, and civil together. So, *al-Mu'ayyidāt al-Targhībiyyah* for afterlife are so many in Islām and specially things which are related to good deeds, sincerity of deeds, reformation

of situations, obligatory sacrifices and preferring public interests over individual interests when it contradicts each other.

Regarding to this, the Prophet (s.a.w.) says: *"whosoever intends to do a good deed but he can not be able to do that then virtues are allocated for him and he deserves rewards from Allāh the almighty in the hereafter and whosoever intends to do an evil deed but he does not do it then nothing (no punishment) is allocated for him"*.[353]

So, this *Ḥadīth* is a supportive ruling of inspiration for good intention and refraining bad intention before the realization of the act.

b. When the intention of the legislator (Allāh) is to prevent people from disobeying his orders and prohibitions, then, the consequence of the violation is painful punishment and that is the supporting rulings of terrifying (*al-Mu'ayyidāt al-Tarhībiyyah*) that guarantees to prevent violation.

48/6 Variety of *al-Mu'ayyidāt al-Tarhībiyyah*

Al-Mu'ayyidāt al-Tarhībiyyah are two kinds: *Tā'dībī* (disciplinary) and *Madanī* (civil). This is because the philosophy of the *Sharīʿah* requires different types of *Al-Mu'ayyidāt al-Tarhībiyyah* according to the types of violation and that is following the matter that violation of the *Sharīʿah* disgraces the *Sharīʿah*.

a. When the act of violation is a kind of aggression that damages the peace of the society and the tidings of the group then the supportive punishment is required to be a deterrent punishment that is able to terrify a person who wants to commit this.

This kind is called *al-Mu'ayyidāt al-Ta'dībī* (disciplinary corroborations) and from this type, the punishment regulation for the legislation of the country is formed.

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[353] Narrated from Ibn ʿAbbās (may Allāh mercy them) from the Prophet (s.a.w.) that he narrates from Allah the Almighty said: *"Certainly, Allāh has written down the virtues and the sins, then he explained that: whosoever intends to do a good deed but he does not do it then Allāh writes down to Him full rewards for this and if he intends and fulfill it then Allāh writes down from ten rewards to seven hundred times rewards and more than that.*

And whosoever intends an evil deed then he does not do it then to Allāh full rewards written down for him and if he intends to do it and fulfills it then Allāh writes down for one sin" narrated by al-Bukhārī in the chapter of *al-Riqāq* (6491) and by Muslim in the chapter of *al-Īmān* (2:147) with the explanation of Imām al-Nawawī).

This punishment can be physical or financial or it can be barring the freedom like imprisonment or banishment or it can be mental like libeling and condemning and sometimes, it can be the combination of two types or more.

It is clear that, this type of sanctions do not guarantee the prevention of violation and cutting off the root of crimes from the society but it is the most possible way of the *Sharīʿah* because, it is not possible to rule completely over the physical activities of human beings. Also, sometimes people commit to the crime as because there is no prevention without this and he is satisfied with the punishment even though it is death.

b. When the act of violation is a type of negligence of the conditions that *Sharīʿah* has legislated for civilian systems in different kinds of transactions of the people and their legal activities like contracts or others then the supportive ruling to prevent violation should be depriving the performer from the outcome that he wants from his action. Therefore, his action is considered as void to the *Sharīʿah*, that means the provision and the rewards is lost, so, the owner will not obtain the desired right, in front of the judiciary it can not be claimed.

This type is called civilian supportive ruling or legal supportive ruling and from this type the concept of *Buṭlān* (invalidity) and its braches in the civilian law is originated.

It is obvious that this type of supportive ruling is more likely to cut off the root of the violation than the disciplinary supportive ruling. This is because to establish the legal consequences on the actions is not having a material effect for the sensible acts and possibly there is no prevention without this but it is an artificial matter and relies on the consideration of Allāh.

48/7 Level of cancellation

This ruling of cancellation for the act of violation is not all the same.

1. Sometimes, the cancellation would be as a whole and that is when the violation would happen in the basic things of the trading regulations, at that time the supportive ruling is called *buṭlān* (void).

2. Sometimes, the cancellation would be partial in some extents and that is when the violation would happen in some minor extents. This is called *fasād* (invalid).

3. When the action would affect other persons rights, i.e. one has sold others commodity without his permission. In this case, the contract would be considered as valid in itself but in terms of ruling it will depend on the desire of the owner whether to accept or revoke: if he agrees on this contract, it will be enforced and if he disagrees then the contract will be nullified. This is named as *tawaqquf* (pending) and this is the protection for others right.

4. When the civilian action contains infringement of the obligatory equality right in the contract among the faciug contractors as it would be the source of oppressing ones rights on others and without his consent then the supportive ruling is the guarantor to recover the equilibrium or the stability of consent. The supportive ruling will give the party whose right is facing harm the option to nullify the contract he wishes. This type of supportive ruling is called *takhyīr* (preference). This is one of the topics of the quality of contractual will or defects of consent and its explanation is preceded in the section of the concept of contract.

So, based on these essences and regards, the concept of general supportive ruling of the *Sharīᶜah* which is one of the essentials and compulsory concept for every law is brought into the Islamic Jurisprudence.

Summary

48/8 It can be concluded that the supportive ruling (*al-Mu'ayyidāt*) in the *Sharīᶜah* as well as in all legislation are divided into two types: *al-Mu'ayyidāt al-Targhībiyyah* and *al-Mu'ayyidāt al-Tarhībiyyah*.

The second type is also divided into two types:

First: *Al-Mu'ayyidāt al-Ta'dībiyyah* that is the prescribed punishment for preventing committing a crime or violations. It is divided into two types:

a. **Ordained Punishment *('uqūbāt muqaddarah)*:** This type of punishment's quantity and nature are affirmed and defined by the legislator (Allāh) by clear texts of the *Qur'ān* or *Sunnah* and He did not give the rulers any choice to interfere in its types and quantity as these crimes entail dangers for the society according to the legislator (Allāh).

b. **Mandatory Punishment *('uqūbāt mufawwaḍah)*:** This type of punishments' feature and quantity is not ordained by the *Sharīʿah* but the rulers are authorized for that. So, they will punish the criminals with the penalty that they think suitable for the crime and sufficient for deterrence and reformation.

   This kind of punishment varies in its nature and quantity according to time, place and individual and the level of social order. That is why; the *Sharīʿah* has authorized this task to the rulers that means to the judicial authority.

   This delegated punishment is called *taʿzīr* in the language of Islamic jurisprudence. I will speak on these two kinds briefly in section 49 and 50.

Second: *Al-Mu'ayyidāt al-Madaniyyah* or *al-Huqūqiyyah* (civil corroborations); this is specified by the legislator that the violation in the transactional regulations will be barring some or the whole outcomes and evacuating the action of violation from the consideration of the *Sharīʿah* in some aspects or as a whole. So, the person will lose a few or all legal outcomes.

This supportive ruling contains four steps: *al-buṭlān* (void), *al-fasād* (invalid), *al-tawaqquf* (pending) and *al-takhyīr* (preference).

48/9 We will discuss soon in the following the ruling of *al-Mu'ayyidāt al-Tarhībiyyah* with its two kinds of *al-Ta'dībī* and *al-Madanī*. However, we will discuss in short *al-Ta'dībī* part as like an overall outline and its general regulations because our subject of this book is *al-Madanī* part of Islamic jurisprudence. Accordingly, we will discuss about *al-Mu'ayyidāt al-Ta'dībiyyah* to enlighten the mind in some aspects to fill up the sections of the study the concept of general *al-Mu'ayyidāt*.

SECTION 49

THE PRESCRIBED PUNISHMENT: THE ORDAINED PUNISHMENT

49/1 The ordained punishment in the *Sharīʿah* is of two kinds: *Ḥudūd* and *Qiṣāṣ*.

TOPIC ONE: *ḤUDŪD*[354]

49/2 *Ḥudūd* contains five punishments namely: punishment of fornication (*ḥadd al-zinā*), punishment of *qazf* (*ḥadd al-qazf*)[355] punishment of theft (*ḥadd al-sariqah*), punishment of armed robbery (*ḥadd al-ḥirābah*)[356] and punishment of drinking alcohol (*ḥadd al-khamr*).

The first four *Ḥudūd* punishments are defined in the *Qur'ān* and the punishment of drinking alcohol is not mentioned in the *Qur'ān* but it is stated in the *Sunnah*.

All these punishments are physical punishments, the minimum is slashing by whip and the maximum is death:

a. The penalty for *Qazf* and drinking alcohol are forty lashes in different places of the body except the mortal organ with a medium length of whip.

b. Punishment for adultery is one hundred lashes as mentioned in the Holy *Qur'an*. The *Sunnah* prescribes to stoning the married (*muḥṣan*) adulterer till he dies.

   The *muḥṣan* in exact terms means that one has married and consummated. As a condition to be *muḥṣan*, he has to be a free and sane man, whereas his partner needs to be also a free-woman [not slave].

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354 *Ḥudūd* is the plural of *ḥadd*. Literally, it is a verbal noun which means to prevent. It is also used as noun for the things meaning barrier or preventer. These punishments in the *Sharīʿah* are named as *Ḥudūd* as it prevent people from its affirmed crimes.

355 *Qazf* literally means to throw. Technically, in the *Sharīʿah*: to throw (accuse) a person to other the crime of adultery, like his saying: Oh adulterer, or oh adulteress, or you do not belong to your father. So, the last statement here is the *qazf* for the mother of the addressee.

356 *Ḥirābah* is robbery which is pillaging, plundering and killing.

c. Cutting off the hand from the wrist is the punishment for theft.

d. The punishment for banditry is what was explained in the Holy *Qur'ān*, Sūrah al-Mā'idah, 5:33-34: *"The recompense of those who wage war against Allāh and His Messenger and do mischief in the land is only that they shall be killed or crucified or their hands and their feet be cut off from opposite sides, or be exiled from the land. That is their disgrace in this world, and a great torment is theirs in the Hereafter. Except for those who (having fled away and then) came back (as Muslims) with repentance before they fall into your power; in that case, know that Allāh is Oft-Forgiving, Most Merciful"*.

As what is obvious from the verses above, it was told when interpreting these verses that the religious authority (*imām*) may choose whichever among these four as the punishment of bandits, and it was also noted that the authorities have to select the most appropriate repressive and reprimauding measure, that he should not be negligent by choosing very slight punishment for a serious offence.

This type of interpretation provides ample opportunity thereby to take the context into consideration while enacting the punishment.

However, as per the prominent jurisprudential view, this explanation is dispersed into different situations:

If a bandit has committed the crime of killing, he should be murdered.

One who has committed killing and robbery should be hanged to death.

One who has stolen that what amount to stealing, but did not commit the crime of killing should be punished by cutting off one hand and a leg in cross (right hand and the left leg), and as a criteria, while amputating it should be noted that the rest of his hand and leg are healthy that he would not be let for no benefit.

The one who was captured before committing robbery or killing should be banished from the country.

This is also true according to the Ḥanafī *ijtihād* as well, where banishment is interpreted as imprisonment, whereby the person is kept away of the social environment (see *Aḥkām al-Qur'ān* by Abū Bakr al-Rāzī al-Jaṣṣāṣ, and also *Tafsīr Fakhr al-Rāzī*).

Repentance of bandits before they were caught would cause the punishment to be dropped. However, if he had committed

murder, he will be punished for that; that we are explaining later. But if he had committed robbery, then, he is obliged to return the robbed property or its surety.

For more details on the criteria, refer to elaboration by jurisprudents in the section of robbery (see *Radd al-Muḥtār*, v. 3, pp. 212-215).

49/3 Criteria Entailing Punishments on Crimes

The criteria with regards to attributions and the manner of perpetration which entail punishment on crimes are many, and there are different *ijtihādāt* on them. They are explained accordingly in the respective places in the books of jurisprudence. Thus, the punishment for theft, for example is on the criteria that the stolen object should worth the value of specific wealth, where the stealing occurs secretly from the safe-kept place. Thus, robbery, looting publicly and denial of entrust property or loan are excluded from theft.

49/4 The Effects of Doubts on Averting Punishments

As a criterion for enforcing pnnishment generally on whatever crime, if the offender had committed it dubiously for any semi-reasons or reason that would lessen his obligation, as in the case of a person who commits adultery, theft or drunk but not knowing that they are prohibited, or the creditor stole from the indebted person's wealth what equals to the former's debts, even in the case where the debt was deadlines, or in case where either partner stole from the other, or a person stole from any of his relative by blood for in these cases they usually would interact with each other or would enter the bouse of the other, that the criterion of safe-keeping is not realized, thereby the case of doubt would avert the punishment.

The basis of this opinion is the saying of Prophet Muḥammad (s.a.w.): *Repulse the punishment, if there is uncertainty.*

He also mentioned: *Repulse the punishment from the Muslims as far as you can. If there is a way, then make him free because the ruler's mistake in forgiveness is better than his mistake in giving punishment.*[357]

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[357] Narrated by al-Tirmidhī in the chapter of *Ḥudūd* (1424) and he weakened its chain of narration. Also narrated by al-Ḥākim in the chapter of *al-Mustadrak* (4/384) said: Its chain of narration is correct but Jahabi made critique on this. Also Dāraquṭnī has

This means the judge will prioritize the extent of the accused person whenever there is doubt. This is what the theory of jurisprudence of crimes and its laws have resolved.

Our Islamic jurists have elaborated more on the range of doubt that drives away the punishment pondering on the indication of the Ḥadīth that is narrated from Prophet Muḥammad (s.a.w.). Even they argue that only the claim of doubt itself in committing the crime will drive away the punishment without any necessity of proving this claimed doubt (see *Radd al-Muḥtār*, 3/150).

49/5 The Conditions of Proving These Types of Crimes

These crimes which require *Ḥudūd* punishment requires specific conditions to be proven in front of the judiciary which are different among each other and more than the conditions imposed in any other laws. It is explained in details in the section of Testimony (*shahādāt*) in the books of jurisprudence.

The crime of fornication which is in it characteristics and conditions requires *Ḥudūd* punishment, is very difficult to prove. Specially, when the allegor is not able to prove the crime then he will be considered as *qāzif* (false accusor) and will be punished by the penalty of *qazf* (false allegation), except if the alleger is her husband and start accusing continuously and cannot prove it, then, he will not be punished by the penalty of *qazf* (false allegation). In this case, the wife would be sought for and *talāʿun* (cursing one another) would be running in front of the judge. The consequence of the *talāʿun* (cursing one another) is separation between them by the judge.

Al-Liʿān (cursing one another) is a specific numbers of oath. The husband who has accused his wife will swear that he is true and his wife will swear that her husband is false.

49/6 When these crimes is proven by the acceptable evidences of the *Sharīʿah*, the punishment becomes compulsory and then forgiveness by the victim is not permissible and compromise from the ruler is not permitted too because it is the right of the *Sharīʿah* which is called *ḥuqūq Allāh* (the right of Allāh). This is because establishing

narrated this in his *Sunan* (3/84). Also al-Bayhaqī in his *Sunan* (8/238) and its chain of narrators is weak as Yazīd ibn Ziyād is a weak narrator. A group of companions (*ṣaḥābah*) have verified the meaning of this *ḥadīth* (see *al-Maqāṣid al-Ḥasanah* by al-Shakhāwī, p. 30).

this punishment is related to protecting the fundamental elements of the Islamic social order. This is protecting the five indispensable objectives: religion, life, intellect, offspring and property.

Among all these types of punishments the punishment for *qazf* (false allegation) is different because the *ijtihād* (Judgment of the scholars) of Islām is almost unanimous that this punishment is not only the right of the *Sharīᶜah* but it involves the right of the *Sharīᶜah* with the individual right. For this, there made condition to establish this punishment that it requires personal claim from the *maqzūf* (wrongly alleged person) if he is alive or from his ascendants or descendants if he is dead in the time of *qazf*. The punishment can be driven away too by their forgiveness.[358]

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[358] Professor Subḥī al-Maḥmaṣānī said in his research about the punishments in *Sharīᶜah* which is as follows:

It is necessary to mention secondly that it is not possible to measure the punishment by one stable measurement, but it is related to time and place where it is applied. When some people do not clarify a part of this it does not mean that it is not suitable even in the contemporary age.

So, cutting off the hand of the thief, likewise other *Ḥudūd* will not be implemented except after deliberation or inspection or maturity of the judge, and it will be repulsed by doubt. There is no doubt that it was necessary in the Arabian society and certainly it is sill beneficial and useful in so many places today. The news which comes out from the Hijaj country supports this as theft has become rare in that place after the government of Saudi Arabia obligates the implementation of the Islamic punishment (see *Yaqaẓat al-'Arab* by George Antonius, translated in Arabic by the teacher al-Rikabi from Damascus p. 379 onwards.

The expert in the penal field is certain that this type of punishment is necessary for the professional thieves in our contemporary age when it is proven that the modern punishments do not fulfill its purpose.

What is your opinion about a thief who is famous and professional who is sentenced to the punishment then he prides for his skill of stealing then when he comes out from the jail then he does not hesitate to repeat this immediately? So will it harm the Islamic society if they destroy this sinful hand and prevent him from repeating and continuing it and deter the others by this? Will the social organization will be considered as cruel if it protects itself in this way necessarily and being hopeless from disciplining the mentioned examples?

I claim some experience in that (most specifically I spent seven years as a judge for penal investigation in Beirut) and I am satisfied with what I said.

After that the slashing and beating punishment which some named as "al-Mudah" (style) to Muḥammad (s.a.w.) it is also the style of other civilized person today. So, among the English still today, even though their advancement in development and civilization, they rule by lashing on the thieves and vagabonds and some criminals and crimes and other numerous cases (you will see the most important cases in the book *"Principles and Practice of Criminal law"* by S. Harris, London 1926, p. 420).

I think it is accurate to remain these penalties in the modern laws to discipline those group of criminals to whom the mild punishment does not bring any benefit (from the book, *al-Naẓariyyah al-'Āmmah lil-Mūjibāt wal-Wuqūd fī al-Sharīᶜah al-Islāmiyyah* by al-Mahmaṣānī, 1/120-123 with slight summarization).

49/7 Caution

There should be warned from an important matter that the meaning of repulsing the *Ḥudūd* punishment is to drive away the specific form of punishment but not driving away the general right of the original punishment. So, driving away the punishment does not contrary with punishing the actor with another punishment which is lesser then the *Ḥudūd* punishment like *Ta'zīr* (disciplinary punishment). Specially, when the punishment is repulsed for doubt then the actor deserves disciplinary punishment.

So, according to the scholar's views, there are two types of rights in *Ḥudūd* punishment:

- The right of the public in the original punishment to discipline and deter the things which are a form of violence that causes harm to human beings.
- The right of Allāh the Almighty that means the right of the *Sharī'ah* on the fixed form of punishment.

See *Radd al-Mukhtār*, the beginning of *Ḥudūd* 3/40 quoted from *Sharḥ al-Ashbāh* by al-Bīrī).

So, holding off a form punishment does not insist to drive away the original punishment which is related to the general right for the welfare of the society (see para 49/15).

TOPIC TWO: *AL-QIṢĀṢ*

49/8 Literally, *al-Qiṣāṣ* is derived from *iqtisās al-athar* which means to follow or to chase. Then it is begun to be utilized as the meaning of executing the murderer as it involves the meaning of pursuing the consequences of blood by punishment (*al-Miṣbāḥ, Mufradāt al-Qur'ān* by al-Rāghib al-Asfahānī)

Execution through *Qiṣāṣ* is called *Qawada* (Tying)[359] as there was a tradition to tie the murderer by rope or similar things to *Qiṣāṣ* (*Radd al-Mukhtār* 5/340).

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[359] It is said: The judge has tied the murderer with the murdered when he kills him as *Qawad* meaning as *Qiṣāṣ*. The judge has summoned the murderer and then drived from him meaning took *Qiṣāṣ* from him for me *(al-Miṣbāḥ)*.

In the language of the *Sharīʿah*, *qiṣāṣ* is to punish the criminal for the willingly crime of murder or cutting or wounding with the similar thing.

The *Qur'ān* has legislated the *qiṣāṣ* for lives[360] as Allāh said: "*O ye who believe! the law of equality (qisas) is prescribed to you In cases of murder*" (al-Baqarah, 2:178). Then, He mentioned the wisdom and social consequences as He said: *In the law of equality (qiṣāṣ) there is (saving of) life to you, O ye men of understanding; that ye may restrain yourselves*" (al-Baqarah, 2:179).

So, He informed that the growth of good social life by stopping bloods and protecting lives and bodies from violation, relies on the *qiṣāṣ* which involves establishing the absolute justice and protection of human blood from being insulted by the aggression on them, so that the offender of other persons life or bodies knows that he is actually offending on himself equally at the end through *qiṣāṣ*. Therefore, at that time he will scare to proceed to the devastative crime concerning on his own life. Indeed, the continuous reality informs that, all kinds of punishments which are not equivalent to this horrible crime like imprisonment or fining or others actually ease committing crime because, the criminal is assured that he will be sound, luxurious and delightful at the end. Likewise, this will keep the scurf remaining in the heart. It will lead the relatives of the murdered planning to take personal revenge, and then the crime will have a stimulating tail.

So, one who has lost his eye or his hand is cut off by the aggressor criminal and sinner willingly and offensively, how does he tolerate when he sees that the criminal looks by the two eyes or enjoys with the two hands.

During the period of ignorance, killing a person used to lead extirpation of the tribe all together as a revenge. Then the order of *qiṣāṣ* was introduced as a curer, remedy and preventer from transgression.

When it is said that – what some modern strange theories believe - actually the offence over the individual is destroying hnman blood. So, it is compulsory to compensate what has been destroyed according to our ability. We should not add more destruction on the criminal that we usually do with the intention of *qiṣāṣ*. The answer is

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360 On the other hand the scholars have disagreed on the source of proof for *Qiṣāṣ* of organs whether it is the *Qur'ān* or *Sunnah*? The reason for this disagreement is the verse in the *Qur'ān* that includes this indeed narrates what Allāh has legislated in *Tawrah*.

that the next destruction cannot be prevented by leaving the *Qiṣāṣ* but it will increase rather by the people themselves with an unjust way. So, it is good for us to avoid the massive arbitrary destruction that creates chaos with a minor one which is expected by justice and that is with the similar punishment. There is no other way for protection without this, because nothing can stop the thrower from throwing his arrow except his certain knowledge that this arrow will be thrown back to his chest (see para 49/11).

49/9 Classification of *Qisas* and its conditions

It becomes obvious from the definition of *qiṣāṣ* that it is of two kinds: ***qiṣāṣ* on the individual** and that for the crime of murder and another kind is *Qiṣāṣ* on the human organs and that is for the crime of cutting and wounding.

Generally, three conditions are imposed for the crime that ensures *qiṣāṣ*: Aggression, intention and the possibility of equalizing the crime with its *qiṣāṣ*:[361]

- So, when the aggression does not exist then it is not crime and there is no *qiṣāṣ* for it, i.e. committing murder by the lawful defending right.
- When the intention does not exist then it is mistake, so it requires financial compensation not the *qiṣāṣ* that we will see. Sometimes, it requires minor punishments for the negligence of being cautious or without being careful.
- When it is not possible to equalize the crime with the punishment or it is doubtful to equalize the crime with the punishment for example, if it is scared that applying the punishment will go beyond the quantity or nature of the punishment then the *qiṣāṣ* would be removed (see para 49/12).

49/10 This condition of similarity manifests its consequences in the *qiṣāṣ* on Human organs. So, the punishment will not be applied except wherever it is possible to establish this condition of similarity like gouging out the eyes, cutting off the hands from the joint,[362]

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361 Based on this, *Qiṣāṣ* is called 'equalizing" then it is said in the tongue: the judge has equalized from some one to some one when he takes *Qiṣāṣ* from one for him.

362 It is noticed that the judge should take planning to stop bleeding by the possible medical way.

plucking out the tongue. However, in contrast, the punishment will not be applied in breaking down the bones and cutting off the hands which is not from the joint because these are lacking the possibility of attaining the *qiṣāṣ* which is not to exceed from the quantity of the crime in the punishment

Likewise, a healthy hand cannot be cut off as *qiṣāṣ* in return of a paralyzed hand because of lacking similarity between them in terms of usefulness.

The schools of *ijtihād* have disagreed much on the limit of this punishment.

This is why the aspects of agreements on the *qiṣāṣ* of organs are very narrow. The *ijtihād* of the Ḥanafīs makes it more confined and according to them the *qiṣāṣ* will not be imposed except after creating the injured part so that the consequences of the injury can be known.

After that the *ijtihād* of the Ḥanafīs on *qiṣāṣ* on individual is more extended in imposing the condition of similarity. They think that *qiṣāṣ* will be established on every perpetual innocent individual when the murder occurs with intention without differentiating the cause of freedom or race or religion. So, a free person can be killed in return of a slave, a man against a woman, a Muslim against non-Muslin, a sane against a madman, an adult against an infant, a group of people against an individual as because of the equality of human personal sanctity (see *Bidayat al-Mujtahid* 2/331-342, and *Radd al-Mukhtār* 5/342-344 and 353-360).

49/11 The Meaning of *al-'Amad*

The meaning of *al-'amad* in the *Sharī'ah* is intending to commit the crime that has been occurred even though the person does not have any preconception or determination. So, the intention in murder is that the murderer will intend to means and features that will reach to the victim and the victim will die with this. This is adequate for the murderer to be punished by *qiṣāṣ* and it is similar whether he plotted himself the idea of the crime and was determined with previous planning and preparation or his intention was instant or improvised at the time of committing the crime.[363]

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[363] Professor Ṣubḥī al-Mahmaṣānī said in his research on *al-Qiṣāṣ*: The meaning of will (*'amad*) in murder is to intend even though there is no preconception or predetermination, and its penalty is *Qiṣāṣ* in Islamic sharī'ah and in so many modern and classical legal systems. Likewise, in the English law preconception and

49/12 When *qiṣāṣ* is repulsed from all kinds of unlawful offences on the individual or body because of the absent some conditions the criminal will be punished by *ta'zīr* (penalty) which not fixed but the judge is authorized to decide the punishment that he things sufficient to recover the offender. [The similar discussion is passed in the punishment of *Ḥudūd* (paragraph 49/8)] Also the offender is obliged to pay finaucial compensation:

These are *Diyah* or *Arsh* or *Ḥukūmat al-ʿAdl* and it is based on the type of crimes.[364]

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predetermination is not the condition to get the capital punishment (see *Punishment law* by Harris, p. 147).

We see it as just or which is just except this? Rather we thing it is necessary to reduce the murder offence and to protect the people in the society.

However, some penal laws and among them two legal system which are classical Osmai law and new Lebanese law imposed the will (*amd*) meaning preconception and predetermination as condition for executing the the murderer (from the book, *The Obligations and Contracts in the Sharīʿah* by the indicated professor 1/141).

I say: Indeed, the lawmaker of Osmani penal law and Lebanese law have gone along with this and imitated the French law and other foreign law without any proof by the influence of some foreign wild blind doctrines. Based on this the law has differentiated between *Amd* (willing) and *Qaṣd* (intention). They imposed condition for *Amd* (will) to be gotten execution to have the determination for the crime in the heart of the offender by preconception and preintention. On the other hand, if the criminal makes *Qaṣd* (intention) with the instant improvised determination then it will be *Qaṣd* (intention) not the *Amd* (willing).

The law has made punishment for the *Qaṣd* (instant intended) murder fifteen years of imprisonment. With this, they have opened the floor to spread out the murder punishment with its most extended ranges for the insignificant motives. It has become like every shedder of blood criminal threatens publicly to everyone that he will kill him and sleep fifteen years in one side. It is a matter of sorrow that the new Syrian law which has come out now on the 26th of Shaʿbān in the year 1328 A.H. (22th June 1949), the law makers have also followed this wrong doctrine to differenciate between *Amd* (pre-willed) and *Qaṣd* (instant intended) in the codes 533-535. It is enough from the 95 years practice under the previous Ottoman law to prove that this separation was the biggest agent to make the murder crime to its actors less important than drinking water. Particularly, with the hope of the criminals with the continuous occurances that evey time the prisoner passes his period by removing from him a big part which is the repeated forgiveness in several national cases then the murderer comes out and walks around like a snake infront of the victim's family whose blood has gone in vain!

These consequences lead the family of the murdered to will to take revenge by ther hands. All of these things are the consequences of altering the law in the murder of *Qaṣd* (instant intention) by temporary imprisonment in lieu of al-*Qiṣāṣ* of the sharīʿah for which the *Qur'ān* says: "*In the law of equality (Qisas) there is (saving of) life to you, O ye men of understanding; that ye may restrain yourselves*" (al-Baqarah: 179).

364 However, the *Qur'ān* has obliged in the *Qatl al-Khaṭa'* (mistake murder) in addition to financial compensation other ritual punishment which is a kind of religious supportive ruling called *kaffārah* (penance).

- *Al-Diyah*: It is performed by money in lieu of life.
- *Al-Arsh*: It is performed in lieu of the organ. It means it is the *Diyah* for the organ. The amount of both the *Diyah* for life and the *Diyah* for the organ is specified by the *Sharīʿah*.
- *Ḥukūmat al-ʿAdl*: This is financial compensation which is decided by the judge for the crimes of aggression on the body like wounding or breaking where the *Diyah* is not fixed by the *Sharīʿah*.

These financial punishments will also include the compensation for the damages of the victim or his inheritors.

49/13 The Procedure of Executing *Qiṣāṣ*

In *qiṣāṣ*, it is not to be taken into account on how much the criminal has tortured the murdered. However, it is restricted to killing the murderer by chopping off his neck by the sword. This is the *ijtihād* of the Ḥanafīs and Ḥanbalīs.

There is no prohibition found in the *Sharīʿah* in utilizing other means, if it is similar to the sword like guillotine or other things which is easier and faster to kill. The matter of choosing the means for execution depends on the ruling authority which should not involve violence or tortnring and wildness as the the Prophet (s.a.w.) said: "*Indeed, Allāh has prescribed al-Ihsan (perfection) on every thing, so when you execute then execute with al-Ihsan (perfection) and when you slaughter animals then slaughter it with al-Ihsan (perfection)*".[365]

49/14 The legal guardian of the murdered if his wishes has the right to be the executioner who will be appointed by the authority to establish the death sentence on the murderer under the supervision of the execution authority if he is capable of doing this perfectly.

Kaffārah (penance) is a form of freeing a believer slave. He who cannot get this will keep fast for two month successively. It is religiously obligatory and the judiciary does not have authority on this rater it is left on the liability of man, *Takfīr* (expiation) is removing the sins for negligence which is related with the mistaken murder and to purify himself from this.

365 Narrated by Muslim (1955), al-Nasāʾī (4405), Ibn Mājah (3170) from the *Ḥadīth* of Sadad ibn Aws (May Allāh be satisfied with him). *Qitlah* and *Jibhah* are the forms and mechanisms of executing and slaughtering. This *Ḥadīth* is among the forty *Ḥadīths* (*Arbaʿīn al-Nawawiyyah*) and it has comprehensive explanation in the book, *Jāmiʿ al-ʿUlūm wal-Ḥikam* by Ibn Rajab, 1/379-394.

The legal guardians of the murdered are the inheritors in accordance with the succession chain until the spouses. This operation is best healing for the pain of the victim without causing harm to the condemned person or to the social order as the executioner is necessary to carry out the death sentence and that would be the legal guardian of the murdered if he is willing to do it.

Also, in this *Sharīʿah* policy, there is a wise method. While it is a healing for the pain of victim then it is also the source of mercy and kindness of the guardians of the murdered on the execution. Maybe while he will stand on the place of the executioner then he would be afraid of shedding bloods and forgive the murdered. At that time the punishment of *qiṣāṣ* will be removed and the sentence will be decided by the adjudication of the authorized judge but not by the predetermined punishment what we have discussed before (para 49/12).

This is the ruling of Islām related to the right of the guardians of the murdered person in implementing *qiṣāṣ*. It is not like what some ignorant or intriguer people think that the *Sharīʿah* requires submitting the murder to the guardians of the murdered person so that they can do with him whatever they like.

49/15 Characteristics of *Qiṣāṣ* and the Right of *Waliy al-Damm* (the Guardians of the Murdered Person) in Forgiving

Qiṣāṣ differs from *Ḥudūd* punishment in the fundamental extent and that is the right of forgiving for the victim or the guardians of the victim is legislated in *qiṣāṣ*; the *qiṣāṣ* will be removed by their pardon. On the other hand, forgiveness is not permitted in *ḥudūd*.

This is why the jurists consider that the *qiṣāṣ* involves two parties right in the punishment:

- The general right of the *Sharīʿah* in the basic punishment is to deter mankind from committing this crime and ensuring peace in the society.
- Individual right of the victim in the nature of the punishment and that is, the *qiṣāṣ* will be similar to the crimes of the offender that he committed. This right is shifted to the guardian of the victim and they are his inheritors.

This is why the sentence of *qiṣāṣ* and its implementation depend on the allegation and claim from the holder of specific right. So,

while they forgive, the *qiṣāṣ* is removed as this kind of penalty is their right. However, the general *Sharīʿah* right for the ruling authority will exist to punish the offender and they will punish him as they feel adequate for deterrent.

When the murdered person does not have any inheritor then the right of *qiṣāṣ* moves to the judge and he does not have the forgiving right as it causes harms for them.

In this way the *Sharīʿah* has followed the middle way in the matter of *qiṣāṣ* where the other legislations have differ from one another in terms of extremism or flexibility as it includes hazard.

49/16 As there are different types of *ijtihād* on this level, some scholars believe that the forgiveness of the *waliy al-damm* will remove the punishment at all. In line with this, the general right of the *Sharīʿah* for the punishment of the murderer will be subjected to the individual right there.

This is how people misbelieve nowadays that the *Sharīʿah* has failed to get the thought of universal right in punishment of murder!

This is a great mistake because only one different view of *ijtihād* does not necessarily represent the notion of the *Sharīʿah* and the truth cannot be determined by this in understanding the text (*naṣṣ*) but merely represents the opinion of the person in the disputed aspect.

The fact on this case is the other views of *ijtihād* that we have clarified just now that the right of the *waliy al-damm* includes the nature of the punishment. On the other hand, the right of the *Sharīʿah* on the root of the punishment will not be removed by the forgiveness of the victim or his inheritors because removing the nature of punishment does not require removing the root of the punishment as mentioned before.

This understanding is certified by the norms of the *Sharīʿah* and its general objectives that require taking down the specific provision from its place. For this, if the murdered person does not have any inheritors then the right of the *qiṣāṣ* refers to the ruler and in this situation the ruler does not have the right to forgive that we mentioned just now.

Indeed, the sayings of the jurists are obvious and extensive on that the *qiṣāṣ* includes particular right of the individual and the general right of the *Sharīʿah* (see *Kashf al-Asrār Sharḥ Uṣūl al-Bazdawī*, 4/161).

One of the obviously true decisions of the jurisprudence of the *Sharīʿah* is that the general right of the *Sharīʿah* cannot be driven away by any individual. Therefore, the punishment for theft for example, cannot be driven away by the forgiveness of the person whose goods are stolen and similarly in other punishments as it is a general right.

We will see shortly that in the *taʿzīr* punishment for beating and scolding and like them, if the victim forgives then according to the jurists his forgiveness will not remove the right of the ruler to punish the offender with adequate punishment for disciplining and deterring under the provision of public interest (see para 50/5). So, in the offence of murder that will be with priority.

After this, the *ijtihād* which follow this true direction have disagreed on delimiting the punishment of the murderer when the possessor of *qiṣāṣ* forgives. So, Mālik and Lays ibn Saʿd and the inhabitants of Madīnah believe that the offender will be punished by slashing and imprisonment. Their argument on this fixation is a narration from ʿUmar ibn al-Khaṭṭāb.

Others believe that his punishment after forgiveness is authorized to the judge that he feels appropriate among the punishments (see *Bidāyat al-Mujtahid*, the last section on *Mūjib al-Qiṣāṣ* 2/338; *al-Mughnī* by Ibn Qudāmah al-Ḥanbalī 9/468).

The last opinion is the exigencies of the maxims of the Ḥanafī School of law.[366]

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[366] Professor of Islamic law at Law School, Cairo, Shaykh ʿAbd al-Wahhāb al-Khallāf (may Allāh bestow His mercy upon him) said in his lecture on "Islamic law is the suitable source for the modern legislation":

"The theory of the *Sharīʿah* - meaning the right of the family of the murdered to forgive from *al-Qiṣāṣ* - is based on that the crime of murder has occurred on the victim and his belongings and on the social organization and laws. Based on this, the punishment of the murdered is the right of them both. This is the meaning of the jurists saying: (In *Qiṣāṣ*, there is right of the slave and the right of Allāh). Based on this, when a willingly offensive murder case is proven and the family of the murdered claimed the *Qiṣāṣ* from the murder then to take *Qiṣāṣ* from him is compulsory. However, if they forgive then their right of *Qiṣāṣ* is dropped away but the right of the government to punish him according to his willing is not dropped away. In my opinion this Islamic concept is natural concept which is supported by the nature of human being because the crime has occurred on victim and his family directly so, it is not just to neglect their parts. But the justice is to take care of their feelings: so, if they claim *Qiṣāṣ* then it contains the cure of their hearts and putting out the fire of rancor from their hearts. If they forgive then it deserves consideration and assessment because certainly it is necessary for them to call for it.

Their taking out of the right do no prevent the government to accomplish its right by punishing the murderer as a revenge for the society and its order.

SECTION 50

THE PRESCRIBED PUNISHMENT: THE MANDATORY PUNISHMENT

50/1 The literal meaning of *taʿzīr* is to prevent, to discipline.[367] Its technical meaning in the jurisprudence is to punish the offender by the penalty which is lawfully the rulers are authorized to determine its nature and quantity.

This includes all kinds of crimes and prohibited activities that require warning and disciplining except the *ḥudūd* and *Qiṣāṣ* offences.

The vision of the *Sharīʿah* on this classification of punishment is that the crimes are not confined, sometimes there may occurs new forms of crimes which were not familiar before. Sometimes, a familiar crime may have different form of image and style that requires another procedure for prevention. This is why the *Sharīʿah* has specified among the widespread crimes the most peace breaching for the Islamic basic social order and those are the exigency of *ḥudūd* which he defined the punishment. Other than *ḥudūd*, he left the authorization of arranging and delimiting the punishment to the general rules, they will delimit the punishment according to the crimes following the variety of time, places, individuals and the level of the discipline of the society.

On the other hand, the concept which is based on that the crime is occurred only on the society and there is no regard on the victim then it is a concept of imagination which is far from the nature of the human hearts. It is just to take care of the both, the part of the family of the murdered and the part of the government that stands for the generic representation. And with this there is combination between the two parts" (see his lecture in *Majallah al-Qānūn wal-Iqtiṣād al-Miṣriyyah*, year 10, no. 3).

For the details about the chapter on *Qiṣāṣ* in the comprehensive Egyptian publications, see *al-Qiṣāṣ fī al-Sharīʿah al-Islāmiyyah* by Dr. Aḥmad Muḥammad Ibrāhīm. This is a valuable thesis by which he achieved the Doctoral degree in the Faculty of Law in Cairo; and *al-Qiṣāṣ fī Fiqh al-Qur'ān wal-Sunnah* by Shaykh Muḥammad Saltūt who is the member of the community of the great scholars in Egypt and the former Sheikh of al-Azhar.

[367] It also comes as the meaning of help because it contains prevention and retraining and based on this what is in the *Qur'ān*: *"so it is those who believe In him, honor him, help him, and follow the light which is sent down with him,- it is They who will prosper"* (al-A'raf: 157) (see *Mufradāt al-Rāghib* and *al-Mughnī* by Ibn Qudāmah al-Ḥanbalī 10/347).

Among the people there are some who refrain themselves from crimes by warning or slight rebuke and for some it is not enough then nothing is adequate for them except extreme punishment. Therefore, the judge should punish by different types of punishments on a single deed according to the difference of individuals and the level of influence by the punishment (see *Fatḥ al-Qadīr, Sharḥ al-Kanz* by al-Zaylaʿī in *Bāb al-Taʿzīr*; *al-Durr al-Mukhtār*, 3/179)

50/2 *Taʿzīr* can be whatever the ruler observes from any one of the lawful punishment, which contains disciplining not torturing, from slashing or imprisonment or boycott or financial punishing[368] which is called nowadays financial penalty *(al-jazā' al-naqdī)* or financial fines *(al-gharāmah al-māliyyah)*. It is possible for *taʿzīr* to be death penalty.

The Ḥanafīs proclaimed that the least punishment of *taʿzīr* is to look askance at the offender or to say to him: "It has come to my knowledge that you are like this". If the crime is small mistake and the convict is an honorable and high-minded and for them, it is adequate for deterrent. The highest punishment of *taʿzīr* is capital punishment if the crime is serious and to cope with this crime among the people it requires this severity, like the crime of doing business of drugs. This is decided by the *ijtihād* of the Ḥanafīs.

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368 The classical jurists have disagreed on the permissibility of *taʿzīr* by taking money, meaning financial penalty, this is because they scared that by this the oppressing rullers would dominate over the public's property. They will take this in the name of punishment and after that eat this. Qāḍī Abū Yūsuf belives that it is permissibl (see *Radd al-Mukhtār* 3/178).

Muḥammad ibn Muḥammad al-Qurashī who is known as Ibn al-Ukhuwwah has reported from the Shafiʿī jurists that Imām al-Shafiʿī obligated some defined financial fines as punishment for committing some crimes. He provided evidence for that what is narrated from the prophet (peace be upon him) that he said about the *Zakāt* of camels: "In every forty livestock camel, it is compulsory to donate one bint labūn.........., who gives this expecting the reward, then, he has rewads for this and who will restrain from this then we will take this from his property as it is the firmness of our lord Allāh the Almighty, and there is nothing for Muḥammad and his Family from it".

See chapter 50 of *Maʿālim al-Qurbah min Aḥkām al-Ḥisbah* by Ibn al-Ukhuwwah. This is the most extended and important writings among the jurists on *Ḥisbah*. The great author has arranged this with seventy chapters. The orientalist Robin Louis has published this through Dār al-Funūn Press in Cambridge, England, and provided a comprehensive introduction in English. The *ḥadīth* is narrated by Aḥmad and Abū Dāwūd and al-Nasā'ī and al-Albānī considered this *ḥadīth* as good *(ḥasan)* in *Ṣaḥīḥ al-Jāmiʿ al-Ṣaghīr*.

I say: There is no doubt today that when the financial penalty is registered and its realization is subjected to accountability organization and the money goes to the public treasury then that danger does not remain anymore.

It is narrated from ʿUmar ibn ʿAbd al-ʿAzīz that he said: "Punishment will be commenced for people according to the more new types of crimes they create".[369]

ʿAlī ibn Abī Ṭālib introduced (may Allāh give him nobility) prison to imprison the offenders.

50/3 The great jurist Abū al-Ḥasan al-Māwardī has narrated the opinions of some *Mujtahid* and the people of his school on delimiting the punishment of *Taʿzīr* in some crimes and charges depending on the strength of crimes and charges. After that he said: "Even though this fixing up looks pleasant apparently but it is empty of accuracy from the evidence by which it is determined" (see *al-Aḥkām al-Sulṭāniyyah* by al-Māwardī, the chapter of *al-Taʿzīr*).

That means fixing up some of those *Taʿzīr* punishments by the jurists which he mentioned is just for showing the way for the judges and the rulers but it is not an obligatory fixatiou that relies upon evideuces from the source of the *Sharīʿah*. Indeed, the right of determiniug the punishmeut for *Taʿzīr* is legally goes to the ruler in accordance with the interest of time.

Except in the slashing puuishment the *Sharīʿah* has specially fixed the topmost quantity that should not be exceeded. The jurists have proclaimed that it is not permitted to reach the quantity of slashing in *Taʿzīr* punishment to the minimum quantity of *Ḥudūd*[370] punishmeut but it should be less thau that even though by one lash. As the messenger of Allāh (s.a.w.) said: *"whosoever reaches the quantity of Ḥudūd punishment without the prescribed Ḥudūd crimes, he is one of the transgressors"*.[371]

But it is possible to intensify by adding another punishmeut with the slashing like imprisoumeut or fining for example.

Imām Mālik talked about the permissibility of exceeding the *Taʿzīr* punishmeut more thau the *Ḥudūd* punishment if the domination requires that. He mentioued as evidence for that what is

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369 See *Muʿīn al-Ḥukkām* by Shaykh ʿAlāʾ al-Dīn al-Ṭarābulsī al-Ḥanafī, the third part of ruling with Islamic politics p. 217. Similar words are narrated from Ziyād in his famous manifested lecture (*khuṭbah*).

370 The minimum Quantity of *Ḥudūd* is forty slashes as it is the punishment for slaves for false allegation of adultery (*Qazf*) and drinking Alcohol, their punislunents in this *Ḥudūd* cases is half of the free man.

371 Narrated by al-Bayhaqī in his *Sunan* (8/327) from the *Ḥadīth* of Nuʿmān ibn Bashīr (may Allāh be pleased with him).

narrated from Maʿan ibn Zā'idah[372] that he counterfeited the seal of the treasury (*bayt al-māl*) and brought it to the custodian and took goods by that. After that 'Umar (may Allāh be pleased with him) got to know about the matter and then slashed Maʿan ibn Zā'idah by one hundred lashes. After that he was accused again and then slashed him more hundred slashes and imprisoned him aud he was accused after that then ʿUmar slashed him hundred lashes and banished him (see *al-Mughnī* and *al-Sharḥ al-Kabīr, Bāb al-Taʿzīr* 10/338 and 357, *Fatḥ al-Qadīr Sharḥ al-Hidāyah* by Kamāl ibn al-Hammām 5/116; *al-Iṣābah* 3/538, *Futūḥ al-Buldān* p. 448, *Sīrah ʿUmar ibn al-Khaṭṭāb* by al-Ṭanṭāwī, p. 337).

50/4 As the welfare requires leaving the *Taʿzīr* punishment lawfully on the authorization of judge's opinion without any predetermination, it is compulsory to define the reason that means to define the criminal cases where the individual deserves punishment.

This is done by the jurists, they put up the things which necessitate *Taʿzīr* as a general criteria as they said: *the criteria is that whosoever commits evil deed or persecutes other illegally by words or deeds or reckoning, requires Taʿzīr* (see *al-Durr al-Mukhtār* and *Radd al-Mukhtār* 3/182 and 185)

So, all kinds of crimes that violates the law is included in this criteria and it is similar whether it is the aggression of some people over some other people on their life or properly like beating, scolding, giving threat, counterfeiting, giving false testimony, cheatiug, deception and like this, or it is profaning the sanctity of the religion or promulgated with sins like breaking the fast in the month

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[372] Like this his name is narrated in all sources of *Fiqh* and history which are narrated from him. It is obvious that there is alteration in his name and the correct one is (Maʿan ibn Aws). He was a strong poet who got both the pre-Islamic (*jāhiliyyah*) era and the Islamic era. There are some narrations that he was with 'Umar ibn al-Khaṭṭāb. He was Maʿan ibn Aws. So, maybe it was mentioned in the fundamental sources of history as (Maʿan ibn Ziyād) related to his great grand father then the transcribers understood that he is Ibn Zā'idah because of his fame, they did not notice that Ibn Zā'idah is the one who got the era of the Umawid and Abbasid and died in the year 150 A.H. as it is described in the Shadharāt al-Dhahab by Ihn al-'Imād al-Ḥanbalī and *Qāmūs al-Aʿlām* by al-Ziriklī and none of them mentioned that Ibn Zā'idah got the age of 'Umar.

The author of *al-Iṣābah* has narrated this story in the forth chapter and felt douht on this and mentioned the possibility that Maʿan ibn Zā'idah can be another person by this name. His reports on several narrations in this phase like (a man whose name was Maʿan ibn Zā'idah) supports this point of view likewise the narrations which are narrated by teacher ʿAlī al-Ṭanṭāwī in Sīrah 'Umar.

of Ramaḍān, mocking the religion, calling for atheism, violating the public norms and like this.

Committing evil deeds also involve neglecting the obligations of the religion and teaching and learning is in its basics. So, if the scholar dilutes in teaching obligation or the illiterate person ignores learning the amount of knowledge which is obligatory then they deserve punishments for negligence as the prophet (s.a.w.) said: *It is compulsory for every Muslim to acquire knowledge*.[373]

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[373] Al-Ḥāfiẓ al-Mundhirī narrated in *al-Targhīb wal-Tarhīb* in *Kitāb al-'Ilm*, 1/68: One day the messenger of Allāh (s.a.w.) delivered a lecture and he praised a group of Muslims for good things and after that said:

"What happened to the people that they do not make their neighbors comprehend (Religious knowledge) and do not teach them and do not advise them (good advice) and do not order them (for good deeds) and do not forbid them (from evil deeds)? What happened to the people that they do not learn from their neighbors and do not comprehend (religious knowledge) and do not get lesson from them? By Allāh, surely people teach their neighbors and make them understand (religious knowledge) and give them (good) advice and order them (for good deeds) and forbid them (from evil deeds); and people should learn from their neighbors and get Understood (religious knowledge) from them and get (good) advice from them otherwise I will anticipate pnnishment for them in this world)".

Then, a group of people said: who are these people among us that you see? They said: Among us the Ash'arīs, they are (juristic) knowgable person but they have rude neighbors who are the inheritants of water and Arab desert people. Afte that it reached to the As'ari people and the came to the Prophet (peace be upon him) and said: oh the messenger of Allāh! You mentioned good thing about a tribe and mentioned had thing about us, so, what are our faults? Then, the Prophet (s.w.a.) repeated his warning speech. Then, they said: is it compulsory for us to make other people intelligent? Then he repeated his speech to them again. They also repeated their speech: is it compulsory for us to make other people intelligent? Then, he also repeated his speech to them. They said: Oh messenger of Allāh! Give us one year. He gave them one year so that they make them understand religious knowledge an educate them and give them good advice. After that the messenger of Allāh recited this verse from the *Qur'ān*: "*Curses were pronounced on those among the Children of Israel who rejected Faith, by the tongue of David and of Jesus the son of Mary: because they disobeyed and persisted in excesses. Nor did they (usually) forbid one another the iniquities which they committed: evil indeed were the deeds which they did*" (al-Ma'idah: 78-79).

Narrated by al-Ṭabrānī in *al-Kabīr* from Bukayr ibn Ma'rūf from 'Alqamah (see *al-Rasūl al-Mu'allim* by Shaykh 'Abd al-Fattāḥ Abū Ghuddah (may Allāh bestow upon him) pp. 15-17).

Their speech "Anufaṭṭinna ghayranā" means *"Is it compulsory for us to discern others meaning to make them the owner of Fitnah which is intelligence and knowledge"*.

I would say: This great attitude regarding the negligence of teaching and learning as social crime where the committer deserves worldly punishment, is an attitude that the history did not mention any example for that for the dedication of knowledge before the prophet (peace be upon him) and after him!!

The word 'Muslim' here includes male and female as the ruling is conditional on the common characteristics which is 'Islām'.

50/5 Characteristics of *Taʿzīr* and the consequences of forgiveness in that:

When the crime which obligates *taʿzīr* is a kind of violating the prohibitions of the religion only not aggression over any one from the people then the punishment is the right of the *Sharīʿah* only. When it involves aggression over individual by beating, scolding or other similar crimes then the *taʿzīr* contains two types of rights: One is the right of the individual to get revenge from the actor and the right of the *Sharīʿah* to discipline and deterring.

So, when the victim has the right and he claims revenge then the ruler does not have the right to forgive from the punishment because he does not have the right to drive away people's rights.

When the victim forgives or the *taʿzīr* punishment is given for a case which is the right of the *Sharīʿah*, then the judge should punish to discipline despite the forgiveness of the possessor of individual right. This is because the possessor of the right owns the forgiveness for his own right as the jurists says. Then the right of the authority retains for assessment and refinement (see *al-Aḥkām al-Sulṭāniyyah* by al-Māwardī, the chapter of *taʿzīr*).

For this, the jurists proclaimed that when a person beats other person then the beaten person beats him then both of them will be punished.

Al-Ṭabarī narrated: The leader of the believers, ʿAlī (may Allāh be pleased with him) listened the call for help in the way. Then, he quickly went there and he said: Aid has come to you and the event became obvious to him. One person sold garments by nine Dirhams. Then the seller wished to return some Dirhams because of its defects then the buyer refused and slapped him when he insisted on. ʿAlī (may Allāh be pleased with him) claim evidences of slapping. When it is testified then he made the buyer seated and said to the seller: Take revenge. The seller said: o the leader of the believers certainly I have forgiven. ʿAlī said: you wanted to be cautious in your right. Then he beat the person nine *dirrah* (lashes) and said: This is the right of the Sulṭān (leader) (see *Tārīkh al-Umam wal-Muluk* by al-Ṭabarī, 6/90).

50/6 In the event of forgiveness of the harmed person or the *Taʿzīr* is free from any personal right, it is permitted for the judge to forgive

if castigation of the actor is attained or he tings that forgiveness is most appropriate for him (see *al-Aḥkām al-Sulṭāniyyah; Radd al-Muḥtār*, 3/186-187).

It is obvions that the grant of the *Sharīʿah* for the rulers the right of forgiveness will not be considered except when giving pnnishment is defilement of the concept of public right becanse, this grant is conditioned with the pnrsnance of the interest like what we have observed.

Some beliefs and recent penal laws among us and among the developed nations of jurisdictions today give the chief of the country the special right of forgiveness even though in the most serious punishments like murder and other than this after the adjudication if this forgiveness involves benefit and it is not considered as defilement of the concept of public right.

Indeed, the procedure of executing punishment is deferred execution. This is known as 'sursis' in the legislation of France and 'counted' in the recent procedure of legislation that gathers the protection of the public right and the personal situation and the arrangement of the interests. These procedures are not except the color of forgiveness which the *Sharīʿah* has authorized the ruling judges who will utilize this according to the interests.

50/7 It becomes obvious from the above discussion that the regulation of *taʿzīr* in Islām is a wide-ranging flexible recompensing unrestricted and unfixed law; rather it is suitable to put on in every period according to the feature of punishment and its quantity.

Therefore, the jurists consider *taʿzīr* inside the range of *al-sharīʿah al-sharʿiyyah* which they define as: *Any action of the ruler those he things beneficial even though there is no specific evidence from the Sharīʿah on that matter.*

So, *al-sharīʿah al-sharʿiyyah* is a kind of reclamation which discussion has passed in the subsequent sources of the ruling of *Sharīʿah*. Sometimes, they say: Certainly, the chapter of *taʿzīr* is the liable guarantor for the rulings of *al-sharīʿah al-sharʿiyyah* (see *Radd al-Mukhtār,* 3/148 quoted from *al-Baḥr al-Rā'iq* by Ibn Nujaym).

50/8 Codification of the punishments today is included in the paradigm of *Taʿzīr*

As in Islām, the punishment of *taʿzīr* is authorized to the rulers opinions without the pre-determination then it does not contradicts

and does not prevent determining the punishment and fixing up by different kinds of laws for different kinds of crimes to preserve the rulings and to comply with the demands of the age like what happened in the contemporary age in the penal laws because this fixation is included in that authorization.

Therefore, most of the rulings of the penal law for us today will enter into the class of lawful *taʿzīr* in the eye of Islām except where there is negligence in the *ḥudūd* punishment and violation in the *qiṣāṣ* punishment is some countries.

Though the both maximum and minimum limits is placed in the recent penal law for the punishment of every crimes, it is actually depending the authority of the law makes on the views of the judges and to authorize them with the quantity in which the law making authority cannot get alternatives.

On the other hand, the *Sharīʿah* is made this authorization more extended in range and left the fixation of penalty on the timed authority who will behave in accordance with the time and place. The fixation of punishment in the penal code is in fact establishing the Islamic concept in it by the judges and utilizing their lawful authority in this fixation but in advance before the crime occurs so that the criminal becomes fully aware of the nature of the punishment and its quantity before he proceeds to the crime. It is obvious that this advance fixation is including into the jurisdiction and the lawful delegated authority of this matter.

50/9 Like this, we will end our study in *al-Mu'ayyidāt al-Ta'dībiyyah* with the word of Dr. Ṣubḥī al-Mahmaṣānī where he mentioned about the maxim of *taʿzīr* that:

You see from this that *taʿzīr* in the *Sharīʿah* is a just and flexible way. It widens for the judges the ground of acting in accordance with the public interest that requires deterring the corrupters and disciplining them.

This is another evidence of the *Sharīʿah* that it is not stagnant like what some people accuse. But in contrary, it is capable of development according to the interests of every age. Indeed, *Taʿzīr* is a means like others that permits the judges to extend the performance of the ruling of punishments according to every events and crimes to reach the intended destination in every general punishment and that is to deter the criminal and rebuking the examples to be followed.

Undoubtedly, this is a broad chapter to adapt with the good things of the modern penal codes when it is necessary and to go along with the flow of the civilization and the inconstant social necessity (see *Kitab al-Naẓariyyah al-ʿĀmmah lil-Mūjibāt wal-'Uqūd fī al-Sharīʿah al-Islāmiyyah* by Professor Dr. Ṣubḥī al-Mahmaṣānī 1/131).[374]

I say: We with our judgment see that this defending of the *Sharīʿah* by Dr. Ṣubḥī al-Mahmaṣānī as a weak defense because, it includes – without his intention – partially submitting that the *Sharīʿah* involves stagnancy but not at the level that they think. Likewise, his saying that it is capable of growth is also partial submission of shortcoming in its root.

In reality, this generous *Sharīʿah* which is implemented in everywhere of the world with its wonderful legal system has got along without growth because, it came with the perpetual constant valuable legal principles in the flexible general texts like we clarified in the previous context.

So, the thing which requires growth is not the *Sharīʿah* in its root but that is (firstly) intellectual growth and empirical growth among the ignorant parties and (Secondly) the means of temporal implementation and the understanding of the jurists.

So, the saying of Allāh the Almighty for example: *Allāh doth command you to render back your Trusts to those to whom They are due; and when ye judge between man and man, that ye judge with justice: Verily How excellent is the teaching which He giveth you! for Allāh is He who heareth and seeth all things*. Also, the saying of the Prophet (s.a.w.): *There is no harm and no causing of harm (in Islām)*. These two are the constant basic legislatives which are not possible to develop to the more perfect one in their subjects; in fact, the way of implementation and adjudication through these will develop.

With this we will end up taking about *al-Mu'ayyidāt al-Ta'dībiyyah*, we will proceed to the following *al-Mu'ayyidāt al-Madaniyyah* or *al-Ḥuqūqiyyah* (which are *al-Buṭlān, al-Fasād, al-Tawaqquf* and *al-Takhyīr*).

We have seen that the suspension in the ruling of contracts is a sanction by which it is wished to – Mostly – protecting the right of individuals when their actions are appeared by other person without their representation. Also, *al-Takhyīr* is a sanction where the *Sharīʿah* gives one of the contractors the choice of assuring the balance of

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374 See in the section of *al-Mu'ayyidāt al-Ta'dībiyyah,* our lectures on (the public right in Islam) published in (Law newspaper) which is issued in Halb (Issue 25 year 20) also in (journal of the institute of Syrian law) in Damascus (issue 3 first year).

freewill when the contract is having defects among the two parties because of aggressing the ones interest on others interest without his consent.

As the detailed discussion of *al-Tawaqquf* and *al-Takhyīr* have been passed in the concept of contracts in exploring into types of will and the general effects of contracts in the concept of *'adam al-nafādh* (unfulfillment) and *'adam al-luzūm* (unnecessary), so, here we will be satisfied with indicating their positions in the concept of *al-Mu'ayyidāt* being adequate with what has been past and to emaciate the reader on this.

Our discussion in the next section will be limited to the following sections: *al-Buṭlān* in section 51-53, *al-Fasād* in section 54-57, and we will conclude our discussion on *al-Mu'ayyidāt* in section 58 where we will compare the concept of *al-Buṭlān* in the foreign jurisprudence with the two concepts of Islamic jurisprudence.

SECTION 51

THE CONCEPT OF *BUṬLĀN*

Literal and technical definition of *al-Buṭlān*

1. Factual and legal entity.
2. Its implementation in the verbal and pragmatic activities.
3. To define the causes of *Buṭlān*.
4. Classification of *Buṭlān*.
5. The difference between *Buṭlān* contract and *Infisākh* contract.

Introduction on *al-Mu'ayyidāt al-Madaniyyah*

51/1 Previously, at the end of section 48 we have discussed that *al-Mu'ayyidāt al-Madaniyyah* (civilian supportive ruling) for transactional orders is manifested in the *Sharīʿah* in four modes: *al-Buṭlān, al-Fasād, al-Tawaqquf* and *al-Takhyīr*.

First: Literal and technical definition of *Buṭlān*

51/2 Literally, *Buṭlān* means falling down of something because of its decay. It is said the blood of the deceased become *bāṭil* when it went in vain without any revenge or blood money. From this meaning, a brave person is called *baṭal* as he presents his life or his home for *buṭlān*.

Bāṭil is which does not have any lasting at the time of investigation; from this meaning the opposite of truth is called *bāṭil*. Based on this, Kaʿab ibn Zuhayr said: Whosoever calls people to his defamation, then, dispraise him by true and false.

There is a verse in the *Qur'ān* on this meaning where Allāh said about the worshipers of idol: *"As to these Mutabbar*[375] *(folk), - the cult, they are in is (but) a fragment of a ruin, and vain is the (worship) which they practice"* (al-Aʿrāf, 7:137) also the expression: *"eating up the property with bāṭil"* that means without right.

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[375] *Mutabbar* is the passive form al-Tatbir which means to destroy. *Tabar* is like destruction by meaning and form.

Anything to become *bāṭil* means to become spoiled and to become eliminated whether it is in its base or it is nullified (see *al-Miṣbāḥ, Mufradāt al-Qur'ān* by al-Rāghib al-Asfahānī).

Then the *Qur'ān* started to utilize *buṭlān* as merely a religious meaning and that is the good deeds will not be results from the virtues that is promised in the hereafter because of its association with evil thing. Allāh says: "*O ye who believe! Cancel not your charity by reminders of your generosity or by injury*" (Surah al-Baqarah: 264)

When the language of Islamic jurisprudence and its terminologies started to be formed, it took *buṭlān* in the language of jurists as a new practical meaning. They utilized it as the meaning of invalidity of an action as the effect of the *Sharīʿah*. This action is not approved in the eye of the legislator in a way that its existence is like its nonexistence because of not taking care of the obligatory requirements of the *Sharīʿah*. So, there will not be any specific consequences of the *Sharīʿah* on it like establishing a right or declining any burden of the *Sharīʿah*. It covers the religious rituals and actions and civil transactions in a same way: the *buṭlān* of prayer or fasting means not considering their validity. Thus, *buṭlān* will not free the obligation of the commissioned person but he is required to repeat this.

So, *buṭlān al-sharīʿah* action in sale and purchase, marriage and divorce, confession and absolution, acceptance and donation and all civilian transactions means not to achieve the decided outcomes of the *Sharīʿah* among the people which includes ownership and utilization, permission and enjoyment and all kinds of rights, results and benefits which lead the way of the actions to Buṭlān and make it as its originating reason.

This is a collection of the views of the jurists and their discussions in that (see *al-Muwāfaqāt* by al-Shāṭibī, 1/292-296). This is in fact the same meaning of *al-Buṭlān al-Muṭlaq* in the terminology of foreign laws (see *al-Mūjiz fī al-Iltizāmāt* by al-Sanhūrī).

Second: the literal definition of *Buṭlān* that we have selected

51/3 Sensible and legal existence

Indeed, in every transaction of human being have two aspects of existence:

- *Sensible existence*, it occurs by their movements and in a practical way.
- *Legal existence*, the *Sharīʿah* considers it after it occurs as the characteristics of compromise because it results from some rulings of the *Sharīʿah*. Its consequences are decided by the *Sharīʿah*.

It is obvious that every thing that has legal characteristics its judgment is pending; if its consideration is absent in the *Sharīʿah* then its existence is like nonexistence. It is like a solid thing that does not have any soul and any sound effects, actually the consideration of the *Sharīʿah* will infuse soul into it and donate the life and activity.

This is a general view which will be enacted in all kinds of civilian activities in speech and deeds that mean *buṭlān* in its civil meaning will involve deeds like it involves speech.

Based on this we can define the literal meaning of *buṭlān* in the terminology of jurisprudence as follows: (*When the action does not attain the legal existence and its consequences in the sight of the Sharīʿah then it is called Buṭlān*) that means *buṭlān* is the absence of that legal existence for action even though its sensible feature is existed.

Third: Its implementation on the action of speech and deeds

51/4 (a) The *Buṭlān* of the Action of Speech

Indeed, the verbal actions will be contractual and non contractual as discussed above.

a. Contracts like sale, rent and donation, their sensible existence is to come out the offer and acceptance or the things that represent this thing by which a contract is bound.

   Its legal existence is to be tied with conditions that bind the both contractors with rights and obligations which the *Sharīʿah* has imposed to come about this binding among them.

   So, when these contracts are found with the fulfillment of all elements and basic conditions then it is considered as occurred in the sight of Allāh. That means it is exist according to the *Sharīʿah* as it is exist sensibly. It results from the outcomes and the rulings that the *Sharīʿah* has bound to occur this contract for ownership and others.

When it occurred without the fulfillment of the basic elements and the conditions that Allāh has imposed on which the legal existence of the contract is pending for example, if the sale is occurred from a mad person or donation or grants are made from the property of endowment or from a minor child then the contract despite its sensible existence will be considered as absent legally which means it did not occurred. At that time it will not result from the Sharīʿah ruling like ownership or obligation. This is the meaning of the Buṭlān of the contract (see *al-Bada'iʿ fī al-Ijārah,* 4/218; *al-Buyūʿ*, 5/305).

b. Like this will happen in non-contracts actions of speech. It is similar whether it is notification like confession or creation like claiming to seek the true.

1. Confession *(iqrār)* is the notification from the individual on others right to him *(al-Majallah* 1572). When the confession is come out from the individual with fulfilling all the conditions then he will be blameworthy by this confession. Because, it is a general rule that the person will be blamed by his confession: so who have asserted a contract then its ruling is obligatory for him, who have asserted an action like damaging and like this then all its obligations like compensation and responsibility becomes compulsory *(al-Majallah,* 79 and 1577)

   But when the confession is lacking some conditions of the *Sharīʿah* for instance, if it is come out from an incompetent person like child or it is come out from a competent person but it is visibly false like one has asserted that he has cut off some ones hand but the hand is live and sound. Then, it will not be considered in the *Sharīʿah* and its sensible existence will be as like as non-existence and consequently, the confessor will not be blamed by this. At that time the confession is *bāṭil*.

2. Allegation *(al-daʿwā)* is a person seeking others right to the judge *(al-Majallah* 1613)

   Conditions are imposed to consider this like the judge has to listen to him and the alleger has to meet the familiar conditions like the intellect of the alleger, information about

the alleged matter should be available so that it is possible to judge over this.

When the alleger is a child without reaching the age of judgment, or he is an adult but mad, or the alleged matter is unknown or impossible habitually or impossible in a rational mind then the allegation on all of these situations will not be regarded as exist in the *Sharīʿah* even though it is found materially in front of the judge. At that time it would be called *bāṭil* (nullified) allegation. Therefore, the judge will not listen to it and he will not ask about this.

51/5 (b) The *Buṭlān* of the actions of deeds

Like this it is said in the actions of deeds. It is similar in whether it is a distinct one like the permissible possession, or it is based on a contract like reception of the sold commodity. These actins are sensible actions which result from the outcomes that Allāh has prescribed when it is fulfilled with all the conditions on which its acceptance relies on.

Therefore, when the conditions are not fulfilled then there will be no consideration for this and it will not result from any outcomes.

a. *Iḥrāz* (permissible possession) is to establish a lawful ownership on a permissible thing because of his taking possession with the fulfillment of all the conditions and one of the conditions among them is the intention of ownership when taking possession.

   So, when this *Iḥrāz* has taken place without the intention then its existence is as like as its non-existence, because it did not achieve the legal existence in the sight of Allāh so it will not result from the outcome which is the ownership for his taking possession.

b. Handling over the sold commodity so that the sale contract is considered as performed; here to hand over the sold commodity it is compulsory for the commodity that it is must be free from engaging with others except the buyer. So, if the seller hands over the sold thing like a bag or like this which is engaged with him then the submission is *bāṭil* (nullified). Then, it will not result from the Sharīʿah ruling which is transferring the entity of the sold commodity to the buyer's custody. In this case, the seller will be responsible and guarantee of the sold product if it damages as

it is regarded as still in his hand without submission because he is using this.

For example, if someone hands over the sold land which is engaged with his cultivation or the house which is engaged with his commodities except he gets permission from the buyer to possess the goods which is inside, then, it will be friendship. At that time the submission will be considered and the buyer will be considered as he got the sold goods as the consequences of the sale and the goods of the seller inside, the sold thing will be considered as *wadīʿah*.

Engaging the sold commodity by others which is a barrier for the validity of submission will include in the sight of the jurists the house which is rented by someone as it is at that time under the lawful authority of the renter. Then, submitting it to the buyer will not be valid even though his sale is valid. The seller should not seek the price from the buyer as because the sold commodity is not prepared to possess[376] (see *al-Durr al-Mukhtār* 4/43)

Also, it can be the example of nullified (*bāṭil*) actions of deeds if the buyer in a valid sale contract takes possession of the sold commodity without the consent of the seller before the payment of his deserved price. The jurists have proclaimed that his possession will not be valid in the Sharīʿah and with this the right of the seller which is to keep the commodity in his custody will not be lost. But, it is the right of the seller to get back the goods and keep it with him until the buyer pays all the deserved the prices (*al-Majallah* 277-278).

Also the same thing goes if the donee possesses the donated goods without the permission of the donator. This is because the donation (*hibah*) as its essence will not be performed without

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[376] It should be noticed today that some countries which have registration and landed property law where the conditions of the registry is valid to prove the ownership of the landed property and its transformation like in our country. Registration of sale in the record book of landed property registry is enough to be considered as handing over the properly here, even though the house is engaged with buyers commodity or under the right of the renter. This is because the conditions of the registry at that time will be sufficient without the material submission and definitely cut off the relation of the seller and he will be extrinsic. This is decided in the juristic reasoning of the supreme court of Syria.

If the seller starts occupying the land after registration and abstain from vacating it and submitting it then his hand will be removed from there by the power of the judiciary.

So, this ruling of *fiqh* will remain, comparing with the non-landed property, limited to the places where there is now registration and landed property law like this.

permitted possession like what is discussed in the concept of contract (para 30/13).

But it is obvious from the sayings of the jurists on the nullification of consideration for the submission of the sold item or donated item in both cases and whatever resembles to this that the possession is pending but not nullified. They provide evidence that in this situation of unapproved possession he can get the permission from the seller or the donator then it will be accepted and denotes the verdict of the *Sharī'ah*. On the other hand, *bāṭil* (nullified) will not allow getting permission that we will see in the consequences of the *buṭlān* (see para 53/10).

Then, the possession of the sold or donated item in this situation will be the example of running the concept of *tawaqquf* (pending) in actions like what is in speech.

The discussion of the concept of *tawaqquf* (pending) or non-fulfillment has passed in the concept of contracts *('uqūd)* (see footnote para 38/1) and we also indicated this concept at the beginning of the section on *al-Mu'ayyidāt al-Madaniyyah* (para 51/1).

SECTION 52

THE REASONS FOR *BUṬLĀN*

52/1 Identifying Reasons for *Buṭlān*

Based on the previous discussion it could be concluded that *Buṭlān* in its all kinds and situations could be turned back to one reason, which is **an act of violating its procedure in the *Sharīʿah* in an obvious way**. By this the meaning of *Buṭlān* is manifested as the defender sanctions of the basic ruling of the *Sharīʿah* like what is passed (see para 48/4)

Based on this, the jurists would say in the definition of an invalid contract: **It is a contract which is not legitimated in the *Sharīʿah*** (see *al-Durr*, 2/168, *Fatḥ al-Qadīr*, 6/42) They mean by the non-legitimating of the contract, which is occurred violating the essential phases of the mechanisms of the *Sharīʿah* in that matter.

52/2 What is the Essential Dimension?

We mean by the essential phases which requires its contravention nullifying all the phases or the basic conditions whether it is in its original that means related to some conditioned characteristics by the *Sharīʿah* in the elements and basics of the contracts; or it is merely formal.

We have seen in the concept of contract for example that every contract has basic elements which are necessary to exist to establish its occurrence actually and among its basic ingredients are its pillars (see para 29/1).

Every basic element of this has conditions that mean the required characters by the *Sharīʿah* which are necessary to be materialized in that until the foundation of the contract is made on its correct elements and achieves its legal existence (see para 31/9).

We have also seen that there are formal contracts which formation is subjected to some specific rituals like registering, certification or writing down whereas those formal rituals are considered in the *Sharīʿah* among the conditions of making those contracts like attestation in the contract of marriage in accordance

with the *Sharīʿah* or registering in the contract of attorneyship in legal disputes (see the footnote of para 47/7).

There are some specific contracts whereas the submission of the assets on which the contract is based upon is the condition of fulfillment of that contract like debt and trust deposit (see para 30/3).

Thus, all of these kinds of basic elements of contracts and it fundamental conditions – in total the rituals and styles in the formal contract and the submission in the identical contracts- indeed, those fundamental aspects are manifested always from the sight of Allāh and its confinement is: whether according to its clear texts or by making juristic reasoning by understanding the texts of the *Sharīʿah* and making juristic deduction on it so that the commissioned actor becomes keen on his way of actions.

Based on this, these conditions of the contracts are names as: **the conditions of occurrence**, because everything from this is manifested as an aspect of those essential phases which is if lost then the contract will not performed:

- Absence of competence (*ahliyyah*) in the contractor (because of his young age or insanity for example) requires invalidity of the contract because of his violation of the essential phases in the regulations of mutual contract in the identical aspects. Likewise, the absence of eligibility of the object of the contract for dealings which is arrived upon it, also to sell the property of endowment, getting married for a man with a woman who is not allowed for him.
- The absence of witness in the contract of marriage, the absence of registration whereas the law requires registration to occur the contract in the formal situation. All of these nullify the contract because of its violations of the essential phases of the **formal** aspects and like this.

But the approach of juristic reasoning sometimes may differ in some aspects on the regulations of the *Sharīʿah* whether it is fundamental element that results in the complete nullification of the contract because of its violation or it is subsidiary that does not require invalidity of the action basically but requires another defect

which is called *fasād* and with this the contract will be eligible for invalidity what we will see in the section 54 in the concept of *fasād*.[377]

52/3 The Classification of *Buṭlān*

Buṭlān is eligible for classification in the sights of our jurists. Sometimes, a contract or an action can be invalid in some of its part and can be accepted in other parts according to other aspect of the thing. That is because; sometimes it fulfills the criteria of the *Sharīʿah* in one of its parts without the other parts of the thing. So, there is no barrier in classifying the criteria.[378]

The jurists have dictated that when a person gathers his property with the property of endowment and then sell it in one hand then the value of the selling property of his portion will be valid and the endowed properly will be invalid (see *al-Durr al-Muḥtār wal-Radd al-Mukhtār fi al-Bayʿ*, 4/104)

Similarly, if a person combines in a marriage contract two women whether one is legitimated for him and another one is not legitimated for him and he get married with them in a single marriage contract then the marriage with the women who is legitimated for him will be valid and the other one will be nullified. On the other hand, if the nullification occurs in some unparticular part that can not be specified in any way then it will cover all; that is like if a person combines to sisters in marriage in single marriage contract. In this case, every one of the two is legitimated to get married with individually but two combine the two sisters or what is under this rule is prohibited. There is no preference for correcting the contract for any one of them definitely then the contract will be

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377 Among these kinds is the disagreement in the juristic reasoning on information about the two exchanged things in the transactions like sale, lease, and compromise on the goods in return of the goods.

The juristic reasoning of the Shāfiʿīs believes that every uncertainty in the contract inherit nullification (*buṭlān*) of the contract because, the information about the place, the exchanged thing and other related things to this are the basic parts in their view.

The juristic reasoning of the Ḥanafīs believes that the information about the place, exchanging things in return of the contract are the subsidiary things that do not require complete nullification because of its violation rather it obligates *fasād*.

378 Based on this concept of *Fiqh* in the capability of *Buṭlān* to be classified, the civil law of Syria has been enacted which is come out lately, like the text of the Article 144 is provided as: When a contract is invalid in its parts or capable of nullification, then this part is only be invalid, except it is become clear that this contract cannot be occurred without this part which is nullified or capable of nullification, at that time the whole contract will be nullified.

nullified for both of them. This is unlike if a person get married with them in two contracts successively. At that time the second contract will be invalid except he forgets the first marriage and that time the both will be invalid as the absence of and preference thing among them and due to the inability of realization based on lack of knowledge (see *al-Hidāyah* and its commentary on *kitāb al-nikāḥ* 3/123, *al-Durar* 1/331, 333)

52/4 The difference between nullification (*Buṭlān*) of the contract and its dissolution (*Infisākh*)

The previous discussion on dissolution of contract at the end of the concept of contract appears similar to *buṭlān*. Sometimes, our jurists use the two terms interchangeably. However, there are clear differences between the two terms.

a. Nullification (*buṭlān*) of the act will be violating the regulations of the *Sharīʿah* in its fundamental aspects in the process of contract. The contract at that time will be invalid and not acceptable. Thus, when a contract is performed correctly then it cannot be imagined after that there is violation in the process of the contract because it is performed already; except it is revealed that there was violation there which was hidden that requires nullifying the contract. At that time, the acceptance will be turned back and it will be considered as invalid from its beginning.

   With this, it becomes obvious in the nullification (*buṭlān*) of the contract that it is a civilian sanction for the procedure of mutual contract like what is discussed before.

   On the other hand, *infisakh* will be after completing the contract correctly because of the incidental reasons which prevents the contract to be valid with it after it is exists, like the destruction of the sold item with the seller after the contract before the submission. So, there is no violation here in the contract, destroying the sold item after that is not violating the regulations of the mutual contract but it an incident by which it is difficult to realize the contract then it is invalidated. Like this, it is noticed in lease contract when the leased item is destroyed, in the partnership when his particular property from the capital is destroyed.

b. Also, *Buṭlān* is different from *infisakh* in another point of view and that is, the contract with *buṭlān* will be like without existence for ever. On the other hand, *infisakh* is, the contract is eliminated from its basics then *infisakh* will be depending on the retroactive effect like in the destruction of the sold item before submission. Sometimes it occurs shortly without any basement and by this, the obligation of the mutual contract is terminated considering from the time of elimination (*infisakh*). Afterward, what is passed will be remained under the ruling of mutual contract, like in the invalidation of lease and partnership contracts and like them among the continuous contracts which discussion has been passed in its suitable place (see para 48/14).

SECTION 53

THE CONSEQUENCES OF *BUṬLĀN*

53/1 Indeed, *Buṭlān* has negative consequences from which several general rulings are ramified which are basically, the characteristics of *Buṭlān*. Soon we will be discussing the followings successively and in order:

- The negative consequences.
- Then the exceptional situations comparing with that.
- Then the ramified characteristics from those basic consequences.

53/2 The basic negative consequences of *Buṭlān*

Indeed, *Buṭlān* has general negative consequence and that is:

***Buṭlān* is by which the action losses its casualty for its ruling, so, no particular effect for it will be result from which is affirmed in the case of its validity.**

So, when the action is invalid in the contract then no obligation of it will be arisen by this. When it is confession then the confessor will not be charged by this. When it is freeing then the obligation will not be declined by this and so on....this is the general view for the invalidity of all actions without exception.

With this the sayings of the jurists become clear: ***Bāṭil* contract does not result from any ruling** (see *al-Badā'iʿ* 5/305).

Some contemporary scholars today feel doubt on this as the non-consideration of the invalid *Bāṭil* contract is the *Sharīʿah* ruling for that, so it is the negative ruling which opposes the constructive positive ruling of the performed contract. Thus, how is it accurate to say that *Bāṭil* does not result from any *Sharīʿah* ruling? This is itself a correct point of view but the meaning of the jurists is that the invalid contract does not results from any ruling and consequences those the legislator (Allāh) has decided in the case of its occurrence and consideration that we have elaborated in the previous discussion. The origin of doubt and objection here is denying the word *Sharīʿah* ruling (*Ḥukm*) which misleads refuting any ruling, not the affirmed specific ruling for the valid contract.

53/3 The exceptional situations where the *Bāṭil* contract has accepted effects

Nevertheless, there are rare exceptional situations from this general principle of the negative consequences of *Buṭlān* where the invalid contract has effects on the characteristics which are based on the deed. So, it will result from some supplementary effects which results from in the case of occurrence of the contract. We will see it soon in the following three situations:

53/4 The First Case: In the Contract of Marriage

The situations where the invalid contract has some subsidiary effects for the valid contract are manifested more in the marriage contract.

In the invalid marriage contract, its basic ruling does not establish the permissibility of sexual enjoyment and expenditure for wife and inheritance in any situations but when it results from entering upon the sexual pleasure then the women deserves dowry (*mahr*) by this, the lineage of the child from the male will be established by this, the women is required to make *'iddah* (a specific period during which a widow or a divorce may not remarry) from the date of separation. This is because the legislator (Allāh) takes precautions for verifying the offspring and obligating the *'iddah* only by doubts and it requires the obligation of *mahr*. This is because the relation of a man with a woman in the *Sharīʿah* is not possible to be out of the two consequences: whether the prescribed (*ḥadd*) punishment if it is merely adultery or the *mahr* if it is a valid or doubtful marriage. The contract – even though it is not valid- inherits doubts, by which these precautious ruling will be established.

Even though, if there is not space for doubt then these rulings will not be imposed there, what we will see soon (see para 54/7).

It is noticed here that these exceptional rulings in the invalid marriage contract would not be established except because of entering upon the sexual pleasure and not merely by the contract. Nevertheless, it would not establish any ruling, if there is no invalid contract here and at that time the relation between the man and the woman would be merely adultery without any explanation, if it is not based upon this invalid contract. This is why, it is considered as an effect of the invalid contract.

53/5 The Second Case: In Compensating the Collected Sold Item in the Invalid Contract

The jurists have disagreed upon the ruling of the invalid contract where the buyer has collected the sold item:

- Some believe that the sold item will be as trusteeship (*amānah*) in the hand of the buyer and he is not obliged to compensate if it is damaged except by aggression or carelessness in its protection. It is like the *wadīʿah* (deposit) in the hand of the depositary. The evidence for that is when the contract becomes invalid then nothing is left except merely the holding of the sold item by the permission of the seller. This does not obligate compensation on the holder except by aggression or carelessness. This view is taken in the pandect.
- And others believe that the buyer is obliged to compensate the sold item if it is damaged, by the same thing if it is *mithlī* (fungible) goods or by the value of the thing if the thing is *qīmī* (nou-fungible) goods.[379] Their evidence is that it is grabbed in the way of intended transaction by the contract and the nullification of the contract prevents transferring the ownership but it does not withdraw the concept of proven exchange in it, which the seller does not submit the sold thing except on its basics. It is proven that the holding of a thing in the way of exchange requires compensation.[380] It is also certain that the held item with the intention of purchase (*ṣawm al-shirā'*)[381] without having a contract, the holder is obliged to compensate by the like or the value when the similar quantity of value is clarified to him. This

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379 *Al-Mithlī* goods is which has example in the market which is similar to its characteristics in a way that it is possible to represent one with the other one in fulfillment without any considerable differences, like sugar, oil = and wheat from same quality also like paper, crystal jars and its boards and the similar things from the same manufactured products.

Al-Qīmī goods are which do not have similar example like the animals, house, and jewelries. So, the value of every one of this varies from one another in its same kinds by the differences of its particular characteristics (Article, 145-146).

See the details of the concept of the *Mithlī* and *Qīmī* goods in the third volumes of this series which we have named as (Introduction to the concept of general compulsion in the Islamic Jurisprudence), para 14/1—14.

380 See the discussion which is passed on the classification of the contracts at para 47/11.

381 *Al-Qabḍ 'alā ṣawm al-shirā'* (the held item with the intention of purchase) is a man gets something from the owner intending that if it pleases him then he will buy it.

indicates that the buyer will not submit except the exchanged element or the compensation. So, the held sold item in the hand of the buyer is not less than this.

This view is preferred in the juristic reasoning of the Ḥanafīs. This view is also narrated from the other three Imāms of Islamic jurisprudence (see *Radd al-Mukhtār* 105/4)

With this we see that the invalid contract, even though it does not results from any ruling in the *Sharīʿah*, sometimes it has descriptive effect in the holding the sold item which makes it liable.

53/6 The Third Case: In the Alteration of the Contract

Another thing which is related to this exceptional rule in the invalid contract is the alteration of the contract sometimes with another contract which is valid in some juristic point of view. So, the contract which is considered as nullified in its particular subject may contain the components of the other contract which does not contradict with the intention of the both contractors then it will turn into that even though it is considered as invalid on the contracted subject.

For example, our jurists decreed the nullification of the sale and lease contracts if negation of the price and rents are announced in both of these contracts clearly, like the contractor said: I sold this thing to you without any price, or said: I gave lease of this without rents. This is because both of them are transactional contracts which are based upon the elements of exchanging two opposite things. So, when the price is disclaimed clearly then the substance of the contract is nullified which is transaction.[382]

After deciding the invalidity of the sale and lease, they disagreed on: will the contract will alter to and the sale will be donation (*Hibah*) and the lease will be lending (*iʿārah*)?; and, will the sale alter to lending also if it contains duration with the negation of price, like if he said: I sold to you the benefit of this thing for one month without any price, or the contract will not alter to anything of that?

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[382] This is unlike when the price or rent is silent in the contract without disclaiming them clearly, like if he says: I have sold this to you or rented it to you and the other accepted it. At that time the price and the rent will be considered as noticeable but it is uncertain hecause of without announcement. Then, the contract will be a Fasid (defected) contract which we will see in the following section.

A group of jurists are in favor of this alteration based on the general maxim which is said as **the thing which is taken into account in the contracts is the objective and the meaning not the words and the structures** (see para 30/2).

Other group of scholars goes in favor of this alteration, based on the evidence that the original contract is nullified here, it is nonexistent, and the alteration will not be in an absent thing. This is the obvious preferred opinion in the juristic analysis of the Ḥanafī School (see *Radd al-Mukhtār,* v. 4 and 5, the first two chapters of *'Āriyah* and *Ijārah*)

But we thing that the first opinion is more preferable and the maxim of Jurisprudence supports this as the proven maxim is (**Utilizing the speech is better than its omission**) as long as it is possible (Clause 60). One of the forms of utilizing the speech is to bear it to the metaphor when the original meaning is impossible (Clause 61). Then the explanation of donation and lending by sale and lease will be considered metaphorically. Metaphor in the contracts is familiar. Even though the jurists have stated in marriage, despite it is a serious matter, the marriage will occur by the word of sale in a way of metaphor in explanation (see *al-Hidāyah* and its commentaries, 3/107).[383]

The Characteristics of *Buṭlān*[384]

53/7 *Buṭlān* has several characteristics those are the general ruling ramified from those negative basic consequences for *Buṭlān* which is indicated previously. These characteristics are as follows:

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383 The modern legal concept in the foreign jurisprudence trends to this view which they call: **the concept of conversion of the contract**, this is a modern concept in German jurisprudence, moreover the law makers expand more on this and they say about transferring the sale to donation even though the price is mentioned in the contract, when the price is worthless and slight comparing with sold item that indicates the intention of donation (see *al-Mūjiz fi al-Iltizāmāt* by al-Sanhūrī, footnote para 168; and *Naẓariyyat al-'Aqd* by his as well, paragraph 594 and what is after that).

This is taken in the legal system of Syria which has come out to us now; its basic is the new law of Egypt. It is elaborated in the clause 145 which is as follows: (when the contract is invalid or subjected to invalidation and it fulfills the fundamental things of other contract then it will be valid considering that contract which fundamental things are fulfilled, when it is obvious that the intention of the contractors move to that)

384 *Al-Khaṣāiṣ* is the plural of *khāṣiyah* meaning characteristics.

53/8 (1) *Buṭlān* requires the nullification of what is included inside it and nullification of what is based on this (see *al-Majallah* 52).

Based on this the jurists have decided that:

a. When a person sells a thing in a invalid sale contract, and this contract contains some conditions and the price is defined then with the nullification of the sale contract the conditions which is imposed by the both contractors is nullified as well so, it is not obligatory on them, the specified price on the specific good is also nullified. This is the example of invalidity (*Buṭlān*) of a thing that reqnires the nullification of what is included inside it.

b. When an exchange of the sold thing and the price is made between the parties as a way of materializing this invalid contract then this exchange is not considered as sale by practice. Because, the both parties have intended by this to establish something based on the invalid contract so, it will be nullified too. And the things both of them have grabbed will remain under the possession of the owner. This is the example of *Buṭlān* (invalid contract) which has based on *buṭlān* (nullified things)[385].

   We will see in the following qualities the conseqnences of nullification of defining the price and the consequences of nullification of materializing the invalid contract.

   Likewise, if someone confesses to other an amount or free it even though it is a general freeing and the confession or the freeing is based on a contract where the both parties have approved like sale or conciliation and after that the nullification of the contract is come out then it will nullify the confession and the freeing which are result from it (see *Radd al-Muḥtār*, *Bāb al-Istiḥqāq* 4/199-200 and *Kitāb al-Ṣulḥ* 4/473 and 479 and *al-Majallah* 1566).

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[385] But when the exchange will not be establishing the nullified contract and will not be based on the nullified contract but the two parties perform it with new intention, turning back from the nullified contract to a *Taʿāṭī* (which is in practice among the people without pronouncing words) contract that satisfy the conditions of the contracts to be performed then this contract is a new contract that gives benefits to its ruling. This is same like if the both parties renew the invalid contract accurately by pronouncing wards.

53/9 (2) When the action of deed is nullified then it requires its repeal and replacing the situation to its previous treaty before the action.

This is because the action of deed creates material effects in all situations, whether the action is valid or invalid. With this, it differs from verbal action which effect is merely juristic. So, it is compulsory to remove the effect which is created by the material invalid action to turn back the legal situations to the previous position.

Based on this, if the seller and buyer exchange the sold item and the price in the invalid contract then every holder is required to give back the thing that he has grasped as because of the nullification of the taking hold based on the invalid contract.[386]

So, if he causes damage to the sold thing in this situation he will compensate the seller by the like thing if its like is found or the value if it is counted by value. It is same whether its price in the market is more or less than the determined price in the contract. This is because, when the sale is nullified then what is its inside the specification of the price is nullified as well. The rule of compensating the goods is equality. The equality of the damaged goods is its similar or equal value. The specified price in the contract was represented by both of them because of the contract. So, when the agreement on the price is cancelled as it is the part of the invalid contract then the compensation turns back to its root which is the similar thing or the equal value.

This is unlike if the contract is occurred correctly. Holding the sold item by the purchaser without the consent of the seller before paying the due price and the sold thing is damaged in the hand of the buyer or he consumed it then he will compensate to the seller the agreed price in the contract, not the value of the sold item, because the sold item's ownership is transferred to the purchaser only by the completion of the valid sale in return of the defined price which represents the value by mutual agreement. This specification of the price is not nullified but the illegal holding of the sold item is nullified certainly. So, the sold thing is damaged in the hand of the

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386 This is included in the sphere of the concept of *Isrā' bi-lā sabab mashrū'* (achievement without permissible means). This is a concept which is brought out from a principle which is approved in the Islamic Jurisprudence with a range and conditions which is limited more that the other Juriprudence.

buyer while he is the possessor of that by the defined price not by the value which will be more or less than that.

Relying on this principle, it is also abandoned if the donee holds the donated goods without the direct or indirect consent of the donor. Certainly, this holding is invalid because donation (*hibah*) is one of the defined contracts which will not end up without the permitted holding. So, if the donated property is damaged in the hand of the donee then in this situation he is the compensator of this by the like thing if the like is found or by the equal value if it is measured by value.

53/10 (3) The invalid contract does not accept permission

In fact, permission is an individual willing which human being will determine and perform actions uprightly depending on whether the legislator (Allāh) has made for him the right of acceptance and rejection in that.

So, the legal point of view is that the object of permission is the occurred contract which is pending that befalls the right other than the contractors. Therefore, the third party may permit this if he wishes then the contract will be realized or he may disallow this then the contract will be invalid. However, the pending contract will be considered as a valid contract but it is locked meaning it is captivated from running. So, by the permission of the possessor of this relation, its lock will be opened and its imprisonment will end up and its purpose will be fulfilled. So, it is like the messenger who reached to the extent where between him and it, there is a land which boundary is protected, if the land owner permits him then he can cross it and if the land owner does not permit him then he will go back (see *al-Badāʾiʿ*, 5/148-149).

The invalid contract, what we have seen, is not pending which is possible to be fulfilled its purpose by the permission; rather it is meaningless which is lacking consideration in the sight of the Sharīʿah, like it was not exist (see *al-Badāʾiʿ*, 5/305). So, when its permission is intended to establish the intended legal goal of it then it is required to generate this with new establishment with the accepted way.[387]

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[387] With this the Syrian civil law is taken which is come out recently as the clause/142 depicts that *buṭlān* will not be removed by permission.

Based on this, the jurists have decided that if the contract is nullified because of the incompetence *('adam ahliyyat al-ʿāqid)* of the contractor, like when a mad sells or a child donates something from his property, after that the mad becomes conscious or the child becomes adult and he permits the contract then the contract will not be valid as it is appeared as nullified that does not accept permission. So, they should renew the formation of the contract if they wish.[388]

Likewise, if the guardian or the legatee of the lad donates from his property or sell something from his property with excessive cheating, afterward, the lad becomes adult and permits that and carry out this then it will not be carried out because it is issued from its root as invalid.

Based on this, if someone sells as meddlesome or purchase other persons purchase then his contract depends on the permission. So, if the other person rejects the contract after the news of the contract reaches to him and after that he turns back and permits this then the contract will not be back as valid as it has bee nullified by the previous rejection. So, it will not be considerable to accept the permission, rather it is compulsory to perform it newly if they like to (see *al-Durr al-Mukhtār*, on *al-Fuduli* 4/141).

An example of this, if one of the two contractors makes offer for the contract then the other rejects and after that he comes back and accepts then the contract will not be performed because the offer has nullified by the rejection then it is not considerable to be come up with the acceptance, rather the acceptance will be considered as a new offer that needs acceptance (see para 30/3 and 31/7).

53/11 (4) The invalid contract does not need repealing; also it will not be taken as a means for argument in front of the judiciary.

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[388] The difference in the consequences between renewing the contract and his permission are obviously as follows:

a. Actually, renewing the contract depends on the intentions of the both parties unlike in the permission it is sole intention.

b. In the renewed contract its consequences will start from its date of renewal, on the other hand in the permission when it is valid then it will go back to its reactionary consequences from the date of the permitted = contract, so by this the ruling of the permitted contract will be effective from the date of issuance which discussion has been passed in the concept of contact.

a. The meaning of invalid contract does not need repealing is, as the repealing is needed for the valid contract where one party has the choice to be free from this tie or to keep this remaining. After that, sometimes, the party having choice can be independent in repealing for example, the choice of imposing conditions in the sale contract where the party having choice can repeal within the limited legislative time for him without the consent and judicial decision. Sometimes, the repealing is needed consent and judicial decision for example, the choice in the event of the commodity having defect. However, when the contract is not repealed which is worthy to repealing then its ruling will be continuing as valid.

As the invalid contract is nonexistent which cannot be gotten; so, removing the non-exist thing is achieving the achieved thing which is impossible among the sensible scholars.

Every contractor from the both contractors should consider the invalid contract as nonexistent, they should act based on this consideration:

- when the invalid contract is sale, then, the seller should sell the sold item second time, use it, or consume it as it is still under his ownership.
- when the invalid contract is marriage, the women can get married with another husband.[389] If the purchaser or the husband charges in the invalid contract in front of the judiciary and the purchaser demands the submission of the sold item or the husband demands the woman by the continuation of marriage, it is possible for the other party to defend his charges by mentioning the nullification of the contract. By this way, the holder of the invalid contract can dispense with the charges which are brought to nullify the invalid contract. It is enough in the *Sharīʿah* and laws for a negative position by which he can be the defender of the charges they are quarrelling once he is attacked by this.

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[389] It is noticed here that when the invalid marriage results from entering into sexual pleasure then it requires making *ʿiddah* (a specific period during which a widow or a divorce cannot not remarry) for the woman. So, it is not permitted for her to get married until she passed her period of *ʿiddah*, so that to get known about the gap of the womb to prevent mixture of the offspring.

However, though from the theoretical perspective there is no need for the person who has held on the nullification of the contract to bring allegation in the sake of nullifying the contract, but in practice he may need to bring charge for the declaration of the invalidity, particularly when the realization of the invalid contract has been performed. That is like if the sale contract results from submission of the sold item and the seller want to get it back. In this situation he is obliged to litigation when he is not able to get it back by the mutual agreement. Likewise, if the reason of the invalidity is hidden and suspicious then the party holding on the nullification of the contract needs to begin with the allegation to be satisfied with the view of the judge and his decision, so that his action does not base upon the valuation of invalid contract and after that the court will rule out on this and then his action will be cancelled.

But, it is uoticed in all these situations where the person holding on the nullification of the contract is needed to bring allegation, the judge in fact does not nullify the contract in these situations (likewise, he repeals the contracts which is worthy to repealing in a way that if he does not repeal it then it will be valid and it will be effective iu reality) rather the judge will decide in these situations that the contract has issued as iuvalid from its root. That means the judgment on the nullification of the contract during dispute does not initiate nullification but it reveals the nullification and decides this as decree.

b. On the other hand, the meaniug of being the invalid contract not to be taken as a means for argument in front of the judiciary is as it is the indispensible consequences of its nullification by itself without the any necessity of nullification.

It results from the judge who will refuse the justification by invalid contract when it is claimed or held on because of his own interest, if the dispute about the nullification of the contract is not resolved and it is not paid attention. This is because the invalid contract as it does not need nullification, so, deciding its nullification at the time of holding on does not depend on the claim.

53/12 (5) The ruling of prescription will not be imposed on *Buṭlān*

Prescription (*Taqādum*) is passing the time which we have indicated in several occasions.[390] There is no resistant in holding on the nullification of the invalid contract from it realization even though the period of prescription (which is fifteen years) have been passed on the contract. This is because the invalid contract is nonexistent and the non-existed thing will not come to the existence with the length of time.

So, if it is happened in the invalid contract for example, the buyer did not receive the sold item even fifteen years have been passed, after that the seller took charge on the buyer to obligate him receiving the sold item and pay the price. Then the buyer should defend the allegation with the evidence of invalidity of the contract. Likewise, if the buyer takes charge on the seller seeking for the submission of the sold item after the prescription then the seller should defend his allegation by the invalidity of the contract. This defend will be accepted from both of them despite of rejecting the allegation of the period of prescription with the invalidity. This is because both of them in fact are not responsible to allegation and litigation to invalidate the contract as we have discussed previously that invalid contract does not need invalidation.

This is unlike if the invalid contract is materialized by the mutual exchange and the period of prescription has been passed, after that the seller takes change after fifteen years and seek for getting back the sold item with the evidence of the invalidity of the sale. In this situation the buyer should defend the allegation of the seller by the prescription of the commodity in his hand without confessing that he has received this from him by an invalid sale. At that time, the adjudication will be rejecting his allegation because where the invalid contract does not need any claim for its nullification but getting back the sold item after materializing the sale by submission needs claim like what is discussed before. So, the right of getting back the property will undergo the period of prescription, because, to give up the claim where it is required by the individual right, the period of prescription will prevent its hearing. So, the ruling of prescription will be considered here as applicable on the **right of retrieval** not on the invalidity of the contract.

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390 See para 10/3 and 23/4.

Similar thing happens if the purchaser takes charge on the seller in this situation seeking for the retrieval of the price due to the invalidity of the sale after the period of prescription has been passed after the payment of the price, so, the seller should defend the allegation by the prescription of right of the alleger.

The difference becomes clear between imposing the ruling of prescription on the right of recovery and not imposing this on the invalid contract, where the exchange of the substitute things is delayed from the date of the contract until the period of prescription has been passed on the invalid contract and the exchange is not carried out. So, in this situation every one of the seller or buyer has the right to seek for getting back what he has submitted with the evidence of invalidity of the contract, the other party does not have the right to defend by the prescription on the contract. This is because prescription does not influence on the invalid contract but the right of retrieval should not be prescribed.[391]

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[391] It is stated in the clause 142 in the civil law of Syria which is issued to us in the year 1949 and the clause 141 among it's basic of Egypt that (the allegation of invalidity will be prescribed after the passage of fifteen years from the time of the contract).

The meaning of the allegation of invalidity is to raise allegation not to push it. So, the allegation on the invalidity after the fulfillment of the contract will be to get back the things happened because of the fulfillment of the contract, this will under go the ruling of prescription. On the other hand, to push the invalid contract is in a way that someone will allegate seeking for the fulfillment of the contract where the prescription will not act upon not by the sahriah nor legally what we have elaborated. This is what the council has decided and this text is formulated in accordance with that at the time of discussion in the review council of the Egyptian parliament. Based on this, it becomes clear that what is mentioned in the clause among the had formulations (see *al-Taqnīn al-Madanī al-Miṣrī* by Professor Jamāl al-Dīn al-ʿAṭīfī, 1/265, footnote no. 2).

SECTION 54

THE CONCEPT OF *FASĀD*

First: The Lietral and Technical Meaning of *Fasād*

54/1 *Fasād* (voidable): Its root in the language is change of something from its sound situation and going out from moderation. It is the opposite of goodness. It is said that the *fasād* of milk, meat, fruits and air when it is looked at as altered and rotten so that it becomes unsound.

After that, it is used in the language in all the things and situations which are out of the order of rightness like rebelling, oppression and violence. Based on this the saying of Allāh the Almighty: *"Mischief has appeared on land and sea"* (al-Rūm, 30:41) and His saying: *"Allāh knows the man who means mischief from the man who means good"* (al-Baqarah, 2:220) (see *Mufradāt al-Rāghib al-Asfahānī, al-Miṣbāḥ, al-Qāmūs al-Muḥīṭ* and *Asās al-Balāghah*).

Afterward, when the juristic reasoning and its terms have been originated then the jurists of the Ḥanafī School named *fasād* as a new meaning of the civil legal system. They used it to indicate the situation where they considered the contract was defected in some of its subsidiary parts that made it in the position between valid and invalid. So, this is not invalid which is like not performed because its violation of the regulations of the *Sharīʿah* is not in the fundamental parts like in the case of *buṭlān* and neither it is considered as completely valid as it contains defect in the order of the mutual contract even though this defect is in its subsidiary parts not the essential parts.

The word *fasād* notifies that as it is talked about the meaning of alteration and defect in the existed thing.

Second: The Origin of the Concept of *Fasād* and the Disagreement in It

54/2 The concept of *Fasād* in the contract is established by the Ḥanafīs as we have indicated before. Actually, the juristic reasoning of the Ḥanafīs who has decided this and stands alone in this is among

the all other juristic reasoning which made the third stage between valid and invalid.

Thus, the contract according to the majority of juristic scholars-based on its legal existence or non-existence- is of two stages: whether it is valid which is applicable or invalid or *fāsid* which is not applicable and that is when the contract contradicts with the legislated order and prohibition in the procedure of the mutual contract.

Except that the juristic reasoning of Ḥanafīs noticed that the mode of violation is not in the same stage rather among them there is fundamental violation and there is subsidiary violation. Therefore, there should not be a signle consequence for two different cases, it is because the contract contradicting its regulations in its subsidiary aspects is only in accordance with the lawful order in all fundamental aspects. It comprises all of its essential things, components and conditions. So, it is necessary to be a stage between validity and invalidity.

54/3 The reason of disagreement in the stage of *fasād*

The root of this disagreement is that they have disagreed on the effect of prohibition (*al-nahy*) of the *Sharīʿah* on the actions that have legal existence like the contract.

Some juristic reasonings especially the Ḥanbalīs believe that the effect of prohibitiou (*al-nahy*) is invalidity because, it nullifies the legacy of the prohibited action generally without any difference between the aspects where the prohibition has been related to. Based on this, they made judgment on the invalidity of the contract which is associated with interest because of the prohibition of the *Qur'ān* in that as Allāh said: "*If ye do it not, take notice of war from Allāh and His Messenger. but if ye turn back, ye shall have your capital sums: Deal not unjustly, and ye shall not be dealt with unjustly*" (al-Baqarah: 2/279)

They also made judgment on the invalidity of the contract which is associated with prohibited condition because of the prohibition of the *Sharīʿah* on that from the *Sunnah* of the Prophet (s.a.w.). They nullify the condition not the contract like what is passed in the concept of contract.

The juristic reasoning of Ḥanafīs believe that only the prohibition on the contract does not indicate necessarily non-legitimacy of the root of the contract in the *Sharīʿah* but there may assemble

sometimes the root of the contract which is legitimated with the prohibition on it like it becomes clear in the following discussion:

54/4 The differences of the effect of the prohibition (*al-nahy*) of the *Sharīʿah* with the differences of its determinants

The *Sharīʿah* has prohibited from the actions without mentioning the nullification of it clearly then the legal effects of the prohibition will differ with the differences of the reasons of the prohibition meaning with the difference of the kind of violation of the order of the *Sharīʿah*.

a. The *Sharīʿah* prohibits the action as it is not legitimated from its root when it contains 'evil defect' in its essence – like adultery, murder and plunder.

   In this type the prohibited action will be considered as merely invalid (*bāṭil*) where the actor will not get any results or benefit. Based on this, in adultery the offspring and dowry (*mahr*) will not be established, the murderer will not inherit from the murdered and also the extorter will not possess the extorted thing.

   Also of these kinds, the prohibition that is mentioned in the traditions of the prophet (s.a.w.) on the *mulāqih* (fertilized) sale and *maḍāmin* (guaranteed) sale which is passed in the concept of contract (see footnote para 47/4), the *Sharīʿah* did not consider it as a suitable object for contract. Likewise, the prohibition on the *mulāmasah* sale and *munābadhah* sale (see para 27/6) as it does not express valid mutual willing. So, these types of contracts are lacking some of its elements from its object and basics then it is considered as invalid.

b. The *Sharīʿah* forbids the action which its root is legitimated, the prohibition goes to the characteristic which the *Sharīʿah* has disapproved and wants to get rid of it. That is because the basic element was legitimated so the aim of the prohibition is that characteristic, i.e. the prohibition of the *Sharīʿah* on interest. So, the contract of interest is actually sale or loan which is legitimated but inside it there is an additional characteristic which is disapproved by the *Sharīʿah* that is its association with increase of the property without any substitute.

   Similarly, the prohibitions on imposing some specific conditions in the sale contract or lease contract, in fact, these two

contracts are legitimated but the condition is the feature which is not legitimated.

When the prohibited contract is of this kind - meaning which root is legitimated – then, the prohibition will not results invalidity of the contract like in the case where the contract is not valid basically, but it will be considered as performed as *fāsid* (annullable) meaning it is defected in its subsidiary phases which leads the invalidity of the contract until it is prevented. So, when it is protected from its prohibitive object then its consideration will be settled down and its ruling will be established.

On the other hand, in the iuvalid contract it will not result anything from the consequences of valid contracts which has been discussed.

This is the meaning of the saying of the jurists in the definition of the *fāsid* contract which is: (**it is a legitimated contract by its fundamentals but not in its characteristics**). This is unlike in the nullified (*bāṭil*) contract which is according to them neither legitimated in its root nor in its characteristics which is discussed in the section of *Buṭlān* (see para 52/1).[392]

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[392] To differentiate non-legitimacy of the root of the contract from non-legitimacy of the character of the contract one should look at the five elements of the contract which are: the contractors *(al-ʿāqidān),* the place *(al-maḥall),* subject *(al-mawḍūʿ)* and pillar *(al-rukn). Rukn* is the offer and acceptance which express the mutual consent or the substitute things in this extent).

So, when the prohibition is directed to one of the elements and affects its validity then it results from non-legitimacy of the root of the contract so it will be nullified. When it is directed to other subsidiary phases of the contract and it is all the elements are sound then the contract at that time is legitimated in its basic but non-legitimated in its characters. This deserves *fasād* but not *buṭlān.*

Based on this, the prohibition on the *mulāqih* and *maḍāmin* sale is related to its object which is the sold item. The prohibition on the Mulamasah and Munabajah sale is related to its pillar (*rukn*) which is mutual consent as the ahsent of the offer and acceptance in the style of those contracts in the sight of the *Sharīʿah.*

As the object (*mahl*) and the pillar (*rukn*) are the basic elements of the contract and this prohibition results from non-legitimacy of the root of the contract, it will be nullified. Likewise, the contract of the mad for example; so, the incompetence in the contractor is like the absence of the contractor and the contractor is among the basic elements of the contract so, the contract of the mad will be nullified.

This is unlike in the interest contract as all the elements here the contractors, objects; pillars and subject are sound which is in fact sale or loan. The relation of the prohibition in it is its association with increase of the property without any substitute which is an additional subsidiary phase of the five basic elements. So, the contract of interest is legitimated basically. The prohibition of the *Sharīʿah* results from the non-legitimacy of the thing which is the increase of the property without any substitute and

c. The *Sharīʿah* prohibits the legitimated action which has not violate any of the regulations of the *Sharīʿah* in its basic elements or among its internal characters but the reason for the prohibition is only the external thing, like the prohibition of the *Qur'ān* on selling at the time of calling for the *Jumuʿah* prayer.

This prohibition does not obligate *buṭlān* (invalidity) of the contract and neither *fasād* (annullability) because, the sale – as it is a civil contract – is full of its fundamentals and the essential conditions. The prohibition is on the external meaning that is distraction from the obligatory worship by performing this contract. So, it requires merely the religious prohibition, likewise, if a man is distracted from other prayer because of his engagement with his sale and even he misses the limited time of the prayer then it is religiously prohibited but it will not affect on the soundness of the contract which they have practiced in lieu of the worship in that time.

Also, of this type is the prohibition mentioned in the traditions of the prophet (s.a.w.) on making engagement of a man on his brother's engagement and his offer for buying on his brother's offer for buying except he gets permission from him,[393] and the examples of these are the features of prohibition. So, this prohibition does not obligates *buṭlān* (invalidity) or *fasād* (annullible) in the performed marriage and purchase contract from the civilian judicial aspect but it requires religiously a disliked thing in an ethical sense which is out of the components of the formation of the contract.

When we have equalized among the consequences of all of these features of prohibition without looking at the reason and purpose of the prohibition then we have equalized between the

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it is among one of its subsidiary characters. So, the contract will be *fāsid* (corrupted) but not *bāṭil* (invalid) (see *al-Furūq* by al-Qarāfī al-Mālikī, v. 2, section 70).

393 Making engagement of a man on his brother's engagement: this is like a man got engaged with a woman for getting married with her then another person arrived and competed with him and he himself got engaged with that woman before the cancellation of the negotiation with the first person.

A man's offer for buying on his brother's offer for buying: it is the similar example of the previous thing in sale contract, a person proceeds with buying some thing then another person comes and buys it. The two Imām al-Bukhārī and Muslim in their authentic *ḥadīth* books narrated that the Prophet (s.a.w.) has prohibited that (see *al-Hidāyah* and *Fatḥ al-Qādīr*, on *al-Bayʿ al-Makrūh* 6/107; and *Naṣb al-Rāyah li-Aḥadīth al-Hidāyah* by al-Zaylaʿī, on *Kitab al-Buyūʿ*, v. 3, *ḥadīth* 14).

contractual things having complete soundness with the one which is incomplete.

54/5 This is the collection of the views of the scholars of Islamic jurisprudence and the source of Islamic jurisprudeuce on the structure of the concept of *fasād* which is viewed by the juristic reasoning of the Ḥanafīs, we have explained it here easily and elaborately.[394]

Al-Qarāfī al-Mālikī said in his book, *al-Furūq,* about the structure of this difference between *fasād* and *buṭlān* according to Abū Hanīfah, "It is a good understanding".

The juristic reasoning of the Mālikīs and Shāfiʿīs unlike the Ḥanbalīs have followed in other places the Ḥanafīs distinguishing between the prohibition which affects the essence of the action and the prohibition which is related to other external thing that does not corrupt the contract. However, like other juristic reasoning, they did not differentiate between *fasād* and *buṭlān* as its meaning and consequences (see *al-Furūq* by Al-Qarāfī v. 2 section 70).

With this it becomes clear what we have indicated before that according to the view of the jurists *fāsid* contract is considered as it is on the stage between invalid aud valid. So, it is not invalid which is lacking the complete consideration of the *Sharīʿah* and not completely valid. This is when the coutract has fulfilled all the conditions of its basic things and ingredients which are the necessary fundamental elements to occur in the contract but it contradicts with the regulation of the mutual contract in a way like it contains the things that it should be free from such as the prohibited conditions or it is lacking what it should contain like the information about the object of the contract, so, when it is uot known then the contract will be *fāsid* (annullable).

Third: The Actions where *Fasād* is Different from *Buṭlān*

54/6 We have seen in the previous section that *buṭlān* goes on all kinds of material and oral actions whether it is contractual or non-contractual (see para 51/3 and 51/5).

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394 See *Uṣūl Fakhr al-Islām al-Bazdawī* and its commentary, *Kashf al-Asrār* on *al-nahy* 1/256-291 and specially pp. 258, 266, 268, 270, 280, 290; and *Fath al-Qāḍīr Sharḥ al-Hidāyah* on *al-Bayʿ al-Fāsid,* 6/42, 55, 93; and also *al-Badāʾiʿ*, 5/299-300).

On the other hand, the sphere of *fasād* is more restricted than that because, distinguishing between *fasād* and *buṭlān* does not cover all the actions but among them, there are some contracts that have only two stages: validity and invalidity, so, there is no difference between *fāsid* and *bāṭil* in those at the time of non-consideration of the contract by the *Sharīʿah*.

However, the Ḥanafīs who established the concept of *fasād* in the part of *buṭlān* in the sphere of sanctions of the *Sharīʿah* did not put the principles until today which would clarify the things on which this separation would go on and on which it would not. But they elaborated the reasons of *fasād* and its ruling that covered the chapters where they differentiated between *fasād* and *buṭlān* like sale, lease, donation, waive and others:

They pronounced in some other chapters that there was no difference there between *fasād* and *buṭlān*, like in the chapter of worship (*ʿibādah*), prayer (*ṣalāt*), fasting, pilgrimage and giving charity (*zakāt*). So, all of these will be: whether it is valid that makes the *mukallif* (legally capable person) to be free from the obligation or it is invalid that does not omit the obligation and at that time it is said that it is *fāsid* or *bāṭil* as the same meaning (see *Radd al-Mukhtār*, v. 1, the first chapter on *Mufsidāt al-Ṣalāt*).

54/7 Criterion on which the concept of *fasād* will go on and on which it will not

By studying the texts of the scholars of Islamic jurisprudence and the source of Islamic jurisprudence and also studying their research on distinguishing between *buṭlān* and *fasād* in different topics of jurisprudence from the civil ruling, the following criterion becomes clear to us:

Certainly, the division between *fasād* and *buṭlān* will not go on except on the financial contract that originates opposite obligations to each other or transfer the ownership.

a. So, in this criterion the contracts of sale, lease, mortgage, transference, conciliation on property, waive, distribution of property, partnership, share cropping and its similar things will enter into as it originates mutual obligation.

   Also, the loan and donation contract will enter into it as both of them transfer the ownership.

All of these, which *fasād* (anullable) can be distinguished from *buṭlān* (complete invalidity) will be considered as performed with annulable (*fasād*).

b. All other following actions will go out from under this criterion:

 i. The merely material actions.
 ii. The oral actions which are not from the kind of contracts, but it is an individual willing like divorce, manumission, endowment, absolution, guarantee and likewise confession.
 iii. The non-financial contracts i.e. marriage, procuration, will and arbitration as procuration, will and arbitration, are the accreditation contract.
 iv. The financial contract that does not originate mutual obligations and does not transfer the ownership like depositing and lending.

Even the jurists cannot imagine *fasād* in lending contract except when it is in return of the substitute thing then it will undergo the ruling of lease contract.

All these kinds of actions which will go out from this criterion will not be considered as except it has two stages of existence and non-existence or valid and invalid. There is no third stage between them which is *fasād*. But its *fasād* and *buṭlān* are the same meaning to indicate the absence of its legal existence in the sight of the *Sharīʿah*.[395]

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[395] It is noticed here from the previous discussion in the section of *Buṭlān* that the invalid marriage results from some consequences of valid marriage like offspring, dowry (*mahr*), *ʿiddah* when it results from entering into sexual pleasure, that is because the doubt here is considered as sufficient to prove the offspring where the *Sharīʿah* has expanded caution to prove this and followed by this *mahr* and *ʿiddah* (see para 53/4).

This is the consequence by which some jurists demand differenciating between the *fasād* (annulable) and *buṭlān* (invalidity) in the marriage, not as it is performed or not performed, but both of them are not prformed but regarding the establishment of this effects or not.

- *al-Nikāḥ al-Fāsid* (defected marriage) according to them is the marriage where the doubt is suitable to permit sexual enjoyment and also estahlishes with this offspring, *mahr* and *ʿiddah* even though the marriage is not performed according to the *Sharīʿah* like the marriage without witnesses, the marriage of a woman before she finishes her period of *ʿiddah*, the marriage of the person with the woman whom he divorced three times hefore the establishment of the reason of new legacy.
- on the other hand, **the *Bāṭil* marriage *(al-nikāḥ al-bāṭil)*** is where there is no doubt in it basically, like if a person gets married with one of the phohibited women for

The jurists have counted in some occasions the actions where *fasād* befalls with some differences with more and less. They reached to twenty one and composed poetry by this. Some of them proclaimed that the meaning of *fasād* and *buṭlān* is equal in the procuration *(wakālah)*, will *(wiṣāyah)*, endowment *(waqf)*, deposition *(iqālah)* and exchange *(ṣarf)* (see *al-Durr al-Muḥtār* and *Radd al-Mukhtār* in the chapter of *Mahr fī al-Nikāḥ*, 2/352-354). But, we have noticed here two things:

i. They did not cover all the contracts where *fasād* and *buṭlān* are equal.
ii. Their consideration on deposition and exchange as where *fasād* and *buṭlān* are equal is not admissible. But in accordance with the rule, there is difference between *fasād* and *buṭlān* in those contracts.

54/8 Remark

ʿAli Ḥaydar has taken this concept of *fasād* to the chapter of allegation comparing with the contract. He divided allegation in his, *Uṣūl Istimāʾ al-Daʿwā* into three parts:

1. **Valid accusation** ***(daʿwā ṣaḥiḥah)****:* this is the allegation which fulfills all the conditions and contains legitimated claim, like seeking for the price of the sold item and getting back the extorted thing. This results from the court proceeds with its legal proceedings as its responsibility to answer the disputes and the responsibility of proving the allegation of the alleger when the opponent party denies this and so on...

2. **Defected accusation** ***(daʿwā fāsidah)****:* It is an allegation which fulfills its basic conditions as it is valid in its fundamentals but *fāsid* with some of its external characters (meaning what we called the subsidiary aspects), that is like if the alleged thing is unknown for example, some one made allegation to the other on debt but

him like his daughter or sister having known this prohibition, it is like merely adultery rather uglier. So, it does not result from any thing like offspring or Mahr. The *ḥadd* (prescribed punishment in the *Sharīʿah*) is obligatory in that case according to the foremost opinion among the schools of Islamic law (see *Radd al-Mukhtār* on *al-Mahr* 2/350-351, and on *Ḥadd al-Zinā*, 3/353-354).

did not mentioned its quantity. In this situation, it is not suitable for the court to proceed with the legal proceedings but it is capable of repairing. So, it is not permissible to reject it immediately and to proceed with it and the responsibility of answering the dispute. But the alleger is responsible firstly to correct it by defining the alleged item. So, when he corrects and completes it's lacking then the court proceeds with this or otherwise rejects it. But, this rejection from the court does obligates omitting the right absolutely but the alleger can reinstate it in the correct way whenever he wants.

3. **Invalid accusation** ***(daʿwā bāṭilah):*** This is the allegation which is not legitimated in its fundamentals, like some one accused other by seeking donation or to pay the debt as he is the neighbor of the debtor or by seeking for materializing the invalid contract[396]. So, all of these will not result any ruling but the judge will reject it as pardon as it is not possible to correct it (see *Uṣūl Istimāʿ al-Daʿwā*, pp. 43-45).

This is a good understanding and good juristic reasoning and our judicial procedures are based on this. Indeed, the texts of the jurists and the laws of the principles of the judicial procedures – even though they do not divide the inaccurate accusation between *bāṭil* and *fāsid* and do not differentiate between them in terms of the name – are the supporters of this in ruling and practice.

Certainly, Article 50 from the norms of the principles of laws of Ottoman provided that when the accusation contains ambiguity then court will seek for clarification from the accuser to remove the ambiguity but it does uot obligates rejecting it at the beginning.

The basic judicial practice in legitimated accusation is that it will not be rejected because of the marginal defect which is capable of correction for example, uncertainty except when the accuser becomes incapable of completing the lacking and this is unlike the accusation which is uot legitimated basically and especially when the accusation have been subjected to the financial charges and legal procedures,

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396 Meaning that the accuser has confessed in his accusation that the contract he wants to materialize is an invalid contract. However, if he believes that it is validity then the accusation is primarily valid and after that the court will judge between the validity and invalidity of the contract.

when its rejection will cause loss for the accuser the expenses, efforts and time.

It is compulsory to differentiate in the inaccurate accusation between its legitimacy in its basic and capable of correction which is *fāsid* and its holder is liable to correct it and between the accusation which is not legitimated basically because of the absence of the fundamental conditions which will be *bāṭil*.

Based on this, the chapter of accusation will be added to the group where the concept of *fasād* is considered and it is regarded as the exception from the criterion that we have set up as it is one of the non-contractual verbal actions but it differentiates between *fasād* and *buṭlān*.

Fourth: The Technical Meaning of *Fasād*

54/9 We have indicated before that the Ḥanafis have established the concept of *fasād* in the aspect of invalidity in the civil sanctions. They defined the fasid contract as **the contract which is legitimate in its fundamentals but not in its characters** (see para 54/7).

We have seen that this definition does not provide the clear feature of the essence of the meaning of *fasād* but discovers its reasons only and it contains ambiguity that inherits so many uncertainties. Base on what is passed, it is possible for us to define *fasād* in the contract as its intended meaning in the terminology of Ḥanafis by another definition as: it is the defect in the contract which is violating its regulations of the *Sharīʿah* in its complementary subsidiary aspects which lead to be worthy to revocation.

This definition, after the discussion has been passed, becomes clear. It is distinguished with:

1. It draws the essence of *fasād* which is a defect in the contract legally, indicates its obligatory reasons which is violating the regulation of mutual contract in the subsidiary aspect.
2. It characterizes the effect of *fasād* in the contract as it makes it liable of revocation and nullification, so, it indicates the consequences of *fasād* which we will look for shortly.
3. It means that *fāsid* (defected) contract is performed. That is in a way of its characters of worthy to revocation, when it is not worthy to revocation then it has legal existence which is sound in the sight of the *Sharīʿah*.

Besides, the meaning of worthy to revocation does not refer to the meaning of obligating revocation in all cases but this expression will be suit for according to the situations where revocation of the *fāsid* contract will be stopped according to the *Sharīʿah* as because of the prohibitive things in some cases like what we will see in the discussion on the consequences of *fasād*.

Besides, from the definition of *fasād* the definition of the *fāsid* (defected) contract is comprehended.

SECTION 55

THE GENERAL REASONS FOR *FASĀD*

55/1 Indeed, the situations of *al-fasād* which are understood from its definition turns back to the general reason which is violation of contract its *Sharī'ah* procedures in its subsidiary complementary parts.

This general reason is manifested in the contract in several features of which the jurists have grasped and defined in every contract, therefore, it is considered as the direct reason of its *fasād*.

These different features of violation which obligates *fasād*, among them there are some that have general effect to defect the contract which is befallen by *fasād* and among them, some are specialized in some contracts without others.

Therefore, the reasons of *fasād* are divided into two parts: general (*'āmmah)* and specific *(khaṣṣah).*

To know the specific reasons we should refer to the conditions of validity in every contracts separately from the juristic books, there is no chance here to present this in this general research. Joint ownership for example will defect the mortgage contract but will not defect sale contract (see para 25/7-8).

To impose prohibited conditions which is called as corrupting conditions, will defect the transactional contracts but will not defect donation (see para 43/14) and so on.

The general reasons for *fasād* which is exposed to us by studying will not go beyond the three: obscurity (*jahālah*), uncertainty (*gharar*) and coercion (*ikrāh*) based on the view of those who think that coercion requires *fasād* in the contract and not pending (mawqūf) (see para 185 and 194).

First: Obscurity

55/2 Obscurity that invalidates a contract in accordance with the juristic reasoning of the Ḥanafis is the excess obscurity that leads to complex dispute. A complex dispute is the one which is difficult to settle because of the equality of the evidences of the both parties based on that obscurity (see *al-Badā'i',* on *Ijārah* 4/207).

That is like if a person sells a ewe which is not defined from the flock of the goats: The buyer wants to give the bad one with the evidence of non-specification. On the other hand, the purchaser wants to get the good one with the evidence of non-specification as well.

Likewise, if they made lease contract with the absence of price or share cropping without mentioning the share of everyone from the harvest and there is no *'urf* in the place on that contract so that it becomes possible to go back to it.

Likewise, if a group of people made a partnership contract without mentioning the procedure of the division of profit among them (see Article 1336).

All of these and similar to these are the features of obscurity which is the defector of the contract.

On the other hand, the obscurity which does not lead to the complex dispute is not harmful for the contract. That is like if the person sells all what is inside the trunk or inside his house without knowing what is inside. So, the contract will be valid, even though it is unknown, as it is defined by itself by the boundary which blockades its quantity which is agreed on and that is the trunk or house. This specification is a suitable evidence for obligating the both contractors and settling down the dispute: so, when it is manifested that it is more than the seller thought then the evidence of the purchaser is preferable than him. Also, when it is manifested that it is less than the purchaser thought then the evidence of the seller will be preferable than him (see *Radd al-Muḥtār,* 4/21).

Based on this, the juristic reasoning of the Ḥanafis has permitted imposing the choice of specification in the transactional contracts, for example, if a specific thing is sold with the condition that one of the contractors from the seller and buyer has the right to choose the one on which the sale contract goes back.

The juristic reasoning of the Ḥanafis has permitted imposing the condition of choice of specification comparing with the choice of imposing conditions (see para 3/7 (8)) because of the necessity of the contractors for mediation and consultation among them. They said: The obscurity of the sold item does not cause harm at the time of the contract as it does not lead to the complex dispute as the authorization of specifying the sold item for one of the contractors has opened the way of removing this obscurity, they also made the will of the authorized person for specification obligatory to the other by his consent. It is suitable to settle down the dispute with justice

without transgressing the will of any one of the contractors (see *al-Durar Sharḥ al-Ghurar*, on *al-Buyūʿ*, 2/154).

55/3 Aspects related to invalid obscurity

Obscurity which invalidates a contract is commonly related to the following aspects:

1. The obscurity of the contracted thing (the object of the contract): that is like obscurity of the sold item in the sale contract or rent in the lease contract or conciliating thing in the couciliation or the donated thing in the donation and like this.

2. The obscurity of the substitutes in the financial exchang contracts: that is like the unknown price in the sale contract, the obscurity of the conciliating substitute thing in the conciliation contract.[397]

3. The obscurity of the deadline in every contract where the deadline is compulsory: that is like the obscurity of the contracted duration in the lease contract, or the obscurity of the due date to pay the price where it is postponed in the sale contract, or the obscurity of the date of maturity for the substitute thing in the conciliation contract.

   On the other hand, where the deadline is not compulsory then its ambiguity will not cause harm like the duration of continuing the partnership. The partnership is a contract where the deadline is not compulsory in accordance with the juristic reasoning of the Ḥanafīs. Even though a deadline is defined, the partners have the right to cancel it before this. So, there is no need to know its deadline before but it will continue until there found the thing which terminate this like repealing their willing or death.

4. The obscurity of the conditioned means of certification in the contract: that is like if the seller imposes conditions on the purchaser to give security or guarantee for the postponed price.

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397 From the sight of law both of the exchanged things (sold item and price) are considered as the object of the contract.

It is compulsory to give the security or the defined guarantee otherwise the sale will be repealed.

Note

It is noticed in this place that the jurists in their discussion on the defecting obscurity characterized it as "obscurity that leads to dispute".

In this way, they explained it as dispute, in fact, they mean by dispute the complexity which is impossible to settle down because of the equality of the evidences of the both parties in that like what we have clarified, and that is by the indication of the branches they mention. Otherwise, merely dispute cannot be avoided after mutual contract even though the contract is correct. So, the judiciary is the guarantor to establish the truth and settling down the disputes according to texts of the contracts and the principles of the ruling. Actually, the complexity will be in the contract when the obscurity is suitable for every one of the contractor's willing.

Second: Uncertainty (*Gharar*)

55/4 *Gharar*, its literal meaning is *al-Taghrīr* meaning delusion and involvement (see *al-Qāmūs*).

The jurists mean by this a contract which is depending on an illusive unreliable thing. It is named as that for the apparent thing deceives the contractor and involves him with delusive consequences.

Its root is proven in the *Sunnah* of the Prophet (s.a.w.): *He forbade the sale of al-ḥāṣāt (one kind of sale like gharar) and al-gharar.*[398]

The juristic reasoning of the Ḥanafīs distinguishes in this regard between two types of *gharar* (uncertainty):

1. Uncertainty in the root of the contracted thing. This requires the invalidity of the contract, that is like selling the fetus in its mother's womb, so, it is invalid because of the possibility of being flatulence or giving birth as death... like the sale of the stroke of the hunter and diver, meaning what the hunter will bring out from his nets of the fishes, the diver by his dive from the pearls.

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[398] Narrated by Muslim in his authentic *ḥadīth* book (1513) from the *ḥadīth* of Abū Hurayrah: The messenger of Allāh forbade *bay' al-ḥaṣāt* (One kind of sale like *gharar*) and *al-gharar*) (see para 5/20).

So, the sale contract will not be occurred in any thing of that because of *gharar* as it is similar to gambling. This is why the legitimated things are not permitted to sale before possessing it.

2. Uncertainty in the **characters and quantity** and similar things from the subsidiary parts. It requires the defect (*fasād*) of the contract which is meant here.

Mostly, the jurists mention about the defect because of uncertainty in sale and partnership contracts:

- **In the sale contract (*al-buyū'*):** If a person sells a cow with the condition that it could be milked this pound, so the contract is invalid because of uncertainty as it is possible that it cannot be milked with this quantity completely. This is unlike if he sells it as milk or the character of milking then it is the character that does not have uncertainty: when it is manifested that it does not contain milk which is called milk or the character of milking in the *'urf* then the purchaser has the right to repeal the contract because of the missing of the imposed condition.

  Likewise, if some one sells a ewe as it is pregnant or pregnant of a male goat then the sale is *fāsid* because of uncertainty.

- **In the partnership (*al-sharikat*):** this is like if some one from the contractors in the partnership contract imposes condition that one of them should have the fixed amount of Dīnār or Dirham from the profit then that is uncertainty because there is probability that the partnership corporation will not get profit except this amount or less than that or will not get profit basically or lose. Therefore, the partnership to be correct it is imposed that the profit must be distributed among the partners with the known ratio of share like a half, a fourth and likewise in the percentage. So, when a specific amount is fixed for any one of them then the partnership will be *fāsid* (see Article 1336).[399]

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[399] It is noticed here that the code here stated in this clause on the nullification (*buṭlān*) of the partnership when the fixed amount from the profit is conditioned for one of the parteners. But the intended meaning is corruption (*fasād*) like what is proclaimed in the texts of the jurists about the partnership which is compatible with the rule (see *al-Durr al-Mukhtār* 3/163).

Ibn al-Mundhir said: There is no disagreement among any one of the scholars about the non-legitimacy of this stipulation (see *Fatḥ al-Qadīr,* 5/402).

- **In share cropping:** When defined fixed quantity from the harvest or the fruits of the trees is stipulated for one of the parties then the share cropping becomes *fāsid* because of *gharar*. So, to make the contract correct it is compulsory to be the portion from the fruits known ratio of shares.

Third: Coercion (*Ikrāh*)

55/5 There are different kinds of views among the juristic reasoning of the Ḥanafīs on the effects of coercion in contract when a contract is performed by coercion: will it defect the contract, or will it make the contract pending?

Imām Abū Hanīfah believes that coercion defects the contract and it results all kind of the ruling of *fāsid* contract in the *Sharīʿah*. Even for example the ownership of the sold item or donated thing will be transferred if the coercion is in sale or donation contract and when the materialization of the contract is completed with the submission in accordance with the general ruling of the *fāsid* contract what we will see in the consequences of *fāsid* contract.

On the other hand, Zufar ibn Hudhayl, among the famous companions of Abū Hanīfah believes that the contract with coercion is valid and pending but not *fāsid.* So, it will not result from its ruling of the *Sharīʿah* by the occurreuce with the evidence that it accepts permission after removing away the coercion with the agreement of the scholars. This is the evidence of pending not corruption, so the *fāsid* contract will be repealed and its defect will not be removed by the permission of the forced contractor. So, the coercion is the barrier for the materialization of the contract not for the validity.

The elaboration of this has been passed in the chapter of defects in the desire (see para 34/3 the texts and footnotes).

Most of the times the jurists are indulgent with the expression between *bāṭil* and *fasād,* they apply *fāsid* on *buṭlān* and the contrary (see *bay' al-fasid* in *al-Durar al-Mukhtar,* also in *al-Durar* and *al-Hidāyah*).

Also, Professor Shāfiq Shahhatah has pointed out this indulgent in this expression (see his thesis on *Naẓariyyat al-Iltizāmāt fi al-Sharīʿah al-Islāmiyyah,* para 163).

Based on the opinion of those who thing coercion is the corrupter of the contract, the coercion is one of the general reasons of *fasād*. And based on the other opinion, coercion will go out from this subject and at that time it will be one of the barriers of realizing the contract.

It is evident here that the view of Imām Zufar is preferable than the view of Imām Abū Hanīfah which is apparent here and it is perceived that the clause 1006 from the code has preferred the opinion of Zufar as it has proclaimed that: The occurred contract by coercion is not accepted but when the forced contractor has permitted this after the termination of the coercion then it is accepted legally.

The meaning of non-acceptance is not establishment of the ruling of the contract even though it is performed completely. This meaning goes with the view of Zufar which is pending in the contract because the pending contract is the one that does not results from anything before the permission and the ownership will not be transferred in that when it is the transformer of that and even its realization is completed. On the other hand, Abū Hanīfah talks about the transformation of the ownership in the forced contract when its realization is completed like all the *fāsid* contracts, and the forced person has the right to repeal this contract like we have discussed previously.

55/6 These are the three reasons for *fasād* in the juristic reasoning of the Ḥanafis and followed by those **the corrupting condition**, this is the prohibited binding condition which discussion is passed in the chapter of the contractual conditions from the concept of contract (para 43/14) so the corrupting condition will corrupt all the exchanging contracts like sale, forward sale, lease, conciliation, distribution, spreading out, likewise the contract of partnership and sharecropping.

Excluding from these reasons, there are specific reasons which effect is confined in some contracts. For example, joint ownership defects the guarantee contract, to confine duration for a sale contract will defect it, non-confinement of duration will defect the lease contract, without making exchange in the place of contract will defect the exchange contract... and other reasons and to know these reasons it requires knowing the conditions of soundness in every contract separately.

SECTION 56

THE CONSEQUENCES OF *FASĀD* AND THE RELATED THINGS

56/1 We have seen before: the *fāsid* contract is considered as occurred (para 54/7).

Also, we have seen in the definition of *fasād*: It makes the contract worthy to repealing (para 54/9).

It is obvious that occurrence of the contract requires its effects because the contract that does not result any effects then it is like nullified.

Based on this perception, the *ijtihād* of the Ḥanafīs decided that the defect (*fasād*) of the contract – as its literal meaning of defect (*fasād*) which is, it is the stage between valid and invalid – its consequence is: **to be the contract worthy to repealing by the will of every one from both of the parties and by the will of the judge.**[400]

Meaning the *fāsid* contract will lose its power of obligation. So, when a party is sought to perform this then he can defend himself by repealing it. When any one of the contractors do not ask for repealing of the contract then the judge will repeal it voluntarily without any claim, (like in the case of *buṭlān*) to protect the order of the contract which is among the general universal order. But, this does not prevent resulting from the basic ruling on the *fāsid* contract based on its occurrence. So, issuance of the ruling as the result of occurrence and worthy to repealing as the consequence of defect (*fasād*) are in these two consequences with the following elaboration:

First: Resulting From the Ruling on the *Fāsid* Contract

56/2 The issuance of the ruling on the *fāsid* contract based on its occurrence will not be established merely by the contract i.e. in the valid contract, but it should be delayed until the realization of the *fāsid* contract. For example, when it is *fāsid* sale, the purchaser will not own the sold item by the completion of the offer and acceptance i.e. in the valid contract but when it is submitted to him, then he will own

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[400] See *al-Bada'i'* 5/300.

it and his actions will be realized in that. For example, in the *fāsid* donation regarding the ownership of the donated thing, *fāsid* conciliation regarding the ownership of the substitute, *fāsid* distribution regarding the ownership of the shares and so on (see Article 366 and 371).

In the *fāsid* lease contract, its ruling will be established and the rent will be compulsory by gaining the service in reality (Article 471).

The perspective of the jurists in delaying the establishment of the ruling of the *fāsid* contract till the date of realization is, as long as it is worthy to repealing, to present it for nullification – even by the will of the judge though any one from the both parties claim its nullification – so, there is no *Sharīʿah* advantage in hurrying on establishing ruling on the contract which the *Sharīʿah* requires its nullification, this is because eliminating a thing is easier than establishing it. But when the realization is performed and the contract is occurred then there remain no hindrance to establish the ruling of the contract (see *al-Durar Sharḥ al-Ghurar* on *Bayʿ al-Fāsid* 2/174).

56/3 But the ruling which will be established in the *fāsid* contract at the time of realization will not establish the complete rights which is defined by the contract, but *fasād* (defect) will repulse these rights which are according to its basic principles which obligates the equality in the exchange because the agreed upon rights in the contract is *fāsid* with its *fasād* (see *al-Badāʾiʿ* 4/218).

Based on this they decided in the *fāsid* contract that when its realization is completed by the submission and even the ownership of the sold item is transferred to the purchaser then its price becomes compulsory to him at the day of possession. The price will be according to the price rate in the market not the price they have agreed upon and defined at the time of the contract (see Article 371).

Also, in the *fāsid* lease contract the when it is established, the lessor deserves the similar rents (in the market) meaning the price of the received service, but not the mentioned price at the time of the contract.[401]

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[401] But in the corruption of lease contract they consider that the fixed price will be the maximum limit because of the agreement on it. So, it is compulsory that the similar price in the market should not exceed the fixed price except when the corruption of the lease contract is arised from the obscurity of the rent because of non-fixation of it at the time of making contract. So, at that time the similar market price will be compulsory whatever the amount is (see Article 461-462).

In the *fāsid* partnership contract, when it is the partnership of goods then the partners deserves according to their share in the capital from the obtained profit not in accordance with their agreement at the time of making contract (see Article 1328).

When the capital goods is provided by one party like in the Mudarabah contract and the contract is *fāsid* then the capital provider gets the profit and the Mudarib (labor provider) gets the price according to his work with the condition that this amount does not exceed the amount which is fixed at the time of the contract (see Article 1426).

56/4 Note: There is no difference between *ṣaḥīḥ* and *fāsid* in Mortgage Contract *('Aqd al-Rahn)*

According to our jurists the consequences of *ṣaḥīḥ* and *fāsid* is equal in the mortgaging (*rahn*) contract.

They proclaimed that the *fāsid* mortgaging contract will establish – regarding the loan which is performed with its means – the ruling

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This is unlike the price of the sold item in the sell contract as it will be established despite it exceeds the amount of the fixed price in the contract.

The Ḥanafīs give reason for this difference between the corrupted sale and lease contract that the sold item is valuable by its own. So, at the time of corruption its worth price is compulsory regardlessly how far it reaches.

On the other hand, Accordin to the juristic reasoning of the Ḥanafīs service (*manfa'*) is not valuable by its own but the contract makes it valuable. So, when the two parties fix the price with their agreement then it is not permitted to exceed this (see *al-Badā'i'* the last section on *Ḥukm al-Ijārah* 4/218).

But this view of Ḥanafī on the non-valuability of the service by its own is a weak view. It is subjected to bitter criticism in another juristic reasoning where the servce is considered as a concrete thing which is valuable by itself like what we will see in the third part of this seris of *Fiqh*: *al-Madkhal ilā Naẓariyyat al-Iltizām al-'Āmmah*, in the chapter of concrete thing and service in the part of goods.

So, it is compulsory in the corruption of all contracts to consider the proved rights in that which is defined by the contractors equal to what they have decided in the corruption of the contract, because, the corruption of the contract does not deprives of the consent on the fixed complete rights in that, except when the corruption of the contract is arised from the obscurity of the substitute or from the coercion accordin to those who think that coercion is the corrupter of the contract not makes it pending, so at that time it is compulsory to establish the cxchanged substitute in the corrupted contract to what extent it reaches.

It is known that the concept of *fasād* (corruption in the contract) with all of its components of principles and ruling are arised from the juristic reasoning of the Ḥanafīs. So, it is capable of modigfication according to the interest and the differences of the views which definement will be in accordance with *ijtihād* and the authrised person based on the views of the reliable jurists.

of the valid mortgaging contract which is the right of seizing the mortgaged thing and the superiority of collecting the debt from him, even though the borrower or mortgagor repeals the contract because of the defect in the contract. The mortgaged item will be kept under the lender or mortgagee in the occasion of the defect of the contract which is equivalent to the debt as like as the valid mortgaging contract completely. This is the most preferable views among the juristic schools. This is because the borrower or mortgagor did not get the loan except on the base of documentation by mortgage. So, when the mortgagor has repealed the contract then he should return the loan before getting back the mortgaged item and the right of seizing others property to fulfill the right from him is proven in the *Sharīʿah* in many situations without the mortgage contract like the representer in purchasing when he purchases for the authorizer what he has authorized him to purchase, so he has the right to seize the commodity from the authorizer until he pays the price even though the representer did not pay the price from his property because it is subjected to claimant (see Articles 1940-1941).

There is no difference between the validity and corruption in mortgage contract regarding the consequences, in the right of debt which is occurred because of this *fāsid* mortgaging. This is unlike in the case where the loan is taken before without mortgaging and after that he mortgages something in return of that and this mortgaging is *fāsid* then it will not result from the valid mortgaging contract.

On the other hand, in the nullified mortgaging contract it is like did not occurred basically and no ruling of the valid mortgaging contract will be established in any way.[402]

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[402] The example of defect contract which is violating its subsidiary complementary conditions is mortgaging jointly owned portion of property in return of the debt. Indeed, the mortgaged thing is a valued property which is mortgaged in return of the compensation right and fulfills its basic conditions. It is occurred but the joint ownership will defect the necessary possession of it (see para 25/8).

The example of invalid mortgaging which is violating its basic conditions like if the mortgagor is lacking competence like mad or the mortgaged item is not compatible with mortgaging like the property of endowment and likewise, if the right of the mortgaged item is in return of non-compensating contract like mortgaging in return to deposit. So, the deposit is trust which cannot be compensated because of destruction at the time deposit without transgression and negligence then the mortgaging contract will go in vain, as if the consigned goods is destroyed, then nothing from the mortgage will be fulfilled (see para 31/6; and *al-Durr al-Mukhtār wa-Radd al-Mukhtār* on *al-Rahn*, 5/337-339.

Second: Entitlement to Dissolution and Barriers to Dissolution

56/5 To be entitled to dissolve a contract because of *fasād,* two conditions have to be met:

1. To remain the contracted item on its same condition after the fulfillment of the contract.

   Repealing the *fāsid* sale contract will be prevented if the sold item is destroyed to the buyer or if he consumed it or if its structure is changed in a way that its name has been changed like if it was wheat then he made it flour or it was flour then he made it bread. Likewise, if any increase or decrease happens in the commodity, i.e. if the sold thing was a house, he populated it, or, it was land, he planted tree on it, or, it was clothes, he colored it.

   The prevention from repealing the contract in all these situations and its similar things will result the ownership, or, the ruling, which is established by the realization of the *fāsid* contract, will remain.

2. Repealing the *fāsid* contract should not lead to nullification of the right which is obtained by other than the contractors on the contracted thing, otherwise the right which is arisen for other will prevent lawfully repealing the previous contract based on the corruption.

   In this case, if the purchaser receives the sold item in the *fāsid* contract, he will be considered as the owner of this by the receiving and after that he sells it or donates it or mortgages it by the valid contract or gives it to the endowment, repealing the first sale contract will be prevented and its ruling[403] which is established *Radd al-Mukhtār* by its realization will remain (see Article 372) and *al-Durr al-Muhtār* on *Ḥukm Bayᶜ al-Fāsid* 4/125-127 and 130-131 aud *al-Badā'i'* 5/300-302)

   The purpose of the jurists in preventing this abolishment of the contract at the time of non-fulfillment of these two conditions despite of its corruption is to adhere to the steadiness of the transaction and to protect the obtained right.

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[403] It is transferring the ownership to the buyer and his obligation to pay the price of the sold item.

56/6 Who has the authority to dissolve a *fāsid* contract?

The authority of repealing the contract will be established for every one of the two contractors with the condition that the other party is present; regardlessly whatever is the reason for the defect according to the opinion of Abū Hanīfah. Likewise, the judge has this authority (see para 56/1 and *al-Badā'i'* 5/301).

But his companion Imām Muḥammad thinks that when *al-Fasād* is caused by *fāsid* condition which is imposed for the interest of one party on the other then the right of abolishment of the contract will be confined to the party whose interest is preserved in imposing that *fāsid* condition as he is capable of correcting the contract by removing the condition. So, if the other person is permitted to abolish the contract then his right will be ineffective in correcting and fixing the contract *(al-Badā'i'* 5/300).

56/7 A summary of Professor Shāfiq Shahātah's discussion on *fasād* is: Indeed, the statement about the transformation of the ownership to the purchaser by receiving the commodity in the *fāsid* contract is the description of the Ḥanafīs only; it is the essence of the concept of *fasād*. The purpose by this is in reality to protect the others right, so it is not valid to provide evidence by the corruption of the contract in front of other and the owner of the thing does not have the right to get back what has gone out from his ownership by the *fāsid* contract when it is passed from hand to hand, if that is permitted for him then the contractual relation would be unsteady.

Thus, causes of *fasād* are plenty and the Islamic jurisprudence does not have way to announce the actions[404] so the other party remains ignorant of the defect of the ownership of the person from whom his ownership is transferred to him. So, when he buys then his ownership will be inconsiderable. This is why the jurists have created a principle which has great advantage, by which it is possible to get along without the way of announcement. This is because they have

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[404] I would say: rather in other modern jurisprudence also do not have way to announce the action in the moveable properties so that he will know it whenever he wishes, rather it is impossible in the moveable properties, therefore, the way of legal announcement today has been limited to registering the landed actions in the cadastre because it is possihle for every landed property to keep record unlike in the movable properties.

considered the action purifies it from the defects that corrupt the ownership of the actor.

But how is it possible for a person to transfer the ownership more than he owns?

It is manifested that this ambiguity calls for the jurists to assume transferring the ownership to the purchaser by receiving the sold commodity in the *fāsid* contract and he can transfer his ownership to others or keep it as mortgage. At that time the owner[405] cannot get back the property from the other in this situation. But he can only demand from the first purchaser the compensation which is the value of the sold item) (see *al-Naẓariyyat al-ʿĀmmah al-Iltizāmāt fī al-Sharīʿah al-Islāmiyyah* by Professor Shafiq Shahatah, para. 172-173).

This is a good speech and perfect understanding in the concept of *al-fasād.*[406]

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405 The meaning of owner here is the seller in the first corrupted contact and that is regarding what was before, because his ownership has transferred.

406 Professor Shāfiq Shaḥātah views another thing in the analysis of the concept of *fasād* that we do not accept , among his views:

"Indeed, *fasād* in reality is *buṭlān*, the corrupted contract in reality is nullified (*bāṭil*) that does not have any effect between the contractors as the jurists stated that when the guarantor (*kāfil*) pays based on the corrupted *kafālah* (guarantee) contract then he can get back what he has paid....and establishing the corrupted contract will not remove tbe corruption".

And the sayings of the jurists: "Indeed, receiving the commodity will transfer the ownership in the corrupted contract) is not but only imagination which intends to correct the action of the purchaser in the sold item. So, other person's right will be realized by that. The thing supports the non-transformation of the ownership to the purchaser in the corrupted contract in the sold landed property will not be taken by preemption despite its collection is occurred' (see the above mentioned thesis, para 169-170 in brief).

I say: It becomes clear from the previous discussion on the concept of *al-Fasād* which is supported by the texts that this view from Professor Shāfiq Shaḥātah is not sound because of the following reasons:

1. As we have clarified that it is the third stage between valid and invalid (see *al-Badāʾiʿ* 5/299). So, the corrupted contract cannot be considered as nullified and also not nullified between the contractors. How it would be as the texts of the jurists proclaims that the corrupted contract is occurred and the nullified contract is not?
2. The *Kafālah* (guarantee) contract is among the actions where there is no distinction between corrupted (*fāsid*) and nullified (*bāṭil*) and its corruption in their terminology is on the meaning of nullification like what we have clarified before (see para 54/7).
3. When the realization of the corrupted contract does not remove its corruption then it does not obligate that it will be nullified between the contractors. This is because the corruption (*fasād*) requires the contract to be worthy to abolishment which cannot be prevented by the realization but relating other persons right in the contracted thing will prevent this.

56/8 The Annullability cannot be lifted by giving permission

It should be noted that the annullability (*fasād*) of contract as well as its nullity (*buṭlān*) cannot be lifted due to the permission of either one or both of the contracting parties. Because, it is resulted from breaching the contract pattern and none has the authority to approve this breach. By contrast, invalid contract will remain fit to be terminated even if two parties allowed its termination.

The annulability, however, can be lifted through removing its cause, like if the annulability was due to a prohibited and invalidating condition and then both parties abandoned it at the contract meeting itself. Likewise, if the invalidity was due to unknowing one of the substitute or the profit ratio in a partnership and then both parties specified the substitute or the profit which was unknown. In that case, the invalidity will be removed and the contract becomes valid, for the well-established principle states that "if the hindrance removed, the forbidden will be reverted" (7/28).

56/9 This is the concept of annulability in Islamic law which explains its theoretical basis, its reasons and its impacts. It shows that in the civil procedures, *fasād* is a third category between *ṣiḥḥah* and *buṭlān*, in which case the contract will be concluded despite deficiency such that it deserves termination. And prior to the termination it has some effect in the form of which is different from that of in the state of validity (*al-Badāʾiʿ*, 5/299 and onwards).

56/10 Arranging the status of contract according to the categories of civil procedures:

Based on all these civil procedures, the following order should be regarded in respect of the status of the contract:

- The contract is either concluded or void.
- The concluded contract is either valid or invalid.
- The valid contract is either operative or dependent[407] or halted.

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4. The sold landed property is a corrupted sale contract which will not be taken from the purchaser by preemption.

[407] The operative contract is that which do not depend on the permission of other than two contracting parties as it has nothing to do with others right. Whereas the

- The operative contract is either mandatory or optional or non mandatory.

(*al-Majallah* 105-115; *Radd al-Muḥtār*, 4/100).

It is important to notice this opposite relation between the names of these status and the names of their respective procedures in the terminologies of the *fuqahā'*. Accordingly

- The conclusion is just opposite of the voidness
- The validity oppose the invalidity
- The execution oppose the suspension
- The mandatory oppose the option or non mandatory.

It is not permitted to employ any of these terms in other than its right place and to be set against other than its respective opposing terms for it may cause confusion and misleading as each status differ from others in terms of both meaning and rules.

dependent contract is that which require the permission from other than the two parties as it is connected with his right. This has been explained during the discussion on the general consequences of the contract under the concept of contract (para 38/2).

SECTION 57

THE ATTITUDE OF LAW ABOUT INVALIDITY AND OUR OPINION ON THE MATTER

57/1 The juridical law did not define the concept of *fasād* which was established through *ijtihād,* the way it defined the concept of *buṭlān* as we shall see.

The Ḥanafī method of *ijtihād,* which introduced the concept of *fasād* and on basis of which was the judiciary of Ottoman Empire, restricted the power of intention in respect of the contract conditions, though it is considered as a moderate method with respect to others as we discussed before (para 42/3, 43/12 onwards).

Accordingly, the unpermitted condition in a contract is considered as invalidating the contract.

Since there are many such conditions, the number of invalidating cases in the contracts become very large.

During the last period of Ottoman era, the foreign trade with Europe become widened along with the developments in the methods of internal trade and manufacturing. Moreover, during the modern age, many new types of rights brought about which was not familiar before, viz. the right of author, the inventor and all those who have any new work of art to invest his book, inventions or art works, which is termed as copy right or patent. The holders of copy right and licence do need to sell and give up them for others who can utilise them. As well, the foreign trade became in a very need for guarantee contracts which is known as *al-sawkarah*[408] in order to guarantee the risk on transported goods especially in case of shipping. The scope of manufacturing contract by ordering the products widened in trade dealings with the foreign plants and factories. Similarly, the promise contract by providing the necessities, livelihood and raw materials to the government offices, companies, factories and colleges, which is known as supply contract, is also become popular. All these depend on mutual conditions of various forms.

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[408] See para 46/24.

The valne of time in commercial activities also increased such that the failure of any parties to pay on time, or his refusal to fulfil his promises on its due time became more harmful to the time and properties of the other party than it was before.

Thus, if he who promised to provide manufacturing materials to the owner of a plant failed to deliver it to him on due time, the factory and its workers would be jobless. If he who sells goods to a trader delayed its delivering such that its price falls down, the buyer might suffer possibly a great loss.

This lost cannot be substituted by ordering the promisor to fulfil his basic promises, as it only guarantee his basic rights and it does not include the compensation for the damage of the unemployment and the loss which resulted from the delay of his litigant in fulfilling his promise on time as a result of his carelessness or refusal.

This increased people's interest in stipulating money guarantee in their contracts on the other party who fail to fulfil his promise on time.

This type of condition is known as penal condition in the foreign law terminologies.

In this way, the combined reasons and motives as well as the time factors resulted in the development of general commercial life. Thus, there emerged dire need for more freedom in dealing methods than what existed in the principles of Ḥanafī School which was applied in the state judiciary.

Some principles in this school with regard to the concepts of *buṭlān* and *fasād* considering their old definitions especially the deal being invalidated in case of various trade conditions emerged as obstacles to respond this needs.

Because of this, many difficulties appeared in the freedom of contract as a result of invalid conditions and the provision prescribed by the principles despite the increased need of commercial and industrial dealings to widen the scope of stipulating conditions in contractual rights and obligation.

57/2 The doctrinal spirit and narrow juridical views of that period was the two obstacles to seeking treatment/finding solution from the pharmacies of other schools of law and from their storage which have prolific law and liberal theories that will be adequate to meet the legislative needs if one school of law fail to do so. Nevertheless, in respect of the contractual conditions, the *al-Majallah* committee did not accepted other schools than the Ḥanafī, viz. the Ḥanbalī School,

the opinion of Ibn Shubramah and al-Qāḍī Shurayḥ, which give extended freedom, nothing less than what provided by the modern laws, in contractual conditions as explained before during the discussion on the power of intent under the contractual concept.[409]

Now, as long as *al-Majallah* which represents the legitimate civil law, did not solve the issue because of not accepting other than the Ḥanafī thought, the Ottoman Empire felt a dare need to introduce a new legal text that expand the freedom of contract, contractual conditions and the capacity of the thing on which is the contract.

57/3 The Ottoman government, however, did not want to confront with *Majallat al-Aḥkām al-Sharʿiyyah* through direct changes. So it turned to the civil procedural ordinance which in fact has nothing to do with this subject. Accordingly, it substituted one of its clauses which deal with some procedural law (i.e. the article 64) with another new clause which has been added there through an ordinance issued on 15 Jamād al-Ākhirah, 1332 A.H. The following three legal principles were established therein:

1. All that which has been widely circulated from among the substances, benefits and rights is considered as an object on which a contract can be done just as any valuable property. The things that will come upon also have the same rule.

2. All agreements or conditions would be considered as obligatory for both contracting parties unless it violate the common ethics or general system or it contradict any particular legal text, or to the real-estate law, or to *waqf* law, or to the personal laws like the inheritance, death, the capacity of both parties and family rights. These are the six exempted areas the rules of which are

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409 Paradoxically, the concept of *fasād*, which was the solution, became the problem. Because, the Ḥanafī thought in fact introduced the concept of *fasād* in order to save as a barrier without deterioration of the contract in the abyss of nullity whenever it violate its legal form as is the case in few school. Accordingly, the Ḥanafī thought made difference between various types of violation and its degree and restricted the nullifying violation into very narrow range. So, the basic idea was out of genius Ḥanafī legal thought. Positively, it considered the prohibited conditions as only invalidating a basically legal contract and not nullifying it. However, the scope of such prohibited conditions has been widening in Ḥanafī thought whereas the freedom of stipulation being rigid, despite it has been considered as medium among other schools which has been explained during the discussion on the power of intention.

considered as obligatory against which any agreement is not allowed.

3. The contract is considered as complete if both parties agreed on the fundamental issues i.e., the basic aspects, even the subsidiary issues are not mentioned. Then, in case of the disagreement on those subsidiary issues the court will identify them according to the case.

57/4 (a) Analysis of the First Principle

The first principle of these principles is modification of some reasons for invalidity concerning the position of the contract, it widened proneness of position to be valuable, this proneness is one of conditions of general ratification. It made tradition the base of being valuable where as its basis was legitimacy of benefits according to our jurists' opinions. For example, it was not considered valuable money according to Muslims, its purchase or sale was not ratified, and its damage was not guaranteed.[410] It became valuable money and a position valid for sale and all contracts.[411]

It included abstract rights such as right of irrigation of lands, elevation of building floors, debts in possessions privileges of some modern lawful rights such as industrial property right, literature property right of authors concerning printing and publishing, privileges of issuing permanent newspapers and *al-Majallah*, names of these news papers, and names of famous commercial shops whose name people want to buy to make use of their reputation.

All these became agreeable to sale and all contracts due to this lawful article. It is noticed that results of this principle can be

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410 As for non-Muslims wine is considered valuable, money and it is legitimate to contract it and the Muslim guarantee to non-muslin what he damaged. Islam obliged us to deal with them according to their doctrine this is example of legislation tolerance (see *Radd al-Muḥtār* 4/104).

411 It is different from hashish, opium, and similar drugs which the Law bans by special text. They are not valuable according to lawful and legal point of view according to the second principles. Their sale is not ratified. They must be confiscated and keeping them is considered a crime which law punishes. The theory of worth lesseness is also existent in lawful consideration hut its base is to prevent dealing this money, other than legal prohibition. We will see this in detail in the chapter of money in the third part of *al-Madkhal ilā Naẓariyyat al-Iltizām al-'Āmmah*. See *Kitāb al-Milkiyyah wa-Nazariyyah al-'Aqd* by al-Shaykh Muḥammed Abū Zahrah, para 4.

explained easily according to the rule of Islamic jurisprudence except for contract of wine and other legally prohibited things

57.5 (b) Analysis of the Second Principle

The second principle involved a modification of some other reasons of invalidity and some reasons of corruption concerning authority of will in declaring and forfeiting rights according to the lawful rule "contract is legislation of contractors".

1. When we consider reason of invalidity, we find that contracts which were invalid due to suspension on a condition as sales, renting and all compensation and contribution contracts became agreeable to suspension according to agreement of the two contractor as we presented in research of will authority (see para 43/15)

   Contract of negative obligations as negation of making the building high in front of one's neighbor to a determined height, negation of running laboratory or negation of trading with a certain kind of goods to relieve industrial or commercial competition.

   All these cases and similar ones have considered obligatory contracts after they were invalid according to the Ḥanafī opinion.

2. As for reasons of corruption, this principle cancelled the corrupting stipulation which was one of reasons of corruption concerning guarantee contracts All contract conditions became right and obligatory except for those which contradict the excepted six aspects named public system, public moral, etc.

57/6 Therefore, it became lawful that the two contractors agree in the determined contract to other rules other than which legislation and jurisprudence confessed in every contract[412] which lawful text did not prevent the origin of these legislation rules of these contracts is that they are not obligatory legislation and arranged it previously so that the two contractors could depend on them. Therefore, they go without explaining them in the coutract. The result is that they are

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[412] It is called *Muqtaḍā al-'Aqd*, as previously discussed in para 39/7.

proved for the two contractors as long as they do not agree to things other than them (see para 39/7, 42/8, 47/3).

If the two contractors agreed that the buyer would not possess the sold thing till paid delayer money or credits or they agreed that the seller would not guarantee the sold thing if it was damaged before handing, the contract would be as they agreed this stipulation was a corrupting one according Ḥanafī *ijtihād*. The origin is that judgments of contracts are obligatory and to stipulate a condition contradicting what contracts oblige is corruption except there is a text which allows contradiction.

This principle also involves promise of financial guarantee in the case of withdrawal or delay with execution of obligation. This is called clause penile *(al-sharṭ al-jazā'ī)* is the modern law terminology as we mentioned (para 57/1).

This clause penile was known by al-Qāḍī Shurayh's belief. Similar rule was narrated about him as we previously illustrated (see para 42/18).

This second principle and all its result belongs to the principle of authority of will. If rules Ḥanafī belief and similar believes could not include it according to the limits of contract conditions freedom, there would be in Islamic jurisprudence a lot of believes which would adopt wide consideration of stipulation freedom as we previously illustrated in research for contract will authority of Islamic jurisprudence.

57/7 (c) Analysis of the Third Principle

The third principle came to modify another reason of corruption called ignorance. It did not consider that ignorance is harmful in contract form and correctness as it was in a subsidiary aspect. The main aspects were known and agreed since contract or two contractors agreed to abase valid to determine them later.

For example, if two contractors traded and agreed that the price of the sold thing was that of the market or the price which would be settled on that day or someone bought a thing to resale it with stated profit as ten percent of capital which the seller will receive. The main aspect in all these examples are agreed as the sold thing is known and the price is fixed according to a certain mount. So there is no harm if someone does not know the price during contract.

This ignorance was considered as a corrupting reason in the Ḥanafī *Ijtihād* at and a reason of invalidity according to other believes

but this principle included in Article 64 which was searched confined correctness of the contract to knowing of main aspects which the two contractors agreed on. The determination of subsidiary aspects when there is difference between contractors is up to the court. It determines them through experts. It takes these agreed rules to be measurement of determine the disputed subsidiary aspects.

This principle is strong structured. It is acceptable according to Ḥanbalī *Ijtihād* at whose jurists confessed sale for the price of immediate time as we illustrated previously in theory of contracts (see para 42/16).

But if some main aspects were unknown and were not agreed in the contract or there was not a good base to determine them, they would corrupt the contract according to that principle and the legal judgment of Ḥanafī *Ijtihād* at. It would be the same case if the sold thing was unknown or two contractors agreed to fix the price or percentage of profit later. This would be a corrupt contract according to article 64 as it did not correct contracts which included ignorance except those had ignorance in subsidiary aspects, and agreement about the main aspects or those who had a good base to determine them later.[413]

57/8 Attitude of the New Syrian Civil Law

Our Syrian Civil Law was issued while we were printing this book. The people who issued it quoted from the new Egyptian law issued in Egypt in 1949. It is received from some foreign civil laws and we will see that foreign jurisprudence is void of corruption theory which is equal to our jurist theory.

Consequently, our Civil Law appeared and its Egyptian origin void of any effects of corruption theory. It supported the three principles of Article 64 of ottoman right trials origin law illustrated previously.

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[413] Most jurists today think that Article 64 of right origins law cancelled corruption theory completely. This is a wrong thought. It cancelled corruption of stipulation except that was a breach of judgment of public system. It also cancelled corruption resulted from subsidiary ignorance but main ignorance is still a corrupting factor of contracts.

a. The two Articles 83, 132 of this new civil law confessed the first principle related to valuable money and its proneness to contracting.

The Article 83 says that "everything which is lawful according to its origin or an article is legitimate to be position of financial rights".

The Article 32 says "legitimacy of position is to be a future thing". It included validity of selling the non-existent which would be existent as fruit before its time even embryo in its mother's womb.

b. The two Articles 188, 149 included the second principle concerning freedom of stipulation

Article 148 said that "contract is legislation of contractors"; Article 149 said that "contracts should be executed according to what it includes through away agreeable to what good intention obliges".

The civil law excepted also what is related to rules of inheritance, public system and public morals from their contradictive agreements (see Article 137, 146).

In the last section, it arranged real estate rules whose contradictions cannot be agreed on. It left the rest of personal status including marriage, divorce and other to judgments of Islamic legislation except for rules of persons' fitness their names, and their motherlands. It arranged them in articles 31-35.

c. The Article 96 included the third principle and confessed that agreement on all essential problems is enough to complete the contract if there was a dispute between the two contractors concerning the explained subsidiary questions. The court judges them according to the nature of dealing judgments of law, tradition and rules of justice.

These three lawful principles which the Article 64 included from the law of ottoman trial origins were completed by the civil law which was the natural position of these texts.

57/9 Our Opinion of Corruption Theory

The essence of speech is that corruption theory in Islamic jurisprudence is well constructed, and offers useful and valuable

advantages in the legal supporter systems. It made it a useful station in the way of invalidity.

The suitable position of it in the past was *al-Majallah* which was legal civil law. These three principles are modification of judgments of *al-Majallah* but the Ottoman government put them in the law of trial origins as we mentioned previously.

As for narrowness which was noticed during its application before existence of Article 64 of ottoman right trials origin law, it did not arise from the corruption theory itself but it arose from narrowness of contract stipulation freedom in Ḥanafī belief which considered that most judgments of contracts are obligatory. Stipulation of things other than them was corrupting factors if it were not for corruption theory. This stipulation and similar ones would make contracts invalid as the opinions of other schools of Islamic law. The corruption theory was established to be wide and not narrow. The people were as the one who sat in the opening cold air and had a disease. These diseases were resulted from cold not from opening air or it was like a person who exaggerated in taking useful drug and it hurt him. Exaggeration is what hurt him rather than the kind of cure!

We illustrated that the corruption theory is attempting theory agreeable to be modified concerning the reason of corruption at its judgments according to legal need and interest.

We saw that the application of corruption theory for clear system had the best effect on the judgmental origins (see para 54/8) till the foreign judgment applied the idea of distinguishing between imperfect, defectives claim which could be changeable and invalid claim with illegal origin which is refused and which does not accept correction.

They applied defect theory in claim practically although they did not call it that name. The Ottoman law of family rights made use of the application of the defect theory with regard to marriage in accordance with the opinions which distinguish between defect marriage and invalid one, and in accordance to its consequences. They are equal as they are not ratified.

The mentioned law considers marriage that contradicts its legal and lawful conditions a corrupt marriage if sexual intercourse results in attribution of the baby and *ʿiddah* although it is not ratified such as adultery of prohibited women according to Abū Ḥanīfah, marriage without witnesses and marriage of underage to which law stipulated determined age.

The law considers marriage invalid if it has no effects such as abstract adultery which does not prove attribution as marriage of Muslim woman to a non-Muslim husband (see the law of family rights- the list of reason which obliges invalidity and corruption of marriage Articles 52-58, 78).

This is a wise distinction leading to remove theoretical contradiction concerning proving some judgments of a contract which is described as invalid one. It depends on widening the meaning of corrupt one to include the contract which is not ratified the difference points between it and invalid contract is the settlement of correct behavior effect or their negation.

Issuing modern laws must consider corruption theory with modification of its reasons according to the principal of contract will authority and it will make use of it a lot.

SECTION 58

NULL THEORY IN FOREIGN JURISPRUDENCE, ILLUSTRATION, CRITICISM AND COMPARISON OF NULLITY AND ANNULLABILITY THEORY IN ISLAMIC JURISPRUDENCE

58/1 We see that it is useful to present a brief illustration of the *buṭlān* (null) theory in the foreign jurisprudence after our research of the two theories of *buṭlān* (null) and *fasād* (annulability) in Islamic jurisprudence. We will compare them and this will be the end of research of the legal supporter's theory.

58/2 Division of nullity into absolute and relative according to foreign jurisprudence:

The French legal scholars divided nullity into two kinds: (a) Absolute nullity *(al-buṭlān al-muṭlaq)* (b) Relative nullity *(al-buṭlān al-nisbī)*:

As for absolute nullity, its theory conforms to the null theory in Islamic jurisprudence concerning idea, rules, reasons, and results that it is almost identical to the original copy of the same theory in Islamic jurisprudence.

According to foreign jurisprudence, the null contract is void. If it was contracted, it would be considered non-existent and the reason of this nullity is the loss of one of main categories of the contract or some conditions which will resul in the following:

- The null contract does not result in judgments or its consequences. It is not permitted or it is not considered valid by the authority.
- If one of the two contracting parties adhered to the contract and filed for judicial enforcement, the judge would pronounce the contract void and refuse the claim as the contract is in fact non-existent, therefore, it is not an evidence for judgment. Everyone who has interests other than the two contracting parties has the right to adhere to that nullity such as heir and creditor.

- Refutation by absolute nullity for the claimant does not submit to the solvency rule and what we mentioned before in nullity theory.

The complete agreement between the foreign and Islamic jurisprudence arises from the idea that the null contract is considered non-existence according to the legal perspective and the significant results of non-existent thing become mental obligation about which there is difference of opinion except for some subsidiary matters out of self-consideration in the null contract. It is the same in the case of protecting the acquired right of others through good intention after the null contract, i.e. the right of the mortgagee from the buyer who bought according to invalid purchase (see *al-Mūjiz fī al-Iltizāmāt* by al-Sanhūrī, para 165-179).

58/3 As for the relative nullity in foreign jurisprudence, it is the ratified contract which contains a defect that is called fulfilled defects such as fraud, mistake and compulsion. It is the same case in the diminished capacity as in the contract of the minor who is able to distinguish between right or wrong. All of these are reasons characterise the contract as relative nullity.

The contract in the case of relative nullity is correct and obligatory on the two contracting parties according to the legal perspective but it is validate between the two contracting parties unless it affects a right of others acquired through this contract.

The difference between absolute and relative nullities is that the fromer is absolutely and genuinely null whilst the latter is similar to voidability.

The contract of the relative nullity is still correct and executable till the judge pronounces that it is void according to the claim of the person whose desire is affected by a fulfilled defect in this contract. We mean the claim of the one whose protection and interest depend on this voidability as in the case of fraud buyers. It is ratified by permission and the right of voidability is forfeited even if this permission was implicit as if he executed the contract by consent after knowing the reason for annulability. The other party has no right to ask for voidability as the contract is obligatory for him.

The judge must not unilaterally void the contract during the claim of execution of the contract without the request of the party to consistently use "contracting party" or "party". So, this nullity is called relative nullity as it is obligatory on one of the two parties.

This is different from the case of absolute nullity: the contract in this case is non-existent from inception and it cannot be taken as evidence if its execution was requested, everyone affected by it would have to adhere to the nullity. The judge has the right to unilaterally void it as we previously mentioned (see *al-Mūjiz fī Naẓariyyat al-Iltizāmāt* by al-Sanhūrī, para 63; and *Droit civil Francais*, v. 2, para 259-260).

58/4 Criticism of This Foreign Division

It is clear that relative nullity in foreign jurisprudence is not related to only significant or insignificant meaning of nullity. Indeed, it is not true whatsoever. All what it includes is annullability which is legally accorded to one of the two parties to protect his own right.

It is clear that annullability is different thing from nullity itself. It is incorrect to describe the contract here as null even if it is a relative nullity because the nullable contract is to protect a private right. It is an existing ratified and significant contract concerning all aspects and its consequences in all its judgments. Its annullability is to protect one of the two contracting parties and his right to annul its obligation only and it is not elevated to a null contract.

Is it not clear that the annullability of the obligatory contract can be established by one of the contracting parties or both of them through stipulation? If one of the two contracting parties stipulated the right of cancellation of sale untill certain duration, this right would be established for him. This sale is revocable at the option of the one who made this condition without seeking legal judgement. This contract is considered sound before it is nulled. It is not accepted to describe it with any kind of nullity in logic characteristic of rights. The foreign jurisprudence did not consider this case as one of the cases of relative nullity.

The difference between the capacity to cancel due to stipulated condition and cancellation of it by judgment due to a supposed obligatory defect in the consent is an extreme assumption in order to give him a chance to continue with the contract or his refusal when he wants.

58/5 It is clear that nullity that is considered correct is one kind of absolute nullity. The cases which are called relative nullity are not related to the meaning of null in any way but it is a negation of contractual obligation.

These cases of which some cases arise from the lack of legal capacity and is considered by jurists as suspension or negation of execution. The contract is called suspended as the sale of the young who can distinguish, it is suspended on the permission of his guardian (see para 38/5). It is the same in the case of the contract of a person who is forced according to the jurisprudential opinions. It is suspended on permission after removing the compulsion (see para 34/4, 55/5)

The other cases arising from defects of consent are considered as a negation of obligation from obligatory contracts. They are related to fixed option in the cases of defects of consent of the party involved.

In these cases, the contract is described as a cancelled obligation which means it is annulable according to the will of the wronged party. He has the option to annul or continue with contract as we presented in the discussion of contract obligation theory (para 40/6-11).

Our earlier jurists have resolved in the cases of obligation negation, all the judgments which the modern foreign jurisprudence named as "relative nullity".

Foreign jurisprudence combined negation of execution and negation of obligation and put the two cases under the null theory. The expression "relative nullity" regarding these cases appears in the illusion of headlines. If the reader knew them, he would see the misleading appelation and confusion of idea.

Our jurists were more accurate and discerning concerning these divisions and use better language and terminology.[414]

58/6 The difference between the so called relative nullity and annullability

After we had mentioned previously we came here to say that annullability theory in our Islamic jurisprudence had no equal theory in the foreign jurisprudence originally. According to them, the

[414] It is noticed that the Syrian civil law following the new Egyptian original law used the word *qābiliyyah al-ibṭāl* (voidable) as a literal translation of the word "annulabilite" instead of relative nullity, although the law relied on the French law which originally adopted this wrong legal designation. Jamāl al-'Atīfī, in his commentary, is explaining its Egyptian origin in the Articles 138-141 to the corrections of this designation on purpose in the final enactment of the law. This wrong designation "the relative nullity" was noticed and modified.

relative nullity is not equal to annullability in our jurisprudence but it is equal to cases of negation of contractual obligation as we pointed out previously. It is different from annullability concerning aims and judgments:[415]

a. As for legislation aim, they are mainly different as the theory of annullability is a protective upholder to the legal system of contract which is intended to divide the null classification and finding out a third category between it and soundness at which the contract which contradicts its system can be classified. It is also for distinguishing between the essential breach leading to the nullity as a loss of a tenet of the contract and subsidiary breach like ignorance which leads to difficult dispute as we previously illustrated.

   Imām al-Kāsānī said in *al-Badā'i'* 5/299: "the annulable contract in our opinion is other than the correct and null ones".

   As for relative nullity in foreign terminology or negation of contract obligation in our terminology, it is not a third category between soundness and nullity.[416] It is right to annul the contract which is given to one of the parties to protect him from possible harm which would not be achieved with his consent. It exists in our jurisprudence beside the annullability theory which entitled the negation of obligation as we illustrated it previously. It upholds the protection of private right and not for a general legal system like the annullability theory.

   Annullability due to gross ignorance is not intended to protect any of the two parties. It protects the system of contract which requires knowledge, the commitment and in which contract execution is suspended including limits of wills desires (of the contracting parties) in which it was established.

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415 Dr. Shāfiq Shaḥātah said: "This important distinction between nullity and annullability is one of the advantages of the Ḥanafī jurisprudence. It is very different from what is known in the modern laws as absolute and relative nullity (see *al-Naẓariyyah al-'Āmmah al-Iltizāmāt fī al-Sharī'ah al-Islāmiyyah,* para 63).

416 The following para was involved in the commentary explaining the new Egyptian law concerning the annullability of the contract in cases which were called relative nullity. In this disposition, the contract has two grades only: the grade of soundness resulting in consequences of the contract before its nullity, and the grade of nullity nullifies the consequences of the contract when it was established and this is after its nullity. They are not three grades: sound, annullable, and null (see *al-Taqnīn al-Madanī al-Miṣrī* by Jamāl al-Dīn al-'Atīfī under articles 138-141).

b. As for rulings, we saw that annullability could not be removed by permission of the two parties according to our jurists. The contract may still be cancelled, and the two parties may annul and cancel the contractor.

The judgment on the annulable contract is not established until it is executed, and compensation is mandatory when executed. It is compensation which is equal to value or similar renumeration. It is not compensation as determined in the annulable contract as we mentioned previously (see para 56/2-3 and 56/5-8).

CHAPTER EIGHT

THEORY OF LEGAL CAPACITY AND GUARDIANSHIP

Chapter Outline

59/1 We divided the sections of legal capacity and guardianship theory into four branches:

1. The first branch: it includes section 55 regarding the structure of legal capacity and its definitions and kinds
2. The second branch it includes five sections (60-64) regarding the five phases of human legal capacity according to grades of his life: they are the embryonic phase, then, the age of discomplish, the age of puberty, then the age of majority, then, adulthood.
3. The third branch. It includes section 65 regarding contingencies of legal capacity
4. The fourth branch: it includes section 66 regarding guardianship and legal agency. Then, we end the eighth great chapter with two important supplements:
   i. The first one illustrates the number of defects of conventional with reference to legal capacity.
   ii. The second one illustrates the advantage of focusing on the theory of capacity in a way which resolved its problems.

SECTION 59

STRUCTURE OF LEGAL CAPACITY, ITS DEFINITION AND KINDS

TOPIC ONE: STRUCTURE OF LEGAL CAPACITY

59/2 We saw in the discussion of general ratification conditions of contract theory that legal capacity of the contractor is one of them (see para 31/2).

We saw in the discussion of nullity from the advocates' theory that required one of the reasons leading to contract nullity is the loss of legal capacity for ratification such as the insane and the undiscerning minor (para 52/2).

All actions and behaviours which include soundness and nullity as submitted to the jndges, attestation of right, testimony of right, and all of these stipulate that the person who practice them to have capacity of these actions and behaviours. Otherwise, they wonld be void and not considered since capacity is one of conditions for soundness.

It is the same case in worships such as fasting, prayer and others they need two types capacities:

- Capacity such that these worships are correct even if he was not accountable. Worships are ratified and correct from the minor who is not accountable.
- Capacity such that these worships are obligatory for him and he becomes accountable and responsible for leaving them. As for the punishments of crimes, they stipulated the capacity of the criminal to bear punishment as correction and restraint of others.

If the criminal did not have the capacity of punishment liability as the insane or young one, he would not deserve punishment. Thus, we find that capacity is required in every step in his actions and actions whose results depend on special characteristics of the doer

59/3 From these notes, the structure of capacity is very clear we conclude that:

a. Capacity depends on the necessity that the person has qualities to have existed and substantiation of his conduct to prove legal judgments for him and their consequences.
b. These characteristics must be suitable to each topic taking into account what is appropriate.

Capacity which is stipulated in a person for certain actions and behavior differs from that which is stipulated for other actions and behaviours. The capacity of the recipient is different from the capacity of the donor and contributions for it to be sound, so that is the general meaning of capacity according to legal consideration and its terminology.[417] So, what is the general meaning and terminology of legal capacity on the legal consideration. This will be illustrated as follow:

TOPIC TWO: DEFINITION OF LEGAL CAPACITY

59/4 Legal capacity is one of the characteristic of a person. Literally, it is used to mean efficiency and sufficiency of affairs. It is said "this person is worthy of leadership". It means that he is efficient to be a leader and this person is worthy of great affairs. This means he is efficient to do them.

In juristic terminology, we can define legal capacity in its comprehensive and general concept as a characteristic which the legislator appraising in a person making him appropriate for legislative address.

59/5 Analysis of Definition

1. The legal capacity of persons are complete characteristics according to previous illustration, they are couple human phases completing grades concerning body and mind.[418] Through this

[417] We will see that the legal capacity of a person for sound gift acceptance in which the ability to discern from right and wrong is enough but as for the legal capacity to bestow or contribute, he is required to be an adult and major because the gift is financial harm to his right (see para 62/6 and 62/8).

[418] Eligibility, as it is generally meant from the perspective of Islamic jurisprudence, is related not just with mental soundness, but with physical fitness as men. That is, in Islam there are certain religious obligations which requires, in addition to the mental capability, certain physical capableness as well, as in ritual the worships such as prayer, fasting, etc., as in certain communal (*kifā'ī*) obligations as in the case of *jihād*, for

gradual consummation, individuals are prepared so that their rights, dues, and soundness of some actions and behaviours can be proved. At the end, they are prepared to afford the responsibility of shortening of what the law requires and obligations which he undertakes through his own will and commitment to fulfill this capacity is achieved at the adult phase. This human completion is like its shadow which is efficiency and capable. This means it is a characteristic and readiness of the person which grows and enlarges gradually just nice as all his distinctive talents and senses.

2. This predisposition goes back to the Legislator Himself who determines its ranks according to the complete human phases to prevent him from harm because is the ruler who prescribes and proscribes people to reform them and protect rights of individuals and communities by rules he legislated. Appraisal of people's efficiency of all those judgments is up to Him.

3. Legislative address means legal judgment. They are the same in terminology of origins of jurisprudential science. What the legislator legislates including some religious worship such as prayer and fasting, some obligation and civil rights such as obligation of contract execution, guarantee of damaged things, proving possession of property due to reasons of possession, obligation of expenditure and its conditions among spouses and relatives, is called legal judgment.

   They are called legal judgment as the Legislator is considered to judge people through them and requires their application among them. It is called legislative address as the legislator is considered to address people through prescription and proscription, and obliges them to execute and respect (see *Uṣūl al-Fiqh* by al-Khuḍarī, p. 21).

4. Human legal capacity follows phases and status subject to his completion and absence of physical and mental defects as we previously mentioned. In each phase, a person has capacity of some judgments and consequence without others so we added the

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example. Thus, no one is required to carry out such worships just because there is religious obligation demanding that, unless he is physically capable of discharging them, that is in addition to being mentally capable.

words "legislative address" to the legal capacity definition to the lowestruling following capacity of embryo as we will see.

TOPIC THREE: KINDS OF CAPACITY

59/6 Capacity with its general comprehensive explained meaning is divided into main kinds: passive legal capacitu *(ahliyyat al-wujūb)* and active legal capacity *(ahliyyat al-adā')*.

We will explain these two kinds and we will divide people's actions into kinds according to relation of each kind of their actions to one kind of the two kinds of capacity:

First: Passive Legal Capacity

59/7 It is a person's legal capacity to the discharge of of obligations and the exercise of right. Exercising his rights here means proving his right, deserving value of ruined wealth from whatever damages it, movement of possession concerning what he buys or borrows and obligation of others to spend money on him if he is disabled or poor.

Discharging his obligation means proving his dues as his obligation to pay for what he buys, pay his debt and obligatory expenditure on his relatives, the poor and the disabled whose expenses are obligation for him if he is rich.

Every legal capacity of persons required by the legislator to prove his right or obligation is legal capacity of discharged obligation.

59/8 The Basis of Passive Legal Capacity

The basis of passive legal capacity in Islamic law is humanity. It is not related to age, mind or majority. Every human in any phase or characteristic, even an embryo or insane person is considered to have passive legal capacity but it may be perfect or imperfect:

a. If he was fit to exercise his rights only and not discharged his obligation, he would have imperfect passive legal capacity of obligation as an embryo in his mother's womb before birth. We will deal with it in detail later.

b. If he was fitter, he would have financial obligation as he would have perfect legal capacity like the undiscerning minor and insane person as we will explain in detail later.

59/9 Components of Passive Legal Capacity

It has two components:

a. The first component is called exercising which enables him to be a creditor. It enables the person to be a creditor where his rights are proved (even if it is not appropriate for a right to be proved upon him), i.e. capacity of the embryo in its mother's womb. Thus, it is imperfected legal capacity.

b. The second component is that which causes a person to be a debtor because the debtor is like the creditor. Rights can be proved upon him and due to legal reasons. Passive legal capacity of a person is completed by this component, i.e. legal capacity of a person after it is proven that he is born alive.

59/10 Passive Legal Capacity and *Dhimmah*

The second component of passive legal capacity which causes a person to indebtedness results in another matter that is legally accountable in the human character called *dhimmah*.

This *dhimmah* is a considerable container supposed to be formed in a person where debts and consequential obligations are proved. If a person became fit to indebtedness, he would need to have considerable strength in his character to settle his debt. This supposed strength is called *dhimmah*. It is intended when we say that someone has an amount of money in a person's *dhimmah*.

We will see in the next third part of this jurisprudential series an explanation of the *dhimmah* theory, the legal reason which calls for supposing it in a person and its comparison with financial safekeeping in foreign jurisprudence.

Second: Active Legal Capacity

59/11 As for active legal capacity, it is person's fitness to practice deeds whose legal consideration depends on the intellect.

In the discussion of nullity from the legal supporter theory (para 51/3) we said that the effects and results of material actions which had considerable effects depend on their considerable existence according to the legislator's point of view. Their material existence is not enough for these effects to be resulted. All civil behaviours are

involved in this idea. These actions, either worships such as prayer and fasting or civil behaviours as contracts cannot be added to this consideration by the legislator if the performer does not have realization and sanity part by which he can realize their results as whole. It means that he must have the minimum amount of understanding so that his practice will be through considerable correct intention.

59/12 It is clear through this, that a child does not have performance capacity before he becomes discerning and able to understand the legal address as a whole and execution of some responsibilities (see *Risālat al-Ahliyyah wa-ʿAwāriḍuhā* by Shaykh Aḥmad Ibrāhīm Bik, p. 4).

This is different case from passive legal capacity which cannot be jointed with a non-existent person as we mentioned that this capacity is related to humanity according to existence. It is established for the embryo in his mother's womb and it is diminished. It is not a basis for practicing deeds and affording their responsibilities and results. It is a basis to prove a person's right and dues. The embryo in his mother's womb has some rights according to divine and human law. He has passive legal capacity even if it is imperfect.

As for the active legal capacity, it is a basis for actions and legal behaviours as we explained earlier. These actions and behaviours depend on the intention and will of the doer. There must be distinction and reasonability to exercise it.

The active legal capacity begins when a person becomes discerning but it is imperfect as we will illustrate. It is completed when his physical and mental ability is completed through maturity and majority. Hence, he is responsible for all legal obligation and he exercises all rights.

Third: Division of Actions According to Capacity

59/13 According to previous statements, actions of human which results in effects and legal consequences are divided into two kinds according to their relation to legal capacity

1. Actions of a perpetrator who is confirmed insane. The effect is of the action is merely material since the relation of results to their nature is reasonable.

This is like the dangerous action that results in according to law a confirmed harm which depends only on the perpatrators's passive legal capacity for it to bring about financial liability.

This legal capacity is completed since the person's birth. He is fit for obligations when their reasons are achieved.

If an insane person or child undiscerning caused damage to another person's property, he is liable. I mean he is liable for compensation of what he damaged or defect he caused.

2. Actions of the sane and seusible doer, actions will be considered under the law and result in legal effects and consequences because these consequences are related to purposes and desires.

   It is clear that there is no consideration of obligationss or desires without sanity or realization.

   An example of all these actions depend on active legal capacity significant enough in terms of its consequences in the doer in conjunction with purposes and sanity although the Arabic uses the term *ʿaql*, this is mere accurate then *mind* or *brain* etc.

   All contracts and all civil behaviours[419] either verbal or practical ones are involved in performance capacity such as receiving the sold thing or the price. They are not correct for the child who is not distinctive and attaining general legitimate things, the child who is not distinctive does not own what is in his hand.[420]

All religious worship including prayer, fasting pilgrimage and other involved in these actions. Actions are divided into two kinds according to degree of required capacity:

a. Actions in which completion of performance capacity is stipulated. It means the doer must be adult and major as financial contribution including gift, endowment and other similar actions as they are a loss for the doer. He must have complete capacity to protect his money and rights so that his practice can be correct.

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419 The meaning of civil behaviours is those behaviours which are legitimized to set up a right or obligation as contracts and attaining legitimate affairs or for execution of obligation as handing the sold thing and receiving price.

420 This is different from distinctive young person who owns what he attains concerning legitimate things in purpose as a major adult person (see *al-Ashbāh wal-Naẓā'ir* by Ibn Nujaym on *Aḥkām al-Ṣibyān*, 2/145).

b. Actions in which imperfect performance capacity is sufficient. It means the doer must be distinctive or aware as religious worship and some civil contracts and behaviours. They would be correct if a distinctive young person performed them.

We will explain this in the following section 60-64.

PHASES OF HUMAN LEGAL CAPACITY ACCORDING TO LIFE STAGES

Introduction of Section 60-64

60/1 It is clear through what we previously mentioned that human legal capacity has grades on their way to perfection according to phases of his life: since he was an embryo till he experiences wet dreams and reaches the age of majority. Legal capacity follows all his life and it passes phases to perfection according to phases which cope with human stages.

It begins from imperfect obligation capacity and ends as perfect performance capacity as capacity grades are concluded from humanity and its following rights and his mental talents and readiness he is inherited. In this position it is clear that if a person's mental abilities and talents increases in tandem with his body growth year after year and month after another, human legal capacity which the law does not extend for year after another or a month after another but it extends and moves from a phase to another according to human life phases and main station as this movement and fast change of capacity and its prosperities are not approved due to dealings disorder. As for capacities, simple distinctions of continuous completion in which human talent develop is not be considered. His capacity does not move from a grade to another different one in its prosperities except in the main stations of his growth stages.

60/2 Consequently, human growth is divided into five main phases: embryo phase, childhood phase, discerning phase, puberty phase, and majority phase. The phases of human capacity completion are distributed to these phases according to the indications of legislation rules.

SECTION 60

THE FIRST PHASE OF LEGAL CAPACITY: THE EMBRYONIC PHASE

60/3 This is the phase when the human is embryo in his mother's womb. It begins from being leech to birth.

In this stage, jurisprudence assigned imperfect passive legal capacity for the embryo in his mother's womb which makes him ready for other than obligation. Some necessary right are proved do him but no dues are proved.

The jurists and originality justify that the embryo has no independent existence from any aspect. It is akin to being part of his mother as it is an organ belonging to her so if a pregnant beast was sold, its foetus would be included in this sale automatically. It can be considered independent from his mother as it has a private life and it is prepared to separate her later and becomes an independent human.

Therefore, capacity of pregnancy was confined to necessary rights especially he may come out dead and there will be no use widening his rights and obliging him with obligations.

60/4 Necessary Rights to the Embryo

All *Ijtihād* at believes agreed on the capacity of pregnancy for four rights regarding:

1. Kinship of his mother, father, and those who he is related to through parents.
2. Inheriting dead relatives who he inherits as he is descendant of kinship. Therefore the greater of the two share is suspended on that pregnancy according to supposing that it is male or female.
3. Worthiness of will
4. Worthiness of what endowed for it.

As both testimony disposition and endowment is legitimate to an urban baby, they are legitimate for certain existent pregnancy through worthiness. Pregnaucy has no rights other than these four

rights: gift is not legitimate for him if his father or others bought it something, it does not possess[421] it due to necessity.

60/5 The share which was set aside from inheritance, testamentary disposition, or endowment is not absolute for the foetus, but subject to his birth alive.[422] If it was born dead, these suspended rights would not be executed, and the endowment would be returned to those who are eligible. The blocked estate would be paid back to other heirs and its will would be returned to the heirs of the person who made the will.

If the embryo was born supposing alive, its possession of these rights would be proved according to the time of previous reason. It means according to reversal effect.

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421 See *Kashf al-Asrār Sharḥ Uṣūl Fakhr al-Islām al-Bazdawī*, 4/239; *Ḥāshiyat al-Ḥamawī ʿalā al-Ashbāh wal-Naẓā'ir* by Ibn Nujaym, p. 202.

422 According to the Ḥanbalī *ijtihād*, the embryo's possession is considered executive in the inheritance after death of inherited person. They concluded that it was legitimate for the pregnant woman to spend some money of the inheritance of the embryo on relatives of her pregnancy who are worthy of expenses if this embryo had money. This is quoted from Imām Aḥmad himself (see *al-Aḥkām* by Ibn Rāghib al-Ḥanbalī under article 84, p. 8, the first issue in Maṭbaʿah al-Siddīq in Cairo). This indicates that pregnancy has obligation capacity and safekeeping according to the Ḥanbalī *ijtihād*.

SECTION 61

THE SECOND PHASE OF LEGAL CAPACITY: THE CHILDHOOD PHASE

61/1 This stage of humau life continues from his birth till he becomes discerning.

Discern means that he has awareness and realization through which he can understand the legislation address as a whole. He understands the meaning of religious deeds and civil dealings. He understands the consequences of these dealings including exchange of rights and obligations even if it is through a whole simple way. He understands the difference between sale and purchase. He understands equality and variation of values.

The child who does not reach this awareness and distinction is considered and called (undiscernity) even if he has realization and distinction in a lot of natural affairs.

61/2 Undoubtedly, when the foetus comes out of his mother's womb to the world through birth, he moves from one phase to another phase which are two main phases in his life and capability: it moves from a stage when he is following part of his mother to another phase when he has independent existence and natural capability which has never had.

Therefore, his legal capacity is necessary to dilate and enter a new more complete phase. The passive legal capacity is that which is extended other than active capacity as awareness is lost. The child still lacks of active capacity in this phase. The active legal capacity graduates him for religious and civil deeds which depend on sanity. The child is not aware of these deeds originally at the beginning of this stage and he does not understand sufficiently at the end.

61/3 Since lack of active capacity in the child who is not discerning, nothing of structural behaviours which he practices either they are sayings or deeds can be taken in consideration.

a. His sayings are all vain which cannot result in a rule and its contracts are invalid as his expressions are not legally considered including offer, acceptance, recognition or release of safekeeping

even if his behavior was a mere interest as acceptance of gift, charity, it would not be correct. His legal agent either guardian or sponsor will act on behalf of him concerning practicing all civil contracts and behaviours which he needs (see *al-Aḥwāl al-Shakhṣiyyah* by Qadrī Bāshā, Article 483).

b. His actions either religious worships such as prayer and fasting or civil actions such as receiving the sold thing, trust or loan, are not accepted. If his guardian bought something for him and the seller handed it to the child, receipt would not be considered. If it was damaged in the child's hand. It would as if it was damaged in the seller's possession before handing (see *al-Aḥwāl al-Shakhṣiyyah,* Article 488).

If a usurper usurped the child's money and he paid it back to the child himself, the usurper would not be released from guarantee of the money value if it was damaged as the child receiving of his money is void and uot accepted.

c. If the child committed a crime even murder, his action would not be considered criminal action worthy of punishment even if the murdered person is the one from whom the child would inherit. The child would not be deprived of his inheritance due to forfeiting obligatory punishment.

61/4 Passive legal capacity is completed in the child with its two categories since his birth and becomes ready for rights and obligation settlement. This capacity was imperfect before his birth as we previously mentioned (see para 60/3).

On this basis, the child, since his birth, has possessed what was bought gifted for him and what his guardian or sponsor makes on behalf of him including contracts of sale, loan, mortgage, renting reconciliation, and division according to legal conditions. Their consequences would be for the child and all obligations with their legal reasons are incumbent upon him.

61/5 Types of obligations for which the child is fit

The child must have obligations and financial dues involved in the three following kinds:

The first kind is financial guarantee which is in return of other's rights as the price of things bought or rented for the child. It also

includes the value of things belonging to others which the child damages even if he is not aware as they are compensation for the protected wealth he had damaged (see Article 916; *al-Aḥwāl al-Shakhṣiyyah*, article 487).

61/6 Therefore, it must be distinguished between offensive actions either on right or selves and civil actions concerning guarantees of these actions practiced by a child:

As for criminal action like a child's usurpation or damage of wealth belongs to others, they are considered as his criminal (offensive) actions reasons whose guarantee depend on passive legal capacity other than active legal capacity.

As for civil actions like receiving a sold thing, loan and a trust whose owner handed the child according to a contract, are considered invalid. If the child damaged what he received, he would not pay guarantee as the owner was indifferent and induced the child to damage things by handing him these things.[423]

This is what jurists mean when they say, "retraint depends on declaration" other than deeds. They conclude that the child's sayings and contracts are invalid and in vain but his actions oblige him to pay guarantee (see Article 941; and *al-Durr al-Mukhtār* on *al-Ḥijr*, 5/89-91. It is meant for a child's criminal actions. As for civil actions, they submit to the rule of correctness and invalidity as it was mentioned in the discussion on invalidity (see para 51/5). The child is not responsible for guarantee according to the rules we mentioned including his damage of what was handed like sale, lending, borrowing and etc.

61/7 Since *dhimmah* follows passive legal capacity as a place in one's character where his debts are settled, the child from his birth (since perfection of obligation capacity) comes to have a *dhimmah* to which all debts of obligation proved on him are related. He did not have safe keeping during the embryonic phase before his birth as we previously mentioned[424] in para 59/10).

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[423] The person who gives a trust and the trustee were children and trustee damaged the trust, he would pay a guarantee due to the negation of inducement correctness from the child who trusts. Damage is still aggression of the child on other's money so, guarantee is obligation (see *al-Ashbāh wal-Naẓā'ir* by Ibn Nujaym, v. 2 pp. 78-79).

[424] It can be imagined that it is evidence that the embryo in stage of being embryo before birth has no character as character must have safekeeping. So if embryo did not have safekeeping, it would have no character.

The second kind is taxes due on wealth as one tenth of crops and land taxes. It includes taxes of real estate, income, customs taxes and similar ones. The child submits to all these taxes as these public rights which are due on wealth and the child aud others are equal concerning reasons and causes.

The third kind is the social responsibility related to the rich such as expenditure on relatives including fathers, brothers and others. This expenditure is a relation including the meaning of responsibilities which society system obliges. It obliges consolidation of family which protects life. The law obliges the rich to spend expenses on the poor individuals of the family according to certain grades, limits and conditions. It considers this expenditure as expenditure of a man for him self so that the state will be up right. It is clear that the old and young rich people are equal according to the reason of this judgment.

61/8 As for money alms (*zakāt al-amwāl*), jurists had different opinions of money alms obligation on the child money due to different opinions about its nature:

- The Ḥanafī *ijtihād* considered it as financial worship whose obligation is suspended on maturity like all religious obligations so they did not consider it obligatory for the child's wealth.
- The three Imāms: Mālik, Shāfiʿī and Aḥmad considered that *Zakāt* (alms) are legally one of social taxes related to money so they made it obligatory for the child's wealth even if he does not have active legal capacity. His agent or guardian pays it on his behalf (see *Bidāyat al-Mujtahid* on *al-Zakāt*, 1/225).

SECTION 62

THE THIRD PHASE OF LEGAL CAPACITY: THE DISCERNING PHASE

A. Meaning of discerning and Its Proprieties

62/1 This phase is the last in the human life from the discerning age to the age of physical and mental maturity.

It is intended that he has a mental capacity by which he can distinguish between good and bad affairs, between goodness and evil and between benefit and harm, even if this view is not deep, this distinction is not complete, and it does not realize all consequences. This stage in fact is mental enlightenment.

Human mind comes to the area of the light and facts and realized things begin to appear for him till they are revealed clearly in front of his sound mind.

Therefore, this stage is one of the main grades of human capacity when he has right awareness. It comes from a raw mind which is not fully agile and its enlightenment is no fully developed.

B. The Principle of Discerning

62/2 This principle has no a certain age or a mark. It may be early or late according to the child's discernment and his intelligence level and mental talents. It is known through its effect where there is balance which appears in the child's thought and deeds. This effect does not appear suddenly. It appears gradually preceded by effects of sanity which is near it as the beads of necklace which are similar to each other. Every bead is a little bigger or smaller than the one near it, but there is a clear difference between two distant beads.

Thus, the beginning of this stage is similar to the end of the childhood stage before it. If this movement is due to the appearance of discern, this reference is not adjusted and the limits of a new legal capacity would have unclear principle.

The wisdom of legislation is obliged to consider a suitable age of discernment. The jurists considered the seventh year of age is the beginning of the discerning stage and a new consequent capacity in sound and natural causes.

C. Limits of the Discerning Child's Capacity

62/3 It is clear that when the child reaches the age of discernment, his abilities and readiness are in a middle stage between childhood without distinction and maturity and majority. This position obliges him to widen the scope of behaviours in constrained way and not absolutely as he needs to train on practicing actions which he became correctly aware of, from another that he needs to protect.

His rights from his bad behaviour and expected mistakes are meant to protect himself as his mind is immature and it does not reach the stage of majority. Hence, jurists recognized that the youug discerning person has imperfect active capacity stage which meant capacity for fiuancial behavior according to indications of its judgments and rules.

Capacity limits and kinds are known through *Sharīʿah* rulings based on it. The base always indicates the building.

D. Civil and Religious Active Lagal Capacity

62/4 According to resolutions of jurists and philosophers, judgments on the disceruing child active legal capacity is divided into two parts:

The first part is legal capacity of worshipping *(ahliyyat al-taʿabbud)* which makes the child fit to practice legal worshipping so that they can cousider correct we call it active religious legal capacity.

The second part is civil performance capacity *(ahliyyat al-taṣarruf)* which makes him ready for financial dealings and right behaviours either verbal or practical as sale, purchase, taking and giving. We call it civil active legal capacity *(ahliyyat al-adā' al-madaniyyah).*

a. The legal capacity of religious performance or legal capacity of worshipping is proved as perfect capacity at the beginning of distinction stage. It results in correctness of worships which is a mixture of mental aud physical action as prayer and fasting by the conseusus of jurists although they are not obligated on him.

   Negation of obligation of religious dues in spite of perfection of passive legal capacity since his birth and perfection of active legal capacity due to distinction depends on whether this capacity makes him ready but it does uot oblige him. Obligation is an order depending on its reasons and legal conditious. The first conditiou is maturity by which the body and mind becomes

perfect. The person is not responsible for practical obligations before maturity.

b. As for civil performance capacity or behavior capacity, it is proved for the young person from the beginning of that stage but it is imperfect so as to protect and safe his rights and money because he is not experienced enough to act with his money and he does not know people's conditions.

E. Division of Discerning Child's Behaviours According to Imperfection of Civil Legal Capacity

62/5 Jurists divided behaviours of the discerning child according to its consideration and results into three kinds due to imperfection of civil legal capacity.

62/6 The first kind is behaviours which cause financial harm to him such as gratuity of all kinds including gift, charity, endowment, borrowing and others.

He has no right to perform this kind and no one either guardian, sponsor, or a judge has the right to obligate him to perform it. If it occurred, it would be invalid. This is to protect his right due to the imperfection of his capacity.

It also includes the child's guarantee of another's debt which is invalid as it means the obligatory payment of another's debt is gratuity.

The jurists applied this in the case f the discerning child's divorce of his wife if he was married. His divorce would be invalid as he loses dowry and benefit of marriage.[425]

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[425] The apparent thing is that invalidity of the discerning child's divorce does not prevent from a claim of separation which can be raised from one spouse against another according to Article 112 of our new personal status law when an adult wife raise a claim to be separated from her young husband because this separation is compulsory (divorce due to the woman's will in return of leaving all her duties) *khulu*ʿ or compulsory divorce by judgment due to the absence of possible reconciliation between the two spouses. The law allows the request of separation right of the two spouses and it did not stipulate any condition of claim. It depends on general rules. These rules oblige that the right practice depends on capacity of the claimant and not on the capacity of another. If the wife is adult, it is apparent that her claim of separation from her young husband is considered lawful. It is the same if the husband was insane, this would not prevent his wife from asking for separation according to judgments of law. It is legally confessed that the insane person is treated like the undiscerning child

They accepted from this kind, the state of a judge who lends wealth of orphans although the loan means contribution at the beginning. He saves the orphan's money from loss. It is better than a trust because if the trust was damaged without aggression or negligence of the trustee, the losses will not be guaranteed. This is different from loan which is guaranteed by the debtor in all conditions. If the judge undertakes lending, the lend money would be safe (see *Radd al-Muḥtār* on *al-Qada'*, 4/341.

62/7 The differences of juristic opinion concerning the testamentary disposition of a discerning child.

Al-Imām al-Shafi'i and Madīnah jurists permitted his testamentary disposition concerning charity. They argued that it is goodness which does not harm the child's money and it will be executed after his death. They provide evidence in the form of *al-āthār* that 'Umar ibn al-Khaṭṭāb (may Allāh bless him) permitted a youth's testamentary disposition.

Abū Ḥanīfah and his followers considered it invalid as it harms the rights of the young person's heirs. The testamentary disposition of a sane adult is legal to prevent by its reward what he lost of his legal dues. The young person is not in need of it as he is not legally responsible and the benefit of his heirs is an interest for him. His testamentary disposition is aggression to saving for his heirs which are better. If he left the better thing, it would in no way harms him. It is not legitimate for him and it would be a testamentary disposition invalid[426] (see *Uṣūl al-Bazdawī wa-Sharḥ Kashf al-Asrār*, 4/259-260).

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as stated by the Article 979 from *al-Majallah* and the Article 47 of the new civil law which replaced it.

426 The rights of the other heirs justify that testamentary disposition of the discerning child to be suspended on their permission and invalid. This is the same for all verbal behaviours which harm others' rights.

Quoted Muḥammad ibn Maḥmūd al-Astrushnī in his *Jāmiʿ al-Aḥkām al-Ṣighār* from al-Ṭaḥāwī's Commentary as saying: If the child made a will, it is not legitimate except after his maturity, it is considered the beginning i.e. the beginning of the will after maturity (see *Jāmiʿ al-Aḥkām al-Ṣighār* on *al-Wiṣāyā*).

This supports our opinion that a will is suspended and one of the recognized rules is that the invalidity does not required permission as we mentioned in the discussion of invalidity (para 53/10). This is stated by al-Astrushnī in his book, *Jāmiʿ al-Aḥkām al-Ṣighār*. However, writings of all schools which I studies agree on nullity. If suspension on heirs was recognized, it is better and more fitting to the principles.

62/8 The second kind is behaviours which concerns benefits of the young person as acceptance of gift, charity and attaining legitimate things.

This kind imperfect active legal capacity is enough to determine whether his action is correct. It is executed without his guardian's permission. It would be the same if this behavior was made by a sane adult as this practice is in favour of the child (see *al-Majallah*, 796).

They considered this kind acceptance of the discerning child as a trust from others including all what is illegitimate to trusts including sale, purchase, marriage, divorce, enmity, receiving and others. His behaviour is similar to the limits of delegation which is obligatory for trustee if the agent is an adult as the child's action through delegation without the permission of his guardian or sponsor is considered training for him.

Correction of his expressions and teaching him aspects of behaviours, their methods and results as much as possible: All these are responsibility and duty of the trustees. It is abstract benefit for the young person (see *Jāmi*ᶜ *al-Aḥkām al-Ṣighār* on *al-Wakālah*; and *Radd al-Muḥtār*, 4/400).

62/9 The third kind: actions which possibly bring about harm or benefit.

They are like financial compensations in all their kinds such as sale, purchase, renting out, renting, mortgage, receiving mortgage, shared cultivation, and irrigation and what is exposed to profit and loss.

The discerning child executes these kinds of actions and they are correct but it does not depend on his opinion only. The agreement of his legal representative is necessary (see *al-Majallah* 967) as we mentioned previously in the discussion of the execution of general effects of contracts (para 38/5).

These actions are correct from the discerning child as he has active legal capacity. The agreement of the legal representative is necessity as this active legal capacity is imperfect in a child, and there is possibility of harm and benefits of these possibilities. If they were agreed to by his representative either a guardian or sponsor, they would be considered as interests of the young person and they are executed as if he practiced them himself.

62/10 Agreement of his legal representative is achieved through two forms: by pre-permission of the child behavior or past permission after behavior.[427]

a. If the discerning child practiced behaviours of first kind with a pre-permission of his legal representative, this behavior would be correct and executive and obliging the young person since this behavior execution even if there was great exaggeration unless its exaggeration would be a result of conceiving. Trade is never void of deception. Consent of deception may be one of commercial publication methods to attract hearts and gain more profits (see *Radd al-Muḥtār*, on *al-Ma'dhūn*, 5/100).

   This is the opinion of Abū Ḥanīfah and it is the best opinion in his belief other than opinions of his friends who do not permit for the discerning child exaggerated deception even if this young person was permitted.

b. If he practiced behavior with permission, it would be correct but it would not be executed as it would be suspended on permission of his legal representative. If this person permitted it, it would be executable since its occurrence meaning that it would be executed by reversal effect as past permission is equal to pre-permission (see para 38/2) if this preventative refused it.

   It would be invalid since its occurrence. This kind includes contract of marriage. If the distinctive young person married without his guardian's permission the contract would be suspended on his permission (see *al-Aḥwāl al-Sakhṣiyyah* by Qadrī Bāshā, article 495).

F. Judgments of Behavior Permission for the Child

62/11 The scope which trade permission for the discerning child includes:

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427 Permission for the discerning child in relation to financial behaviour and trade is a training that is useful for him in enabling him to acquire steadiness, experience, and realization of people's conditions and results of dealings. It is a preparation to his majority phase and a test of his mental talents. It is based on Allāh's saying: *"Test orphans and if they reach marriage and you feel their majority, give them their money"* (al-Nisā', 4/6).

If the legal preventative permitted the child to practice trade, it would include all actions involved in the commercial affairs through traditions as sale, renting shared cultivation, mortgage, and delegation etc... and recognition of rights and deeds. The discerning child is permitted to trade his right to invest his money except for lending or guarantee. Although they are commercial affairs the permitted child is still prevented from them as they are involved in the first kind which is abstract harm for the young person as they include meaning of contribution.

62/12 Here we find an important problem which has different opinions. If the discerning child made a contract of something without permission and he received it through sale, borrowing lending or trusting and he damaged it, would it guarantee or not?

Abū Yūsuf, a companion of Abū Ḥanīfah, is of the view that it would be guaranteed because damage would remain if the contract was not executed. So it obliges the child to pay a guarantee even if he is not discerning as we mentioned (see para 61/6). The case here is a case of active guarantee and the child here has legal capacity of it. It is not case of contract guarantee.

Abū Ḥanīfah and his other companion, Muḥammad ibn al-Ḥasan al-Shaybānī recognized negation of guarantee because action of damaging is forfeited considerably as it is related to inducement by the owner who handed his money to a child which is not permitted and exposed it to damage. The child did not take and damage it himself. There is only the guarantee made in the contract and the child who was not permitted did not have legal capacity which obliges him to pay guarantee for contracts. This is the best and most apparent opinion of the Ḥanafīs.

If the discerning was permitted he must guarantee according to consensus (see *al-Aḥwāl al-Sakhṣiyyah* by Qadrī Bāshā, article 487-488; *al-Durr al-Mukhtar wa-Radd al-Muḥtār*, 5/92 and the end of permitted book 5/112)

In this rule, both the discerning child who does not have permission and the undiscerning child are restrained (see para 61/3, 61/6)

62/13 Permission capacity to specifies and its negation

This permission does not accept specification according to the Ḥanafī *ijtihād*. If the guadian permitted child trade with some kinds of goods,

with some person, certain market and in certain time, the child is permitted to trade and deal with all kinds, all persons in all places and all times till the farmer prevented him again. Permission depends on responsibility. Other jurists such as the Ḥanbalīs said that permission is specifically required and is restrained by the representatives who restricted for the child including type, a person, place or time, so the discerning child is still limited by permission and his action is still incapacitate and not executed.

According to the Ḥanafī *ijtihād* is that permission is removal and forfeit of the original restraint, forfeiting does not require restraint according to their opinion.

The argument of other juristic opinion is that permission is like delegation and delegation requires restraining so the delegate is restrained by what the trustee orders as the power of delegation is with the trustee.

This opinion is more suitable and applicable to *maṣlaḥah*, the permission of trade and dealing for the child is legal as a training and test for him. He may have knowledge of a certain kind without another one. He may be secured to deal with a certain person without another person. So, specification of permission must be correct otherwise its wisdom would go away.

To overcome restraints, permission requires negation of a specific capability like in the restrained permission, one aspect can be released and the other aspects are still restrained.

62/14 Declaration and indication of permission

The permission for the child can be clear such as his guadian says: I permitted you to trade or go to the market and buy and sell, etc. As for indication, if his representative saw him deal with people either selling or buying and the former was silent. The child here would be permitted because action needs indications of position. The rule says silence in the state which needs illustration is declaration (see para 38/2; *al-Majallah* 67). Otherwise, people will decide by indication of the guardian's state and they will deal with the child who was not permitted.

62/15 Distinction between permission of action and solicitation

It is necessary to distinguish between action and solicitation. Permission cannot be achieved without declaration or indication of

the child's right for specific action from his representative. We mean some kind of dealings. But if he sent him to the market to buy certain items like food, clothing and others, this would be solicitation in limited personal action, not a specific permission which is repeated. The child does not have permission, otherwise the mere solicitation is abandoned (see *al-Majallah* 969, *al-Hidāyah*, 8/29, *Radd al-Muḥtār*, 5/98).

62/16 Summary: According to permission and its negation the discerning children are divided into two kinds: permitted and interdicted persons:

The permitted person (*al-ma'dhūn*) is the one whose representative permitted him to deal with actions which are suspended on his agreement. It is the mentioned third kind. Hence the child concerning this behavior is like a person with complete capacity who is obliged to these behaviours and they are executed even if there is exaggerated deception.

The interdicted person (*al-mahjūr*) is that whose behavior is still suspended on the permission of his representative due to imperfection of his active legal capacity.

It is clear through the previous discussion that permission of trade is confined to the discerning child. As for those who are under the discerning age, active legal capacity is non-existent in them and all their behaviours are invalid and permission and negation of permission are equal for them.

62/17 Interdiction of permitted and its conditions

We previously referred to that permission of trade for the discerning child is recovered or can be recovered/is recoverable. His legal representative can prevent him after permission, and that he can permit him again after interdiction because he who owns giving respect, can also recover it.

The interdiction is right provided that the child himself knows about it. Then if the child's representative declared his permission in the market, or if his permission is common, interdiction must also be declared and spread so that people may know it so as not to be harmed or deceived. His interdiction is not right secretly in absence or among a small number of market people, but the young on the judgment of permission and carrying out its dealings until he knows about his own interdiction and so do more of market people. But if

his permission is not declared, and not common, it is enough for the rightness of his interdiction that he knows it without declaring (see *Radd al-Muḥtār* 5/105).

We must notice here that interdiction of the permitted is done shortly with on that is to say, back effect. If the young interdicted the permitted, all his last acts, in his last permission, are still valid or in force.

G. Important Notes

62/18 We note here three important matters

1. The prohibited discerning child, when he reaches puberty and adulthood, the right of his impeded acts is like the discerning child something for more than its value or bought something for less that, his contract would remain for his legal representative's permissibility unless he is permitted from him, because the importance in the balance of benefit and form, is for the type of acting and not for the privations of the contract. This contract from the child depends on the permission or permissibility (see *al-Majallah* 7/967, *Radd al-Muḥtār* on *al-Ma'dhūn* 5/110). Moreover, the apparent benefit at present is not relied upon, but the importance is in the behalf of the child for the consequnces of his action which the law suspended his representative with or to value them.

SECTION 63

THE FOURTH PHASE OF THE LEGAL CAPACITY: THE PUBERTY PHASE

63/1 Puberty is the most significant natural stage that which human life passes through, the human shifts in it, from the infancy state to the adulthood, by becoming held responsible for the religious duties from its beginning, charged with the same responsibility upheld by the aged ones who are charged with the religious duties, and responsibilities.

Being the maturity is a normal natnral situation whereby the body grows and its strength reaches the sufficient limit to bear the bodily religious duties, likewise, the mind and recognition reach the sufficient limit in knowing the good from the evil, the advantage from the disadvantage, and the action consequences. People are naturally varied afterward-regarding this criterion of bodily and intellectual strength- with the stages of intelligence and natural endowment which two persons could be equal in them. The increase of this variance based on the limit could not be considered and can not prevent equality of all in ability to the understanding of the religious charges and bearing the responsibilities after the availability of the minimum amount required for their capability according to them (scholars).

Based on that, the jurists agreed that the man will be charged with the religious duty ordained by the lawmaker to mankind while reaching puberty, the mature is therefore included in the legal text, and commissioned with whatever that text imposes on mankind of generic obligations with their legal stipulation of that are having faith in Allāh the Highest, His heavenly scriptures, His Messengers and all other subdivisions of faith, performing the compulsory acts of worship, acquiring the necessary amount of knowledge for religion establishment, establishment of commanding with doing good and prohibiting of abomination, religious struggle (*jihād*), monetary participation and working towards wherever the Islamic society welfare could be achieved, and to the remaining religious duties and obligations, all that is to the best of one's abilities. Also, the person who reaches puberty becomes responsible for abiding to the ruling which prescribes internal security, prevention of aggressiveness and

personal revenge, subjected to the rulers in the boundaries of their legal authority, going back to them in reconciling the litigations. A man also becomes subject to system of general legal punishment for crimes and misdemeanors he commits.

63/2 The puberty boundary

Puberty can be identified largely with the appearance of natural signs.[428] Whenever its signs appear, the puberty takes its rule as it appears without committing oneself to a specific age.

If the sign appears late, the person will be considered legally mature whenever he/she reaches the deadline of the matured age age that is customarily considered.

The full puberty period is between beginning and ending within the actual maturity according to the custom *(ʿurf)*.

Its beginning is twelve years for males, and nine years for females, as that also varies according to region: in the hot regions the puberty is earlier, and in the cool region it is late.

However, its ending differs according to the scholars' juristic opinions: Abū Ḥanīfah held it to be 18 years for males, and 17 years for females. This opinion was also reported from Ibn ʿAbbās was deemed to have said so. On the other hand, the consensus of the scholars together with the two companions of Abū Ḥanīfah held it to be 15 years for both males and females. This is the most preferable opinion which the ruling is based upon according to the Ḥanafī school.

A person who is between the beginniug of puberty age and its ending is called: adolescent. If the adolescent claims maturity or confirms it, while his bodily growth is likely agreeing to that, he will be trusted or uot at all (see Articles 985-989).[429]

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428 According to the boy it is known through ejaculation, regarding the lady its sign is menses or pregnancy.

429 It is remarkable here that the second para from the second clause of the Uthmani system of monetary management for the Orphan which a part of its ruling is still utilizing until today in Syria clearly stated that "Islamic rulers are prohibited to hearing the case of actual puberty from those that have never completed the age of fifteens (15s)".

For that, the actual maturity confirmation before the ending of the abovementioned maturity age is not accepted in both males and females without distinction.

63/3 It is clear from the above that the period of suspension of what the ruling is depending on the legal duties. It is not a specific year for human being, but it is rather the sufficient minimum amount of two abilities: physical ability, and intellectual ability.

Only that the minimum amount of physical ability is crystal clear in normal healthy situations regarding the puberty or the legal and full puberty according to its customary age which is 15.

The minimum amount of intellectual ability could be known from its indications when balancing person's actions. However, these indications are not like the real puberty in appearance. If it were made the ruling is dependent on something that ties up with religious charge, it would be a likely ruling depending on accuracy whereby the puberty is the most likely natural appearance for the intellectual growth like the physical growth according to the *'urf*, that is why, it was linked to the charge for ease and simplification, as the legislative wisdom requires.

SECTION 64

THE FIFTH PHASE OF LEGAL CAPABILITY: THE ADULTHOOD / MATURITY

64/1 The man is charged (with religious duties) when he reaches maturity, as was explained above. This does not mean the complete civil active legal capacity in that person, and not the effectiveness of his monetary freedom. Indeed, it is the completeness of this competency in the person which hinge on other attributes beyond the puberty that is the attribute of legal age.

Legal age and conscious awareness technically mean rightness and guidance to the right deeds. The adjective from it is: a person of a full age, a prudent. It is the opposite to the error and going astray, as in the word of Allāh the Almighty: *"Let there be no compulsion in religion, truth stands out clear from error"*.[430]

The actual maturity is the intellectual maturity, indeed, the physical maturity does not need it (see: the book of competency and the board of accountability for Prof. Muḥammad Ḥāshim al-Muhanna).

Maturity according to the jurists in this sense, that is, in monetary affairs, is not piety and fear of God. It is rather, monetary acumen which a person has in order to have good disposal of the property in regard to the worldly direction, even if he is a debauched with regard to the religious direction. This interpretation is related from Ibn Abbas (may Allāh have mercy upon them) in regard to this topic.[431]

The opposite to this word is idiot (with two vowel sounds), which means wasting of money and devastating it without wisdom, either evilly like assembling the dissolute people and spend on them, or in a good way as if a person spends all of his money for the cause of building the mosque, without a public need, he will be considered an idiot according to the Muslim jurists, so he deserves interdiction.[432]

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[430] *Al-Miṣbāḥ* by al-Fayyūmī; *Mufradāt al-Qur'ān* by al-Rāghib al-Asfahānī on *'Rushd'*.

[431] See, Articles 946 and 963; *Durr al-Mukhtār wa-Radd al-Muḥtār* on *Kitāb al-Ḥijr* 5/95; and *Kitāb al-Waqf* 3/430; *Tanqīh Fatāwā al-Ḥāmidiyyah* 1/198 quoted from *al-Baḥr al-Rā'iq* by Ibn Nujaym.

[432] See Articles 946 quoted from chapter two of *Kitāb al-Ḥijr* in *al-Fatāwā al-Hindiyyah*. For the sake of truth, verily, this scholarly analysis for the meaning of *Rushd* and this example of Ṣafah with wasting of money by building the mosque without a need to it

That monetary insight is based on the amount of experience, practical activities and the dominance of mind upon the whim, beyond the basic prerequisite of a reasonable minimum amount for discerning good from evil, and pros and cons, with the sufficient proportion for religious responsibility. A person might have a proper mental faculty to be confronted with legal responsibility and its charge, while he might not be intelligent enough to manage money due to his ignorance, or his desire has control over his intellect and recognition. The xxample of this is like the idiot prodigal man, who is legally charged and responsible for the obligation charge, and crimes, but he will be prevented from disposing his wealth due to his stupidity. He will be given a trustee who will spend on his behalf as the minor will be given too.

This financial awareness might be agreeable with the maturity, or fall behind it. This is due to the person's nature and his past practice and experience in monetary affairs and people's situations.

Due to this awareness, not due to just mere maturity, the complete civil responsibility will be suspended regarding the person, and whatever follows this complete freedom to dispose and protect his wealth.

Based on this, it is legally compulsory, if the person has matured and is charged with the general rulings, the issue of his legal age must be carefully looked to. If it is certain that he has reached a legal age he will be considered from the time of puberty as a person completely competent, and he is free from the guardianship or the custody, his actions and statements will be executed, and his wealth will be given to him (see *al-Aḥwāl al-Shakhṣiyyah* by Qadrī Bāshā, article 496).

If it is not established whether he has matured, he will remain incapable of legal active capacity, and his wealth will remain restricted for him, and he will be under the custody of property[433] until his legal age and his awareness are certain.

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are the best examples given by the Islamic scholars as a scholastic idea which is free from every partiality in the ruling of jurisprudence.

433 However, his guardianship *(al-wilāyah)* towards self which consists of authority to mandatory marriage, education, and surgical treatment, as it follows in the chapter 66 it has cut off a person immediately who is rationally mature and become charged (with the religious obligations).

The basis of this is the previous Qur'ānic text that has been explained[434] as the transfer of wealth to the orphan will be suspended until this legal age is apparent, and maturity is not sufficient.

64/2 There is no doubt that it prohibited to give a person his wealth before his financial awareness is clear. This means that he will remain under monetary guardianship and his disposal will not be executed prior to that, as it makes no sense to prohibit him his wealth if his contracts and confirmations are executed, this will waste his wealth through his utterances even if his hand has not possessed it, and the purpose of the (Religious) Lawmaker will not be achieved in protecting him with regard to his wanton disposal (see article 982).

It is certain in the *Uṣūl al-Fiqh* that without it the obligatory cannot be achieved.[435] The legal command of something is also considered a command in whatever that thing needs and what could not completed except with it. The command to do ablution for prayer (*ṣalāt*), for example, is a command to walk to the place where water could be obtained. Obligating the legal obligations that need bodily strength, i.e. worship and struggle, is obligating the consumption of food and drink sufficient enough to protect the ability to perform these obligations. Also, obligating returning what is unlawfully acquired is an obligation to bear the expense in return if it requires expense, and so on and so forth.

From this juristic foundation, it is clear that the legal prevention for transferring the property to its novice owner prior to his legal age is considered as means to prevent him from disposing his wealth. Otherwise preventing him from the wealth has no benefit, it rather becomes useless (see *al-Muwāfaqāt* by al-Shāṭibī, 1/158).

64/3 It is compulsory to pay attention here at this stage that the jurists might perceive some texts which state that the person by reaching a legal age will not be under the guardianship, his competency has perfected, and his confirmation and disposition will be executed.[436] However, these juristic texts and their likes are likely

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434 It is His word the Highest in *Sūrat al-Nisā'*, 4:5: *"Make trial of orphans until they reach the age of marriage; if then you find sound judgment in them, release their property to them"*.

435 See *Uṣūl al-Fiqh* by al-Khuḍarī, pp. 54-56; *al-Muwāfaqāt* by al-Shāṭibī, 2/394.

436 The example of that is what has been said in the footnote of para 62/7 of a book, *Jāmiʿ Aḥkām al-Ṣighār* by al-Asturwashnī which states that "the discerning child could not be guardian until his maturity" which means his maturity is after he reaches a legal age.

to be if the person reaches a legal age. If they generalize the text in most cases, this probably relies on explanation and considerable restriction in other places[437] (see Articles 981-984 and 989).

64/4 Defining the legal age: its meaning and outcome

Legal age could be defined when a boundary is put in someone's age which ends with a natural interdiction legally set by the law on youth. This definition has two results:

1. A person could not be approved of his certain legal age prior to this definition even if he is actually, or legally mature by age.
2. A person reaching the determined legal age, who is mentally healthy (not mad and crazy) will be considered therefore legally having the perfect competency disposition, the legal interdiction will be raised for him and he will be free from being under the

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[437] Prof. Aḥmad Ibrāhīm Bek in his study, *al-Ahliyyah* (pp. 17-18) which goes as follows: "The jurists have agreed on suspending the religious duty upon maturity, either by age or by signs; the guardianship is here ended on self and property, and the legal statement is there confronted to him completely. However, some Islamic countries like Egypt decide according to the welfare is not hurrying in giving the child his property with just looking at his legal maturity, rather, they must wait until he completely reaches his legal age, likewise they raised the discerning age according to what is apparent to them of the child's welfare".

I say: this is based upon the absence of discrimination between the legal charge and disposal competency, based on the assumption of some juristtic texts which we drew the attention to, which is the opposite to the reality.

The allegation that there is agreement among the jurists on that is not definite. The professor himself stated in the footnote the opinion of Abū Ḥanīfah in posponing the legal age to 25 years for the delivery of property. According to the majority of the jurists together with the two companions of Abū Ḥanīfah in posponing the legal age whatever the inexperienced person has reached of age, as we shall see soon, this is what the previous Qur'ānic text indicates which is accepted. The Law of those Islamic countries is based on this clear discretion.

What clarifies the doubt is what we are on it of disconnected report in confirmation between the legal charge and civil performance competency that is competency of monetary disposal.

The religious charge will be confirmed with the maturity because he relies on an amount of bodily power and the natural perception is enough to understand the legal statement and distinguishing between good and evil.

But, the competency of monetary disposal is based on practical experience in money management and preserving it above that natural perception. That is why it is based on conscious awareness with its juristic meaning that we had illustrated.

Upon that the topic is clear, and the texts match each other and all the problems have been solved.

guardianship which is on him without a need to ascertain his legal age.[438]

This is what is meant by age of conscious awareness, and the outcome of this definition in the rulings.

64/5 Is there a specific age for *Rushd* (Legal Age) in Islamic law?

Islamic law-is a law that its foundations are eternal and practicable in all time and place, it does not arrive to define the age of *Rushd*, because the time of *Rushd* differs according to the person's nature, it also differs across the environment, social situations, public economy, knowledge, education, and pubic behavior.

Upon this, the *Sharīʿah* texts and ruling connotations indicate that: the Rushd will not be considered prior to the maturity. The maturity is a stipulating foundation as a focal point to move from a stage of nonage to a stage of legal age. The *rushd* (legal age) sometimes accompanies *bulūgh* (maturity) and it may also differ from it. The existing indications of legal age are considerably found in *bulūgh* (maturity). That is why the *Qur'ān* mentions this certain general principle which is tying the person's complete competency with his social legal age after maturity as it is previously said in His word the Highest: *"Make trial of orphans until they reach the age of marriage; if then you find sound judgment in them, release their property to them"* (al-Nisā', 4:6).

However, defining the age of this sound judgment has been left by *Sharīʿah* to the guardian according to the time requirement and legal politics in public interest.

From therein, the scholars' individual interpretive judgment differs to what extent the legal age could be waited to: Abū Hanīfah agrees to the end of monetary guardianship of a person and releasing his disposal to him at his maturity, even if he is a destructive stupid. But his properties-if he is a stupid- will be delayed to be delivered to him by way of precaution and punishment according to the Qur'ānic text for not releasing his property to him until he reaches the sound judgment; but it should not be waited for more than 25 years of age. If he completes that his property will be released to him even if he remains stupid. It is not allowed according

[438] As in the definition of maturity age, as a person completing 15 years is considered legally mature without a need to confirming his actual maturity (see para 63/2).

to Abū Hanīfah to prevent the adult his property only if he is mad or crazy, because of a moral disadvantage resulted in depriving the rational free person his competency with his dignity which is beyond his monetary disadvantage that is protected for preventing him.

The consensus and the two companions of Abū Hanīfah are of the contrary opinion, they decided the obligation of continual monetary guardianship of the person if he is minor until the sound judgment is found in him without specifying an age for waiting, according to the apparent Qur'ānic text that is previously mentioned, under the pretense of preventing his property which leads to prohibiting him the utterance disposal as it is mentioned above, if not, there will be no advantage in seizing his property.

They also decided the obligation of repeating the prohibition on him with a judicial ruling if shows the stupidity and prodigality after sound judgment, which are both considered that the disadvantages of being stupid is general and not specific.

Abū Bakr al-Jaṣṣāṣ said: The disadvantages of being stupid spread throughout, if he prodigally finishes his property he will become a plague and dependent on people and public treasury.

This is true according to the Ḥanafī school, it is effective with coded. Only that Abū Yūsuf stipulates that the judge must intervene in the interdiction of the stupid, even if his stupidity is true since his maturity (see Articles 958 and 981-984; and *Kitāb al-Ḥijr* in *Radd al-Muḥtār* 5/94-95; *Kashf al-Asrār Ṣaḥīḥ Uṣūl al-Bazdawī,* 4/371-374).

64/6 Defining the Legal Age According to Laws

In the Roman law, there is a limited legal age that which a person could be deduced of the frame legal natural interdiction, and enjoying the complete disposal competency. According to them, this age started from 14 years for males, and 12 for females (that is, the approximately actual maturity age), because the morals are unsophisticated, the family ties and their surveillance is strongly comprehended for the youth. So, there is no need to slow down in order to give them the perfect competency.

If the society is congested, the businesses are divaricated, the desires are excessive and the family ties are weak, it suddenly appear to give the capability as they are forced to delay it until the age of 25.

Some modern law limited the legal age to 19 years others limited it to 21 years. The Egyptian law chose 18 years before it was raised to

21 years (see *Sharḥ al-Qānūn al-Madanī al-Miṣrī al-Qadīm* by Prof. Fatḥī Zaghlūl Bāshā, p. 28).

64/7 It is clear that the legal age is raised to a specific limitation of post maturity. Its interest is needed nowadays. The contracts and their performance have become complicated, divaricated, the public morals have declined and the deceit people are multifaceted in stealing peoples' property. It now becomes the must to increase the precaution in protecting the youth, and safeguard them and their property, by defining the legal age highly. This does not negate the *Sharīʿah* rulings, it agrees with its principles and jurisprudence in maintaining all the interest (see *Risālat al-Ahliyyah* by Shaykh Aḥmad Ibrāhīm, p. 21).

The Lawful Legal Age in Syria

64/8 (a) Before the New Civil Law

In year 1288 A.H. of the Ottoman era, the high authority passed the decree to prevent the judge of listening to the legal age allegation and its confirmation from the person who has not completed 20 years of age, in considering the timeline that the legal age is compulsory to be raised therein to a limit which the experience will be available in it for monetary affairs.[439]

Then, the code of judicial ruling from the management authority was delayed in 23 Shaʿbān 1293 A.H., it approved the Article 981-983 of it for the infant if he matures to confirm his legal age since his maturity, from then the trusty can release him his property.

The code continued basically on the foundation of legal ruling, because the committee that was charged to put it down decided on codification of genuine legal ruling based on the Ḥanafī rulings, leaving the affair of the administration to the authority decree.

64/9 The code invalidated the ruling of the prior authority management in defining the legal age with 20 year, it then reversed to limit of natural maturity, but, it does not give the maturity an enough legal (lawful) presumption for considering the person as a sound legally mature until it affirms his stupidity and decides

[439] This high administration sees the commentary of the Article 983 of *al-Majallah* of ʿAlī Ḥaydar and the commentary of Sālim Rustam al-Bāz (2nd ed.).

interdiction on him, it rather made the person with maturity to match in order to be sound legally mature. So, it needs to affirm his legal age in order to posses the complete capability.

Then, the system of managing the orphans' properties was issued in 4 Rabīʿ al-Awwal 1324 A.H (which few of its rulings were executed in Syria until today) the Article 59 of it stated that "after the orphans have attained to the 20 years of age the *Sharīʿah* court will provides the argument for that, which will be presented to the orphan's directors, after performing the necessary procedure that will include releasing their properties to them which are in the boxes...".

This is a legal reverse from the Ottoman authority to define the legal age in accordance to what it was decided by the high authority management year 1288 A.H., which is completely 20 years. That was due to the legal slogan (for releasing the property to the orphans after completing 20 years, or (not to release them their property before this age) which requires negating the possibility of the legal age before that, which might means (without completing their capability before the age of 20s).

We have previously mentioned that prevention of releasing the property to his uovice owner before ascertaining his legal age needs preventing executing his utterance disposal (see para 64/2). It does not make sense according to the logic of the opposite opinion; if not, the person can dispose all his properties and scatters them with two statements through the coutract or confirmation, so not releasing the property to him should not prevent him from scattering it, as his counterpart creditors could receive it on his behalf.[440]

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[440] In the third edition of this book, I came across what Dr. Ṣubḥī al-Mahmaṣānī from Beirut wrote about the capability in the second volume of his book entitled *al-Naẓariyyah al-ʿĀmmah lil-Mūjibāt wal-ʿUqūd fī al-Sharīʿah al-Islāmiyyah.* The Beirut code of law stated it in third issue of year 28: It decides untying the connection between the complete disposal capacity and property release: after narrating the different individual interpretive judgment in raising the interdiction from the infant with just only maturity or legal age appearance after the maturity, it stated what is in the Article 982 of the code which is: "If the irrational infant matures, his property should not be given to him as his legal age is not actualize, so he will be interdicted from disposal".

He conclusively said: The interdiction will be raised for the infant with the maturity, except if the judge prohibits him. If it shows that he has not mature, his properties shall not be given to him until after the legal age is confirmed. The capacity is something and releasing the property is another thing (*ibid*, v. 2, pp. 113-114).

The Syrian discerning court has preceded him in this concept with its last confirmation in 14 February 1933. It cancelled a judgment of *Sharīʿah* court by the judgment of returning the confirmation allegation of legal age of not being the

64/10 (b) New Civil Law

The Syrian civil law was issued in year 1949, while we are renewing the edition of this book, the Article 46 of it stated that the legal age is complete 18 solar year;[441] it then declared that every persons whenever he completes it will be eligible with his rational strength, it does not prevent him judicially, he can become (completely capable by practicing his civil rights).

Our law regarding this definition opposes its origin from where it was taken, it is the new Egyptian law which protects the old Egyptian codification from defining the legal age with 21 years.

The standpoint which our Syrian law could base the legal age upon 18 years is this, according to the requirement of general employee law in Syria, which makes someone capable to be employed generally in the country, it is irrational for a person to be employed to one of the country general employment while he is still incapable interdicted to dispose his right and his private properties.

Lastly, the new personal law was passed in Syria, year 1953 which its Article 163 stated that the limit of the legal age is complete 18 solar year, according to the civil law.

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claimant completing the age of 20s. It decided the cancellation regarding this decision!!

As above mentioned, the mistake is clearly obvious in this concept, because it is based on separating the connection between monetary interdiction and disposal interdiction, and also between complete capability and legal age; so that a person would be considered completely capable with just maturity but his property will be withheld until his legal age, based on, release of property following his legal age confirmation, and that the legal age is not the complete capability!

The doubt of al-Mahmaṣānī in this arrives from the Article 981, it is as follows as he stated it in the beginning of his study: "It is not necessary to be hurry in giving the infant his property when he matures, he might be rather tested gently, if he is actually found of being legally mature, his property will then be released to him). The meaning of this article does not hidden that, he does not consider the infant a legally mature with complete capability with only his maturity, he rather makes it compulsory to be tested and examined, the meaning is not to prevent his property despite considering the maturity of being legally mature with complete capability".

441 The civil law stated here and all other places on the solar year with the (Gregorian year). This expression is not correct because the word (Gregory and Hijri) both indicate the start of the yearly count of history, not of the type of the year either solar or lunar. In reality, the Christian Gregorian history is counted across the solar year, and the Islamic Hijri history is with lunar year. This reality is accidentally not linguistically.

64/11 Does the freedom from guardianship after the legal age need allegation and judgment?

It is compulsory to look into this position based on the requirement of the above Article 46 of Syrian civil law and article /163/ of the new personal law which confirm the legal age for a person judicially and perfect his disposal capability, and that he is free under the guardianship or the custody, without just completing 18 years of age, if he is mentally healthy, without a need to claim and judgment with this freedom.

The minor underage person will be naturally interdicted due to his incapability with the ruling of the Law, he then becomes automatically free at the legal age also with the rule of law for the removal of the obligation, if he is not mentally ill, or a judicial interdiction has not been passed on him prior to that with another reason (like stupidity) which might prevent him this freedom.

Initially, is to raise the legal interdiction of the minor for the minority with only maturing the legal age if there is nothing preventing that.

This is reasonable in contrary to what the contract is based on in judicial and estate bureau amongst us in the past. It is stipulated to free a person from guardianship or custody, and releasing him his properties after his legal age maturity. That legal age will be confirmed before the judge.

However, the Syrian discerning court in its last interpretive judgment nullified this judgment to the right, it decides that the natural interdiction stemming from the infancy raised by the adulthood, the person will then posses the complete disposal capability without a need to claim and judgment.[442]

If the person reaches the legal age while he is sane or mad, the natural interdiction will be made according to the infancy continuing in our Syrian law without a need to new judicial interdiction. This is the requirement of article 46 of the new civil law, and para 4 article 163 of the new personal law.[443]

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442 Based on the stipulation of claim and judgment due to the freedom under interdiction and guardianship which are both originating from infancy that lead to the alien consequence, the person whose legal age confirmation is not wanted before the judge could reach the old age while he might become a learned or leading politician and he is to the directorate a minor interdicted.

443 The Article 115 of the Syrian civil law considers the sane and the mentally ill person capable of engaging in the contract prior to the time they would be judicially

This is contrary to the case of a person, who reaches the legal age while he is mentally healthy, but he is a foolish and spendthrift, he will be considered completely capable if he has not been interdicted judicially by his foolishness.

Whenever the interdiction is judicially passed on an aged person, either that was due to the emergent sanity or mental retardation after the legal age, or due to the stupidity, the previous judicial interdiction will not be raised and the person will not return to the complete disposal capability until there be a judicial ruling based on the removal of the past interdiction cause (see the decision of Syrian discerning court issued on 8 April no. 37).

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interdicted, the interdiction is known according to the official procedure for the month, only that if the sanity or mental retardation are known of them during their contract dealing, or the person dealing with them is familiar with their situation.

The Article 115 states the confinement of the absolute article 46 which stipulates the prevention of the person with the complete capability if he has reached the legal age eligible with his rational strength , the differing concept for this text is that the person if reaches his legal age will not be eligible with his rational strength and will not be completely capable

Regarding this, the ruling of the Article 115 of the civil law is strange, because it requires the contract of the sane and the person who is mentally ill before the judicial interdiction on them despite the confirmation of sanity or mental retardation during the contract.

For this reason, the Article 163 of the new personal law passed after the civil law of ours states the continuation of the guardianship on the person reaching the legal age either sane or mentally ill without a need to judicial judgment, and it does not stipulates that his sanity or mental retardation must be widely known. So, this abrogates the pending of the article 115 mentioned before and it agrees with the absolute Article 46 of the civil law.

SECTION 65

CAPABILITY INCIDENCES

65/1 Indeed, all the aforementioned stages of eligibility, its principles, and its rules according to the stages of human growth are based on the natural condition whereby the person grows healthily.

Except that, indeed bodily or intellectual incidences may suddenly occur on people, such as death disease, and insanity, that may be considered a macro or micro effect for their eligibility which reduces this eligibility, which vary in grade depending on type of the incidence and its nature.

These emergencies have been divided into two by the classical jurists of Islamic jurisprudence: divine (*samawiyyah*) and acquired emergencies (*maktasabah*).

The divine incidences: Is what a man does not have any choice in their origination; and the acquired ones: are those that a man has option in their acquisition.[444]

There are six emergencies that are considered divine incidences namely insanity, madness, fainting, sleep, death sickness, and slavery.

On the other hand, acquired incidences are: intoxication, foolishness. We would add another incidence which is indebtedness with immersed debt, or bankruptcy insolvency to the acquired incidences (*al-iflās*).[445]

And the difference between craziness and madness is that the insanity is a brain asthenia which leads to weakness in consciousness and understanding. But madness is a mind disorder which causes disturbance or mind eruption.

The classical jurists had debate on craziness and madness based on whether they are in unequal stage from one gene or they are heterogeneous? However, the crazy is different in their view with

[444] This division has not outcome as a result of the rulings, it is ouly appears as a mere arranging in order.

[445] Indeed, our jurists did not mention this indebtedness between eligibility incidences because the debt even if it is immersed one has not considered in doctrinal foundations and theoretical jurisprudence as an incidence to disposition of debtor to his wealth, then the later jurists make legal opinion (*fatwa*) that it is an emergency situation. As a foregone indication in two paragraphs 15/7 and 38/6, we will explain it soon. Therefore, it is necessary to consider it now as one of eligibility incidences.

calmness in its status compared to the mad[446] (see *Uṣūl Fakhr al-Islām al-Bazdawī wa-Sharḥ Kashf al-Asrār*, 4/274-275; *Radd al-Muḥtār fī Kitāb al-Ḥijr; Risālat al-Ahliyyah* by Aḥmad Ibrāhīm, p. 23-27).

65/2 Which one of these capabilities affects these incidences?

We have mentioned in the previous stndy of legal capacity that passive legal capability has its locus on human attribute except the intellect. Each and everyone since his birth has passive legal capacity completely that are necessarily appropriate for the confirmation of the rights for and against him. The fetus in his mother's womb has incomplete prerequisite legal capacity that is necessarily appropriate for the confirmation of some rights for and against it (see para 60/3-4).

On the other hand, active legal capacity lies on the intellect. Based on this, the active legal capacity does not begin on a person until he/she will become sensible discerning.

It will be understood by observing that these incidences their effect is centralized on the performance capability not on the passive legal capacity, due to whatever impacts these emergencies have on a person's condition and on his intellectual ability, they cannot deprive him of his human attribute and have no ability to cause him to become the newborn baby.

In fact, each emergency has a special effect arising from it exceptionable rules for human actions who are befallen by this incidence, and they would be exempted from the general Sharīʿah rulings that are operative on others.

Some of these incidences totally remove the active legal capacity, such as madness, and while others decrease and it subsequently become bounded such as death or sickness.

The general precept in effects of both kinds of the legal capacity emergency situations is that the incidence which removes the legal

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446 The general precept of insanity is that an insane person is considered as a minor who is not able to discern and not reached puberty stage and prudence in all of his peculiar rulings. The idiotic person is indeed considered in Ḥanafīs interpretive judgement that his conduct will be subjected to the details according to the former tripartite division in the discerning stage (see *al-Majallah* 979-980).

However, Shaykh Aḥmad Ibrāhīm (may Allāh have mercy upon him) has actualized in the study of legal capacity and decided that idiotic person is of two grades: discerning and non-discerning. The latter is similar to an insane person in ruling (see *Risālat al-Ahliyyah* p. 26). On this basis, it relates to the clause 47 of the new civil law.

capacity pushes the person back to the same previous state of childhood, while the diminishing incidence that pushes the person back to the same discerning stage which affirms the discerning ruling for him.

65/3 This definition, apportionment, and aggregate presentation of the incidence capability, but illustration of each effect of these incidences and their rules are out of the theme of our study here, and this particular effects are explained in the books of Islamic jurisprudence and its ramifications, the books of *uṣūl al-fiqh* cite them under the study of capability and its emergency situations under the chapter the ruled;[447] who is the obliged person that is addressee by the Sharīʿah. The books of Islamic ruling *(furu')* cite them separately on their different occasions in the jurisprudential chapters, like what are in the book of purification, prayer, divorce, prohibition, and others.

Indeed, Zayn al-ʿĀbidīn ibn Nujaym had clarified most of them in the section *Fann al-Aḥkām* from his book *al-Ashbāh wal-Naẓā'ir*) which is the third art in the book.

Based on our focus on only two incidences with some clarification as them are follow: death or sickness from divine incidences, and indebtedness from acquired incidences:

65/4 Terminal illness: Its definition and its theory

Its definition

The terminal illness is a kind of sickness which renders the man powerless from doing his usual activities outdoors, likewise this kind of illness makes the woman unable to perform her usual duties outdoors, the sickness always leads to death within a year from a single terminal condition.

Moreover, there is no difference whether the sickness confines the person to bed or not, and whether the person will die due to that sickness itself or due to other causes during the illness.

However, if the sickness does not lead to death, such sickness will not be regarded as terminal illness. So, such sickness will be judged as

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[447] A person in technical term of the principle of Islamic jurisprudence is described the ruled due to his subjection for the obligatory Sharīʿah rulings that has been obliged upon him by the law giver the ruler.

a state of health. Also, if the sickness continues up to a year or more due to a terminal condition, such condition will be considered as inveterate condition, so its ruling will be regarded as the state of health.

On the other hand, if it detenerates, even by a slow and slight increment, the sickness will then be considered as a terminal illness from its inception, even if it continues longer and longer.

If the sickness continues for one year or more without deteriorating, and then it suddenly deteriorates in such a way that it later leads to death, such sickness will be considered as a terminal illness from the time the person becomes seriously ill (Article 1595).

It would be observed in *Sharīʿah* terminology wherever the classical Islamic jurists separate the two words (the sick and the healthy) the "sick" according to them is a person found in the state of terminal illness and the "healthy" is a person who is not in the state of terminal illness, whether he is not initially sick or he is sick but not in the state of terminal illness. In any case, the jurists mean the legal sickness and health whenever they mention both, which different adjudications apply, and they do not mean the literary meaning of those two words.

This is called unbinding the general word on the special one for the word *al-marīḍ* (patient) and unbinding the special word on the general one for the word *al-ṣaḥīḥ* (healthy).

The theory of the terminal illness

Indeed, the legal theory of the terminal illness is based on the fact that the illness is a notice of the terminal illness which ends with the personality and capacity, the *Sharīʿah* has made some new rulings based on it, such as inheritance and arrival of the period of paying debts for the lifeless as these debts transfer from the liability of the debtor to his wealth because of his liability is nullified by death. So, his inheritance will be regarded as a legal mortgage for the debts.

The terminal illness is a foremost notice for two juristic consequences negative and positive, which the death will be the warning cause for both consequences:

1. It is a notice for the removal of the patient personality, his competency and ability.

2. It is also a notice for ascertaining the identity rights in the sickly properties of the sick person for those whom these properties will be transferred to after his death amongst creditors and inheritors. So, the terminal illness is regarded as the initial sign of both that removal and confirmation, in order to keep up the rights which have been affirmed by the *Sharīʿah* in the legacy for these two groups (the creditors and the inheritors).

So, it may arise from that, that the debts and liability of the patient will be attached to his wealth, after the debts have been attached only to his liability before he gets sick. This is because of his inability to engage in any kind of job and to acquire wealth. So his liability has become weak that is why his wealth will be attached to his liability for consolidation.

Furthermore, Islamic law permit a person to dispose one third of his wealth to whomever or wherever he wishes out of the beneficial ways, after his death whether by will or by any other thing, which he will be rewarded upon that in the hereafter.

In addition, from this perspective, Islamic law regards the last illness as death. So, any decision that takes place during that sickness such as donation or giving charity even if it is fulfilment, it will be considered as the decision which will be fulfilled after his death.

From this perspective, the sick person in the state of terminal illness will be restricted without confining of his property in favor of the debtors, and also he is also will be strictly restricted with the two third of his wealth in favor of the inheritors.

So based on this the sickly person in a state of the terminal illness, might be in debt or not.

a. If he is found to be a debtor in such a way that the debt covers all the wealth (consumes all his property), in this case he will be prohibited from voluntary contribution or endowment according to the agreement of the jurists. However if he makes a donation in any way, even if it is by selling any one of his properties with a low price (that is engaging in favoritism of cost), or he makes an endowment using part of his money, this portion will not be executed, but only by the permission of the creditors, if they reject it, it will become null, but if they permit him to do so, it will be effective.

   On the other hand, if the debt of the sick person does not cover all his wealth, in this case, the balance of the estate belongs

to the heir after his debt has been paid and deducting tertamentary disposition. Based on this, the donation of the sick person is fulfilled as the testamentary disposition limited to one third of the remaining estate after the debt has been settled. However, if his donation exceeds one third of the remaining estate, the amount above one third may be executed by the permission of the heirs.

b. If the patient is not a debtor, in this case, all his donations such as gifts, endowment, testamentary dispositions, and others will be put into the consideration by observing two principles which are regarded as an obligation to be fulfilled:

   1. The donations of the sick person in a state of the terminal illness, is limited to one third of his wealth. However, anything above that will be subjected to the agreement of his heirs.

   2. The patient's donation to any of his heirs is not valid until the permission of the rest of the inheritors is confirmed, even if it is very small, whether it is from the one third of his estate or not, because the Prophet (may the peace and blessing of Allāh be upon him) says after the verse of inheritance: "Oh verily Allāh has presumed the rightful possession for every kinsmen, oh the will is nullified for an inheritor".[448]

   So, this adjudication is as a matter of whose means which have been mentioned before in the study of *istiṣlāḥ* (para 5/7), in order to remove the opportunity of making a tertamentary disposition to any one of the heirs as the way of preferring him over others at the time of distributing the estate. As the result this, it may cause a spite among the members of the family.

65/5 The state of indebtedness

The debts which a person accumulates, no matter how much they might be, whether they cover all his wealth or not, has no influence

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[448] Reported by Aḥmad, Abū Dāwūd, al-Tirmidhī, and Ibn Mājah from the *ḥadīth* of Abū Umāmah (see *Takhīṣ al-Ḥabīr*, 3/92).

on the competence of the debtor to have total freedom of his wealth according to the jurists.

This is because the debts are attached to the liability of the debtor[449] not his wealth and property. So, his wealth will remain free from the burden of anybody's right. Due to this, his competence should be completely regarded and not diminished in order to do whatever he likes with his wealth. A person having his economical actions can probably invest his money and do whatever he likes with it, his debts will remain debts and he can build on the wealth in order to shift from being bankrupt to a wealthy person.

There follows more explanations according to the juristic point of view in volume three of this series under the theory of (the protection) (see *Fatḥ al-Qadīr Sharḥ al-Hidāyah* by Kamāl ibn al-Hammām on *al-Waqf*, 5/424; and *al-Isʿāf, bāb alfāẓ al-waqf*, and *Radd al-Muḥtār* 3/395).

However, some people as the time goes on take this judgment as a way to trick others and a means for the debtors to traffic their money, in such away which they can benefit from that right. Due to this, the debtor has become crafty for the creditors, where the debtor will put his wealth in charity organization or give to his grandchildren and greatgradchildren for charity, in some cases he may give his money to those whom he trust among his relatives or friends, or sometimes he may sell his wealth with a much lower price in order to favor the buyer. All these may be done by the debtor, in order to prevent the creditor from getting his wealth.

Moreover, when the latter jurists discover this, they try to block this means, by making legal opinion that, the debtor who has accumulated all his wealth, even if he is not interdicted by the judge, if he dispose or traffic his wealth from the creditor, such as making donation or endowment with all of his wealth or part of it. This kind of action is not executed but with the agreement of the creditors in order to save their rights, if they approve it is executed but if they disapprove it will be nullified.

Thus, the meaning of this is that the indebtedness can diminish the competence of the debtor as he can put under the automatic guardianship like a discerning infant. Based on this, the indebtedness is one of the traits of legal competency.

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449 The meaning of *dhimmah* has been explained before (see para 59/10).

Furthermore, the latter jurists of the Ḥanbalī School passed this legal opinion contrary to the principle of analogy which has been used for making some judgment in that school of thought (see *al-Qawāʿid* by Ibn Rajab, principle 11, p. 14).

Furthermore, the Ḥanafīs follow this opinion, that is why Abū Saʿūd the interpreter of Islamic law in Rome passed the ruling (*fatwā*) of not fulfilling the *waqf* of the debtor except if it fulfils the debt from his wealth, and the decree was passed and registered in (his expositions (*maʿrūḍāt*) and also declared by his contemporary and subsequent jurists[450] (see para 15/6 and 38/5 (4)).

We can see that this legal opinion which says that the *waqf* of the debtor is not executed except from the remaining portion of the wealth after the debts of the creditors have been paid shows that other things other than *waqf* which can delay the rights of the creditor to be paid, (such as gift or selling with a cheap price in order to favor the buyer) all these will be given the same judgment as in the case of the *waqf*. Moreover, the Ḥanafīs only mentioned *waqf* because it is the most popular way which has been implemented by some debtors in order to traffic their wealth. Based on this, if it is found, the debtors use some other ways to traffic their wealth from the creditors such as selling and gift. As in this present time, the same judgment will be applied for the reason is the same in the *waqf* and

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[450] Abu Masʿūd is Muḥammad ibn Muḥammad al-ʿImādī from Oscaliber, a village in a district of Rome where he was nicknamed as the Muftī of Rome. The leadership of the Ḥanafīs was conferred to him during the reign of Sulṭān Salīm and Sulaymān. He was the Grand Muftī during the reign of Ottoman Empire, and also the judge of Constantinople and Russia.

He was a revered person in is life. He came up with his own juristic opinion in some issues and the jurists of his time and later jurists followed him. He has written a good poetry, and a reknown Qur'ānic commentary. He died in the year 982 A.H. (see *Shadharāt al-Dhahab* by Ibn al-ʿImād, v. 8 p. 398).

His *maʿrūḍāt* contained his new *fatwā* which specify the loose text, or review of juristic opinion based on the differences of opinion of that time and the *maṣlaḥah* requirement, that caused it to be presented before the authority made a decree that judges must apply it. By that, it had a legislative authority, such as adjudication of not fulfilling the *waqf* of the debtor (see footnote para 29/4; *al-Durr al-Mukhtār wa-Radd al-Muḥtār* on *al-Waqf* 3/395). His suggestions were written in the Turkey language.

Paul Horster, the German scholar wrote a book about Islamic jurisprudence in the 16 century and about the expositions of Abū Saʿūd. This book was published in the German language in 1935 where he presented to the University of Bonn (see *History of Arabic Language* by Brockelmann, v. 2, p. 580; Suppl. 2, p. 651.

others. This generalization is the apparent stimulation by both the Ḥanbalī and Mālikī schools.[451]

65/6 Important Remark

It is common for some authors in the traditional jurisprudential literature on legal capacity incidences to include other conditions other than the ones mentioned in this section. However, there are some observations which we shall mention in the first appendix of chapter eight, follows immediately in section 66.

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[451] The modern foreign jurisprudence has also adopted this principle as decided by Islamic law. The foreign jurisprudence considered the disposal by the incapable debtor of his property as damaging the rights of debtors without fulfilling it to them. Every creditor has the right to suit without making it effective as he wants. So, for that arrives the clause 1167 of the French civil law. This litigation is called Action paulienne according to the person who enacted it. The Arab legists called it litigation of no disposal fulfillment.

Its origin was said to have come from Roman legislation according to them, then it improved afterward to the new rulings in the foreign jurisprudence and its laws (see Collan and cabitan, v. 2, para 437).

But, the existence of this litigation in Roman legislation as become dubious today to the actual researcher (see *Naẓariyyat al-'Aqd* by 'Abd al-Razzāq al-Sanhūrī, footnote para 729).

SECTION 66

GUARDIANSHIP OR LEGAL REPRESENTATION

66/1 Human being, before he reaches his full competency of performance, is called minor whether he is devoid of full competency like an undiscerning minor or deficient of that competency like one who is in the stage between the age of discerning and the age of majority.

A minor, in all circumstances is in need of an adult who can guide his life. He cannot meet these needs on his own because of his incapacity in his childhood phase as well as physical and intellectual weakness in his age of discerning, hence, his lack of civil competency of performance comes to view. Thus, how can his needs and well-being of life be guaranteed?

For this reason, both divine law and positive law are unanimous on the matter that the only approach to take care of incompetent is terminologically called *"al-Wilāyah"* (jurisdiction or legal guardianship).

In this context, we will elaborate in our following discussion the fundamentals and general concept of Legal Guardianship and as so its kinds and rulings in brief.

66/2 Definition of *Wilāyah* and explanation of its core theme

Wilāyah lexically denotes backing up or patronage, power and holding authority.

The jurists defined it as "taking care of a minor by an adult responsible person in respect to the management of his personal and financial affairs.

So *wilāyah* intrinsically is a kind of legal representation which inclusively stands for "being a substitute for another person in dealing of his affairs", legal representation therefore can be seen in two forms: discretiouary (*ikhtāriyyah*) and mandatory (*ijbāriyyah*).

- The discretionary legal represeutation is an attorneyship whose subject is the authority to act on somebody's behalf.

- The mandatory legal representation is the attorneyship in which the law and the court of law authorize someone to discharge the affairs of a minor for his welfare as a substitute for him. This deputy guardian is considered as a legal representative for a minor or infant. He therefore represents the former in all affairs of contracts, lawsuits and legal proceedings in regard to his rights which require getting representation.

It is clear that legal representation (*niyābah*) in its general concept is more comprehensive than legal guardianship or jurisdiction (*wilāyah*). It is because the legal representation can be contractual, by mere selection; it is a guardianship which is authorised through having a contract between attorney and client. Likewise legal representation can be legislative which is imposed by the operative law which is a representation of the guardian on the minor by the ruling of law, or, it can be judicial, which is a representation of the guardian who is appointed by the judge for the minor in order to manage his properties, or, it can be a representation of the caretaker who is assigned by the judge for the management of the properties of an absent adult in some circumstances.

66/3 Ruling of *Wilāyah* and Its Impacts

If the *wilāyah* (jurisdiction or legal guardianship) is a mandatory legal representation, it must follow a general ruling relating to the issue and that the actions are taken mandatorily by the guardian appointed for the minor person in order to his welfare is valid if the legal conditions are fulfilled. The minor cannot invalidate or confute after he is grown up.

66/4 Guardianship on Life and Property

Guardianship comprises two types of legal authority as follows:

1. Authority in the minor's affairs with regard to him and his life for instance wedding, education, medication and employment.

2. Authority in his financial affairs such as business contracts, dealings, expenditures and savings. Therefore, guardianship is divided into two namely "guardianship on life" aud "guardianship on property".

66/5 Who is the Guardian?

It is clear from above mentioned discussion that guardianship is profoundly correlated to the family system and its welfare, and its pillar is the guardian's adherence and his capability to maintain care for the minor and protect the heir right. So, it is obligatory for a guardian to adherence and capability in his personality by nature.

So, the legal principle of guardianship is to take this responsibility a relative who has genealogical relation with the minor, i.e. father of the minor and the son of an insane person.

If the father is the guardian of his family, he is the one who is naturally most careful for his offspring and about their future, then the grandfather in terms of passion. The law recognizes the father and then the grandfather for the full guardianship on both of the minor's life personal and financial affairs. In the absence of the father and grandfather, the guardianship on life is separated from the guardianship on property:

a. Guardianship on the life will be taken care of by the person who is the closest in respect to the inheritance and disinheritance from the next of kin. Whoever is the closest, will be given priority to take over the responsibility of guardianship.

    - The son of an insane person for example, then their grandson and so on as his descendent consequently will be endowed the responsibility of guardianship on their life based on succession from their father.
    - A father of a child or mad will be given priority in regard to the responsibility of guardianship on his sons or brothers of the child. On the other hand, the brothers of the child will be given priority in this case on their uncles because the brothers are the closest successors of his father.
    - In the case of numerousness of the next of kin in the same level like brothers, the full-brothers will be given priority one the half-brothers in the responsibility of guardianship on the basis of the father only.

    If none is found from the next of kin, the responsibility of guardianship of life will be conferred on mother, then on the other relatives and the relatives on the maternal side.

b. Regarding the guardianship on the property of the minor person after the death of his father, the law primarily confers this responsibility on the person who is selected by the deceased before his death to take care of the properties and protect the rights of his minor offspring, no matter whether the selected person by the father is from his family or outsider, whether male or female.

This *wilāyah* (guardianship) of the selected person is called 'trusteeship' and the person who takes this *wilāyah* is called 'trustee'.

If the father does not authorize this trusteeship (*waṣāyā*) of his minor offspring to anybody before his death, the *wilāyah* regarding life and property will lie on the grandfather.

The trusteeship of the grandfather will be replaced by the testamentary guardian after his death.

The trustee who is selected by either the farther or the grandfather before his death is called 'testamentary guardian' and the trustee who is appointed by the judge is called 'legal trustee'.

Both kinds of trustees can be assigned at the time on the minor if none can perform the responsibility singlehandedly but their opinions in any case will be set together with the exception to things in which he does not need their opinion, for instance, asking debt, giving one's deposit back and purchasing urgent needs.

66/6 The Principle of *Wilāyah*

Legal guardianship on persons begins since they are born. No guardianship exists for any person in the embryonic phase before he is born. Most of the jurists agreed to this opinion.

If the father of the embryo buys something on its behalf, will not fall in his ownership although he is alive, It is as like as if father gives a grant to him, the grant will neither be justified nor he the owner of this grant. In fact, for embryo has four rights which were discussed before (see para 60/3-4).

In the Shīʿite Zaydīs jurisprudence, *wilāyah* on life and property of an embryonic phase is accepted. They brought evidence and supporting documents in their books like *Sharḥ al-Azhar* and others about the justification of marring an embryo!! It is a kind of exaggeration.

Assigning financial guardianship on the properties of an embryo has a legal aspect, because the property will be reserved since the embryo requires protection and management. On that account, the Egyptian government legislated in the law of probate courts a ruling on the justification of appointing a *wāṣī* (trustee) for the embryo. The Egyptian justice ministry had given the reason for this justification in its circulation in 21 December 1911 that "there is harm to the embryo's interest if a *wāṣī* (trustee) is not appointed for him because investment, lease, collection and other similar dealings for his property which requires timely executive move would not take place.

In this regard, Prof. Aḥmad Ibrāhīm said "fine precautionary measure is acceptable to the juristic principles" (*Risālat al-Ahliyyah* pp. 7-8).

66/7 Effectiveness and ineffectiveness of *Wilāyah*

A glance in the jurisprudential rulings related to the kinds of *wilāyah* and its authority shows that the guardians (***walīy***) whose guardianship is mainly bestowed on the life only also have a bit of authority on the property of a minor if it is necessary.

Likewise, guardians for properties only also have a bit of authority on the life of the minor.

Moreover, guardians of both life and property have full authority on life and property and they are the son, father, and grandfather.

In the light of the aforesaid conditions, in terms of full effective and ineffective, *wilāyah* on the minor is divided into four which are as follows: effective on the life and property, ineffective on both of them, effective on one of them, and ineffective on one of them.

1. The effective *wilāyah* on life empowers a guardian (*walīy*) the authority of mandatory marriage, disciplinary action, circumcision, medical treatment and surgical operation.

   Those who do not have effective *wilāyah* on the life of the minor will do not have the rights to entrust a doctor for him to be undergone a surgical operation or to be circumcised. If he exercises any of these actions and therefore death or any harm comes upon the minor, he will be responsible for that harmful or has to pay blood money (*Radd al-Mukhtār* 3/318).

   Ibn Nujaym said in *al-Ashbāh wal-Naẓā'ir* that the child should not be given medical treatment without guardian (*walīy*) (*al-Ashbāh*, *Aḥkām al-Ṣibyān* 2/144).

The above is applicable under normal circumstances, however, exceptional under which demands quick rescue or prompting aid, i.e. if the child is hit or stampeded, any delay giving medication and waiting for his guardian may cost his life especially in a road accident. So giving treatment here is legally and traditionally permissible, and the exceptional circumstances have exceptional rulings in accordance with juristic principles.

2. The ineffective *wilāyah* on the life does not entrust the wali such above mentioned authority. He is only entrusted for taking care of the minor, his accommodation, education, and putting him in such a profession which suited him and from which he can be benefited.

3. The effective *wilāyah* on property which basically authorizes the rights of business on the property of the minor on account that both the profit and loss of this business lie on his account; and rights of permission for the miuor for doing business.

4. The ineffective *wilāyah* on property does not entrust him the rights of doing business. He is authorized for protecting the minor's properties, receiving endowment for him, necessary expenditure for him, purchasing basic needs and selling portable properties for savings.

   However, selling real estate of the minor is beyond the authority of the legal representatives although the minor is in need of selling it for his expenditure or for settling his debt. In fact, in emergency situation, if selling of the minor's real estate is needed, a judge's permission is a prerequisite to do so.

66/8 Division of these types of *wilāyah* on the guardians (*walīy*)

These four types of *wilāyah* are divided in a specific order which is as follows:

a) Effective *wilāyah* on the life and property is the *wilāyah* of the father, then the grandfather and so on.

b) Effective *wilāyah* on the life but ineffective on the property is the *wilāyah* conferred on other agnates apart from the father and the

grandfather, and then of near relatives accordingly like son, brother and their sons which we mentioned before.

c) Effective *wilāyah* in property but ineffective in life is *wilāyah* of trustees (*wāṣī*).

d) Ineffective in both life and property is the *wilāyah* of the person whose house the minor lives in. The minor would be stranger to him or be one of his relatives on whom the responsibility of *wilāyah* on life does not lie on. Even the person who picks up a unknown foundling baby and rears him up in his house with his family members will be entrusted this ineffective *wilāyah* on his life and property with the limitations that we discussed in previous chapter.

   Also, the *wilāyah* of a stepfather on a stepson who joined and become a family member.

It becomes clear here that regarding the permission for business for the discerning minor, none has authority except father, then grandfather and trustees who are strong wali in his *wilāyah*. Whereas, those who have weak *wilāyah* on his property will not deserve this permission because those who are not allowed to do bnsiness by using his property, are also not allowed giving permission for it.

66/9 The *Sulṭān* and Judge are guardians (*walīy*) for those who do not have guardians

All authorities of legal representation for the guardians (*walīy*) and trustees (*wāṣī*) lie on the sultan when no competent person is available to be entrusted with the responsibility of *wilāyah*. Either he himself will carry out this responsibility by virtue of his authority of general guardianship (*wilāyah*) or by a mediator who is given permission to take the responsibility for the welfare of the minor.

The judge will act on the *Sulṭān's* behalf in this regard. The general Juristic principle in this issue is "the *Sulṭān* is a guardian to those who does not have a guardian". It is articulated in the prophetic tradition (*Radd al-Muḥtār, Kitāb al-Laqīt*).

However, it should be noted that the judge does not have any power to exercise his authority on buy, sell, lease, rent, levy and others for the welfare of the minor if a legal representative is available. This representative is appointed by the guardian or by the

trustee because the guardianship (*wilāyah*) of this legal representative is confidential in these affairs. His guardianship on these affairs (*wilāyah*) is preferable to general guardianship (*wilāyah*) of the judge. The reason for this is that there is a recognized juristic principle "the specific guardianship (*wilāyah*) is stronger in its subject than the general guardianship" (*al-Majallah* 59)

It is what the recognized principles in the management and modern administrative laws comply with in current age in accordance with the principle of division of authorities, responsibilities and the principle of gradual process. Therefore, the principal officer who does not perform his job or delegates to his junior officer, however, if the junior officer who does not perform the duty assigned to him without reason will be sacked and another officer will be appointed to perform the duty delegated to him.

66/10 There is solely a financial guardianship which does not arise from the lack of competency and basically it has no relation to the life (*nafs*), i.e. the person in charge of endowment and ineffective guardianship of the trustee of the dead man on the portion of the missing adult on his estate. This is the type where there is no connection to our previous discussion regarding the minor's legal capacity.

APPENDIX ONE OF CHAPTER EIGHT

REFERENCES FOR TRADITIONAL JURISTIC STUDY ON CONTINGENCIES OF LEGAL COMPETENCE

66/11 Authors of the principles of Islamic jurisprudence are used to introduce many other conditions in contingencies of *ahliyyah* what our previous discussion did not encompass. They had added something more than what the divinely destined contingencies had included. In addition to the previous points, they have added following five more points to be considered as divinely destined contingences: childhood *(al-ṣaghr),* forgetfulness *(al-nisyān)* and death *(al-mawt);* and regarding women: menstruation *(al-ḥayḍ)* and post partum period *(al-nifās).*

They have added four more points in regard to incidental contingencies: journey *(al-safar),* ignorance *(al-jahl),* mistake *(al-khaṭa')* and jesting *(al-hazl).*

Contemporary researchers who have written in *ahliyyah,* i.e. Professor Aḥmad Ibrāhīm, followed the traditional textual discussion for the theory of *ahliyyah* and its contingencies and they have narrated rulings of these conditions as they are parts of the contingencies of *ahliyyah.*

However, in our opinion, it is wrong, these nine extra conditions is considered as a matter of *ahliyyah* in any case, although they are incumbent in some legal affairs and exceptional rulings.

For this reason, we elaborated on the conditions mentioned before because they are only the right things to be named contingencies of personal legal capacity.

It is better to make clear our observations on these conditions what we are going to introduce here, meaningfully they are not contingencies of *ahliyyah* and therefore it not right to amalgamate them with those conditions.

1. Childhood: It is a natural early phase of every body's life. It is one of the fundamental conditions of the subject of *ahliyyah* and not any condition of the contingencies.

2. Forgetfulness: It comes suddenly upon one's memory. It is not a disease which afflicts human body, mind as well as his

judiciousness. It does not contradict *ahliyyah* in any case and does not detract from but it is considered as reasonable excuse which relaxes punishment for neglecting some religious obligations or conditions as a grace for mankind and removal of difficulties; as narrated in the Prophetic Tradition, *"Allāh sets down mistake and forgetfulness from my Ummah and whatever they have an aversion to"*; and that is like somebody who forgets to perform prayer (*ṣalāt*) in due time, he would not be considered as neglectful to it. Similarly, one who forgets to utter the name of Allāh during slaughtering an animal, in this case, eating this animal will not be unlawful. Similarly, in the case of someone who eats something due to forgetfulness during fasting without the intention to break his fast.

3&4. Menstruation and postpartum period of women: These are the legal obstacles which prohibits performing some *'ibādāt* which requires cleanliness (*ṭahārah*). Those who are in these two conditions are excused from prayer and fasting although they have to make up the fasting later. Similarly, they must avoid entering mosque and reciting *Qur'ān,* likewise, some other similar exceptional religious rulings. *Ahliyyat al-wujūb* and *ahliyyat al-adā,* in their religious and civic manners, are complete.

- In addition, *ahliyyat al-adā*, as it is conditional on the human reason and sense, puts the discerning minor into restricted limitation. This reason and sense in a woman who is in menstruation and postpartum period, completely exist. So there is no impact of the menstruation and postpartum period in their *ahliyyat al-adā*.
- Moreover, *Ahliyyat al-wujūb* is likewise existed in them by the means of priority because it is conditional on human character without dependence on reason and age.

Non-obligation of performing prayer for the women in menstruation and postpartum period and postponement of feasting from them do not refer to deficiency in *ahliyyah* but refer to unavailability of legal conditions for performing the obligation. Evidently, the undiscerning minor is excused from obligatory acts of worship even though *ahliyyat al-wujūb*

completely exist in him since his early age because conditions for obligatory legal duty are adulthood and reason.

We have noted in our previous discussion that *ahliyyah* qualifies and prepares the person but does not compel because obligation depends on existence of reasons and presence of its condition as well as absence of its obstacles (see para 62/4).

Non-obligation of legal ruling and correctness of deed do not mean that they are generated from deficiency in *ahliyyah*. Yet they are generated from losing some other conditions or from the presence of some legal obstacles. There is a big difference between losing *ahliyyah* or deficiency in it and nonexistence of condition or existence of obstacle; otherwise, it must be considered that major ritual impurity which is an obstacle to the correct prayer is one of the contingencies of *ahliyyah* by analogy on menstruation which nullifies fasting and does not exclude it. This argument is not reasonable.

The principle of this distinction is to look at the nature of contingency. If it has an impact on the person's intellectual strength like madness, dementia and faintness; or impact on his legal authority like stupidity, deadly disease and bankruptcy; then, it can be contingencies of *ahliyyah*, otherwise, it is one of the obstacles or does not meet some conditions.

5. Journey: The *Sharīʿah* considers the hardship in journey as a reason of relaxing some religious obligation. Therefore, the *Sharīʿah* makes some obligations optional for a traveller, i.e. the Jumuʿah and Eid prayers. Likewise, some obligations are also optional for the traveler which can be done another time, i.e. fasting in the month of Ramaḍān. Although in a journey, nothing infringes the *ahliyyah* of traveler with regard to observing the religious and civic obligation.

6. Ignorance: Ignorance also does not infringe anything from the *ahliyyah* of the person. It gives some valid excuse in some respects for the person to be excused from the punishment for negligence in observing religious obligations. For example, the person who has converted to Islām in a non-Islamic country and remains ignorant to religious obligations that Islām obligates on him. This ignorance, therefore, is considered as a reasonable excuse which prevents him from the punishment he deserves because of negligence about religious obligations.

Similarly, the ignorance of an employee who has been terminated by his employer, in this case, the duties of employee will remain effective until he receives news of his termination. Here, it should be noted that the knowledge of termination ends the authority of the employee whereas lack of knowledge about termination renders his authority effective. Thus, ignorance does not infringe upon *ahliyyah* but it is an excuse.

7. Mistake: It denotes happenings of something what is not intended. It does not diminish the ability of the person and it has no implication with *ahliyyah*. In fact, it is a portrayal of the unwilling actions of a person. So, it exempts or reduces punishment from the person who committed it.

8. Jesting: it is excluded from all meanings incidental *ahliyyah*. Jesting is just the opposite of taking something seriously into account. It is a subject of verbal conducts and that is to say – playing with words without intending its meanings and impacts. It may cause cancelation of contracts, deals and their termination but cannot be a cause of losing *ahliyyah*. It is then evident that jesting in some cases is exceptional, like in the case of marriage *(al-nikāḥ)*, divorce *(al-ṭalāq)* and release from bandage *(al-iʿtāq)* (see para 33/6).

   In fact, jesting is the absence of the basic element of verbal conduct because its element is the definitive expression of inclination. In jocularity, the indication of this expression of inclination is absent. Therefore, if jesting is considered as a matter of incidental *ahliyyah*, it also must be considered that the absence of all conditions of proposal and acceptance in the contracts are matters of *ahliyyah*.

9. Death: It contains all eliminative elements of *ahliyyah*. Considering this aspect, death can be considered as a fact of incidental *ahliyyah*.

   On the other hand, it may not be considered directly as an element of incidental *ahliyyah*. In fact, it afflicts a life and abolishes it from the existence. As a result, *ahliyyah* is abolished with the abolishment of the existence of the person because *ahliyyah* is a characteristic of the person. Character cannot exist if the person does not exist. *'Awārid al-ahliyyah,* therefore, are incidental which overtakes its elements and influences within in

an alive person where the person losses the legacies that should be enjoyed by him because of this incident. As a result, the person becomes incompetent. This does not arise from the disappearance of personality in the state of death. So, the death cannot be considered as a incidental *ahliyyah* in this respect.

APPENDIX TWO OF CHAPTER EIGHT

SALIENT FEATURE OF OUR NEW ACADEMIC FOCUS ON THE THEORY OF *AHLIYYAH*

66/12 The reader would find our new study and investigation on the theory of *ahliyyah* in a fashion which apparently differs in some respects from the text of traditional study of *ahliyyah* formulated in the original sources of the book of the principles of Islamic jurisprudence and the works have been on *ahliyyah* by the contemporary authors. Through our study we have observed that in the matters of *ahliyyah* there are problems which cannot be solved except new understanding in its division, formulation and distribution its rulings.

The new findings which a reader would get from this study are as follows:

a. We have set five stages of *ahliyyah* in accordance with phases of the growth of human being. The scholars of the principles of Islamic jurisprudence and contemporary authors, who have traditionally copied from the traditional texts, have divided into four stages. They include adulthood and legal age as the fourth and last fundamental by which one's *ahliyyah* gets completion.

But in our observation and investigation on the legal rulings, we noticed that adulthood is the matter which is conditioned for legal obligation; and the legal age is the point of completion of *ahliyyat al-taṣarruf* which requires practical financial experience other than state of complete realization of good and evil in duties and carrying penal responsibility.

Therefore, it must be considered that the age of discretion, a phase in which *ahliyyat al-adā* begins and legal age, a phase in which *ahliyyah* gets completed; are two different phases, not one, in respect to *ahliyyah*.

b. We have divided *ahliyyat al-adā* into two categories, religious and civic, or in terminologically saying *ahliyyat al-tasarruf* and *ahliyyat al-ta'abbud*. The first one begins fully from the beginning of the age of discretion and the second one begins partially in the age of

discretion then gets completed by the legal age or age of reason, not merely by the full maturity for the legal duty.

This division for *ahliyyat al-adā* and its categorization into religious and civic dimension in complementary stages had not been conducted by the jurists and scholars in the field of the principles of Islamic jurisprudence. Whereas, they have noted that the discerning child can partially enjoy the *ahliyyat al-adā* after he becomes adult, but we discovered this division and categorization from the rulings they have set for the judicious child. It then indicates the following points:

i. It is juristically established that the lack of *ahliyyat al-adā* in a person, makes his deal uncertain between harm and benefit; and thereof effective. Moreover, it makes him subject to the permission of his guardian and legal trustee. Whereas, completeness of this *ahliyyah* makes him free from being a subject to a guardian and trustee and makes his dealings effective that is resulted from merely his own intention.

ii. We have observed in our research and examination that the financial dealings of a discerning child require permission. Some dealings in this regard would be unjustified and some would be unjustifiable due to limitation or lake of *ahliyyah*.

   On the other hand, worships of a discerning child are correct and effective regardless of whether it depends on the permission of his guardian (*walīy*) or not. His prayer will be considered as correct despite his guardian refraining him from the prayer but he fulfilled all its requirements.

iii. The Prophet (s.a.w.) said, *"Command your children to pray when they are seven years old"*. Therefore, we have observed that the views of jurists and the scholars of the principle of Islamic jurisprudence in regard to *ahliyyat al-adā* of a discerning child refer to his *ahliyyah* in civic dealings.

   Whereas, his *ahliyyah* in physical worships starts immediately from his age of discern although these worships are not legally obligatory for him because of his weakness.

   Based on this, we have divided *ahliyyat al-adā* into religious and civic dimension as discussed before.

   Here, an important paradox arises in the subject of *ahliyyah*. The jurists require adulthood as a principle for duties, obligatious and responsibilities which indicates to completeness of *ahliyyah*

and they tag this completeness with adulthood. However, in other places, they say that the property of the minor will not be handed over and he will not be allowed to deal with this when he reaches at adulthood. He needs, in this case, to be in full age for being incumbent after his adulthood as Qur'ānic verse refers to.

This distinction between religious and civic *ahliyyat al-adā* in our discussion refers to some points as follows:

- Completeness of the civic dimension of *ahliyyat al-adā* is conditioned on being financial expertise, not being adult.
- Religious dimension of *ahliyyat al-adā* immediately starts since the age of discretion and then continues. In this context, prayers are correct although the person is not entitled to perform them because *ahliyyah*, qualifies the person from neglecting his obligations as discussed before. So, addressing legal obligation for duties or responsibilities depends on other matters than *ahliyyah* for which the first is the adulthood.

c. We have extracted from the contingencies of *ahliyyah* a big dimension which is traditionally considered as contingencies but in fact, basically they don't carry the meaning of *ahliyyah* in their character.

By this new view in the theory of *ahliyyah*, its branches are emplaced in their due places in the stem, and categorization of rulings has been disciplined in it and all obscurities and ambiguities existing in the horizon of *ahliyyah* and its phases have been removed.

CHAPTER NINE

THE THEORY OF *'URF*

67/1 Introduction and General Outline on The Theory of *'urf*

We mentioned in the section on the sources of Islamic jurisprudence, a brief explanation on the concept of *'urf* in terms of it being one of the subsidiary sources of rulings. We provided some explanations relating to the theory of *'urf* which is used as the secondary source of jurisprudential theories.

However, we will discuss this major important theory, which occupies a central role in Islamic jurisprudence, as it is used to deduce some subsidiary rulings from different aspects and various principles of Islamic jnrisprudence, which its large number can neither be counted, nor can its rejunevation be terminated, because the ruliugs which are legally applied due to the *'urf,* change according to the flexibility of *'urf,* as they exist contiuuously. Indeed, this phenomena indicates the eternal existence of Islamic principles and its jurisprudence.

67/2 To discuss about the theory of legality *'urf* can be divided into four parts as follow:

Part 1: Sectious 67-68 comprise the general overview, definition and classification.

Part 2: Sections 69-70 relate to the application of *'urf,* and the rules which limits it.

Part 3: Sections 71-74 discuss the levels of opposition of *'urf* against the legal indications.

Part 4: Sections 75-78 compare between the *'urf* and the customary evidences, as though, we will discuss the matters which relate to the *'urf* and the changeability of times.

SECTION 67

THE BASIC CONCEPT OF *'ĀDAH* AND *'URF*: THEIR DEFINITION AND RELATIONSHIP

THEME ONE: THE BASIC CONCEPT OF *'ĀDAH* THE *'URF*

67/3 Every free action should have the incentive, and this incentive is either external, i.e. to get the benefit from something or an action, or internal itself, like to feel fun for revenge, which motivates to retaliate, also, like extreme modesty which brings about silence or to become hidden on some occasions from some people.

Vividly, if someone attempts the action, which he is directed through the incentive, then he repeats that action, definitely, it will become habitual.

If someone else emulates this character driven by the love to imitate and this imitation happens several times, while this action spread among majority of peoples, it is then known as the *'urf*, which it is really the general tradition.

67/4 This rule can be also applied on sayings as it is applied on the actions:

a. A person is obliged to foster understanding among his community. However, the understanding through the gestures and so forth is difficult and slow paced. For this reason, people resort short expressions which are familiar to them until it becomes the general jargon within their community.

b. As the industry and knowledge of civilization expands, the expression with the prevalent general language relating to these industry and knowledge also become difficult, and long, as it creates some confusion. In this reason, the people of handcrafts, the scientists, and the men of religions resort to enumerate some special terms, which they stick to in their uses, either through the first time it was assigned, or the repeated use which refers to some meanings and objects, which can be easily understood from

these enumerated words, as it could not indicate its meaning unless through a long explanation.

Most of the times, the origin of these customary words may be metaphorical expressions, which its meaning cannot be understood unless within its context. Subsequently, it is used repeatedly, until it stands as the general metaphors, then its use may be until it indicates the special meaning without considering its content, as though it is separated from its original meaning such that it would not be understood except through context. Whereupon the matter may be reversed; any of these metaphorical manifestations may become common language, while the common language may become metaphorical manifestation.[452]

67/5 The traditions which are used in certain places or within special groups of people was not established from one reason or one way.

However, the majority of these traditions were established from the need, whereby certain condition directs people to special action, while this action repeats and spreads until it becomes prevalent *'urf*, as it can be observed in the mortgage conditional sale *(bay' al-wafā')*, and the endowment *(waqf)* of liquid assets such as the funeral instruments and books.

These needs change according to the general places and their public recreations, such as the social places, its organization and its specialties, in relation to the creed aspects, rituals of religion, the etiquettes, rule of judgment, the knowledge centers, the factories, the arts, and the freedom of theology and so forth.

Some of these traditions may be created through the order of the judge, or through his willingness, and his offers, i.e. the tradition of celebrating the Prophet's birthday, which is innovated through the

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452 An example is when we say: A person drinks from the river, definitely the literal meaning for this expression is that he puts his mouth in the river and gulps it whereas the metaphorical meaning of this expression that he takes water from the river with a container, and he drinks. Indeed, this use has spread until it becomes the real meaning for this expression, and it is definite and free from the context.

The same manner with the saying: "He eats from this tree". The exact meaning of this expression is eating from the bark of the tree, whereas the metaphorical meaning is to eat from its fruits. Indeed, this metaphoric use has become the exact meaning for this expression, not the exact linguistic meaning, which means that the metaphorical use has become an actual customary use".

Fatimite Shiite rule, whereupon it spread and celebrated in the rest of the Islamic countries.[453]

Some of these traditions and customs might be hereditary which relates to ancestors which do not relate to any certain need. It can be observed from most of the traditions of the *jāhiliyyah* related to their creeds before Islām dominates these Arab countries.

67/6 Certainly, these traditions and customs have influence on the minds and authority on brains. Therefore whenever tradition become stable definitely, it should be considered as part of the necessities in living, because the action – as cited by psychologists – can be noted due to its repetition, which the nerves become accustom with, like the parts of body, especially, when the need requires it. Then, it is said: "Verily, tradition is another second nature". Therefore, our jurists say: "Indeed, to remove people from their tradition has an intense harm" (see the booklet, *Nashr al-'Urf* by Ibn ʿĀbidīn, 2/115 and 120).

Because of this, the Prophets and reformers encounter many difficulties and insults which make them treat people with firmness at times and with tolerance at other times, in order to change people from evils of their traditions and customs.

In relation to this, 'Ā'ishah (may Allāh bless her) says, when she explains the intricacies of Islamic law:

"Indeed, the first revelation from the Qur'ānic verses is a chapter which mentioned the attribute of paradise and hell. When people turn to Islām, the lawful and prohibited was revealed. If the first revelation appears with the word, *"do not drink wine, refrain from the adultery"*. People could have said: *"We will never refrain from wine and adultery"* (reported by al-Bukhārī. See *Tārīkh al-Tashrīʿ al-Islāmī* by al-Sāyis, al-Subkī, and al-Bazdawī, p. 39).[454]

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[453] Some of these dispositions which were innovated within our communities in Syria from the command of the rulers, the current dealing among people on the leasing of real estate upheld dealing using the western calendar since this rule is the period of French occupancy which requires an annual lease for the leaseholder in 365 days, whereas the tradition of people before that was calculated according to the year of the Hijrah.

[454] See *Risālat al-'Urf wal-'Ādah fī Ra'y al-Faqahā'* by Aḥmad Fahmī Abū Sinnah, Professor of Sharīʿah at al-AzharUniversity, pp. 13-17. Indeed, it is a noticeable article which the author attained behind it with the grade of a professor at the Faculty of *Sharīʿah*. It is also currently published during this third edition of our book which we had extracted several chapters from it in the discussion of the originality of traditions and the customs.

67/7 It is clear from this introduction, that these traditions and customs comprises good and bad, because neither what people accustom to are generated from sincere need and wise interest which the prevalent *ʿurf* makes them easier.

However, people might be accustomed to some traditions, which are observed due to ignorance and deviation passed down from their ancestors, which makes the society miserable, while it will not provide any interest. An example is the enslavement of the poor in the Roman's tradition, as well in the pre-Islamic states of the Arabs, burying alive the newborn girl, the ethnic crises, and the abandoned property[455] in the pre-Islamic times. In addition to these examples, burying alive the wife, when her husband passed away, attributed to the Indians idolater, also burying the properties with their dead owners, traced back to the Egypt ancients, taking the dowry of brides by their guardians, when they marry them in the tradition of nomads from the Syrian Arabs and other countries, until today.

Hence, all these and similar practices are bad traditions and customs, which should be eradicated through enlightenment, legislation, and administration which are endorsed and approved by the Islamic rulers.

THEME TWO: THE DEFINITION OF *AL-ʿĀDAH*

67/8 *ʿĀdah* from the lexical perspective is derived from the *al-ʿawd* or *al-muʿāwadah*, which means repetition. Indeed, it is the name used for repeating action and performance, until it becomes easy to perform and follow. It is said that *ʿādah* is the second nature (*Mufradāt al-Qur'ān* by al-Rāghib al-Iṣfahānī).

The specialists in the principles of jurisprudence had also defined *ʿādah* as "the repeated matter which does not have any rational connection".

Therefore, if the repetition originates from rational connection, it is definitely the repetition which the intellectual can comprehend. It is not any type of traditions, and it is clearly a kind of the intellectual correlation. It is simply like the repetition of effect whenever the cause is confirmed, because the cause is a reason which its effect can never disputed, i.e. the movement of the ring through the movement of finger, and changing the place of something through moving it.

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455 We had previously discussed the meaning of *al-Sā'ibah* in the the discussion on *Khaṣā'iṣ al-Milkiyyah* (see para 25/6).

Indeed, all these illustrations can never be named as tradition, even though it repeats, because its repetition happens from the relation and connection in the nature between the cause and its effect, which the intellect can easily decipher, however. It does not occur through any disposition, or affection, or any external element (see *al-Taghyīr wal-Taḥbīr Ibn Amīr al-Ḥāj Sharḥ al-Taḥrīr* by Ibn al-Hammām, 2/769).

67/9 It is clear from this definition that the *ʿādah* according to its lexical meaning has a comprehensive conotation, which is boundless, because from the definition, it is said: "the repeated matter" which comprises all occurrences that repeat, in the sense that the word "the matter" is like the word "thing" which is one of the extensive words, in terms of its generality and comprehensiveness:

1. Thus, *ʿādah* can be used on something that an individual from a community has adapted in his special affairs, like his habit when he sleeps, eats, type of the food, his speech, and many of his dispositions. Thus, this would be ascribed as a special habit.

2. It can also be used on the other hand for something which the communities and societies had agreed on, whose argues starts from the mind or thought trends, either good or bad. Subsequently, this type is described as succession of tradition as will be explained later.[456]

3. This *ʿādah* can also be used as a general word for every repeated condition initially, either:

    a. from natural causes, like rapid maturity of people, rapid ripeness of fruits in hot regions, gradual ripeness in cold regions, heavy rains in some regions during summer; while in another place, it rains heavily during winter, due to the geographical position and natural factor; or

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[456] The jurists mention from some sources; that *ʿādah* can be confirmed when the action repeatedly occurs twice or thrice, because its word is taken from the word *al-ʿawdah* (recurrence) and *al-muʿāwadah* (going back). See, *al-Asbāh wal-Naẓā'ir* by Ibn Nujaym, the first session under the sixth principle, 1/128.

It is obvious that they refer to the individual habit whereas the comunal tradition means the prevalent general *'urf*. Definitely, this definition is not applicable to that, because the tradition cannot spread and circulate within the communities, unless it has been repeated among the peoples of these entire communities countless times.

b. it started from tendencies, passions, and bad characters, like failing to perform good deeds, practicing evil and harm, spreading of falsehood and adopting usury, transgression and oppression, which jurists later on named it as the period of corruption; or
c. it is generated from special incidents, like the spread of dialects, which is found from intermingling of Arabs with non-Arabs.

All these, can be considered in the view of jurists as part of traditions. Indeed, the *mujtahid* have observed these types of tradition, in their legal opinions and their judgments and they provided some suitable rules for them.[457]

THEME THREE: THE DEFINITION OF *'URF*

67/10 We mentioned when we discussed the sources of Islamic jurisprudence, the definition of *'urf* by the great jurists as "a particular tradition of majority of people either the sayings or actions".

As a matter of fact, we arrive at this definition and condition which are mentioned by the jurists. We explored it to disclose the reality of *'urf* according to the jurists' view, with a clear illustration, and definite description, because we found many of these definitions in obscured and confused forms, in relation to the simple educational approach in which we observe its principles and we ensure its availability.[458]

67/11 Analysis on this definition

1. This definition suggests that *'urf* is part of tradition, which can be really determined from the previous mentioned definition. Obviously, *ʿādah* is a general sort which comprises several kinds, like *'urf*, as we shall establish in the discussion about the relationship between the *'urf* and *ʿādah*.

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457 See *Risālah al-'Urf wal-'Ādah fi Ra'yi al-Fuqahā'* by Aḥmad Fahmī Abū Sinnah, p. 10.

458 One of those illustrious definitions is the definition cited by Imām al-Ghazālī in his *al-Mustasfā* that *'urf* is something well established through the minds and sound nature with acceptance. This definition, as you can see, requires a long explanation for student to comprehend.

2. It can be understood from this definition that *'urf* requires a significant quorum of people, which implies that the subject matter of *'urf* should be adopted by the majority of people in its existing place. This was derived from the word "majority".

   If the customary matter is not widespread among majority of people, it would not form the described *'urf*, while it might form the special habit or the common habit (which it is the tradition that the average of people who observe it and otherwise are the same). It might lighly named as the common tradition, which as a matter of fact, does not reach the level of *'urf*. Therefore, this common tradition should not be included when *'urf* is mentioned, and it will not acquire its rule.

3. This definition also introduces some types of *'urf*; it indicates the division of *'urf* from one aspect, the verbal *'urf* and practical *'urf*. Absolutely, this division is derived from the saying: "It is either saying or action". It indicates the division of *'urf* from another aspect to general *'urf* and special *'urf*. This second division is derived from the indefinite form of the word "people". It really comprises the people of specific regions, or people with specific occupation. Thus, their *'urf* will be specific to them, as well; it comprises people in general in every region whereby it is then general *'urf*. The explanation will be discussed in the section relating to the division of *'urf*.

4. This definition finally implies that *ʿādah* cannot be called *'urf*, unless in matters which are revealed from speculation and the selection. For instance, to measure the quantities of some goods with the weight, and in auother goods with the volume, in another goods with quantity and so forth. Similarly, in marriage that bride will buy with her dowry clothes which comprise some basic attire and ornaments, which she will take along to her husband's home. In addition, the bride would not be hastened to the husband, unless he pays the initial dowry, either in full or part payment. Similarly, the same goes for some types of transaction, like the contract on manufacture (*al-istiṣnāʿ*).

Hence, this will then rule out from the concept of *'urf*, any prevalent thing which originates from natural factors, not from speculation and selection, like rapid maturity of people in some hot regions, and its gradualism in the cold places. This illustration, even

though common and prevalent in some communities, should not be named as *'urf* whereas it can still be named as *ʿādah*, as wa saw in the definition of *ʿādah*.

In short, we can also statement: "It is either saying or action", because the tradition of a group of people, either it is sayings or actions, should not take place unless through thinking or selection.[459] Otherwise, it will be an ordinary natnral habit, not even a saying or action.

THEME FOUR: THE RELATIONSHIP BETWEEN *ʿĀDAH* AND *'URF*

67/2 It is distinct from all that have been mentioned so far, that *ʿādah* is more general than the *'urf*, because it comprises *ʿādah* which originates from natural factors, and the special habit, and the general *ʿādah* which it is described as *'urf*.

Hence, the relationship between *ʿādah* and the *'urf* is simply the absolute generality and limitation,[460] because the *ʿādah* is general, while the *'urf* is more limits, in the reason that the *'urf* stands as limited *ʿādah*. Therefore, all *'urf* is *ʿādah*, while all *ʿādah* cannot stand as *'urf* since *ʿādah* might be special or common.

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[459] This was derived through the stand of the jurists in the definition of *'urf*: "It is something which is well established through the mind" as we had reported beforehand in the footnote of *al-Mustaṣfā* by al-Ghazālī (see 67/10).

[460] The generality and the limitation in term of logic have two types: absolute and similar. Thus, the absolute type of generality and limitation, can be noticed when one of the two things is often more general than other one, while the other one will always limited as it is shown over here, although, this had been explained in the first theory of transactions.

However, the similar can be identified when each of the two is more general than other, in one side and limited than othe.r At another side, the relationship between the two concepts 'white' and 'wear'; the white is more general at one side because of having it on the wear and other thing, whereas the wear is more general at another side because of having it in white and other color.

SECTION 68

DIVISION OF *'URF*

68/1 *ʿUrf* can either relate to the usage of certain words referring to the meaning which are commonly used by people or relate to norms in certain kinds of occupations or transactions.

Hence, with regards to its subject and its application, *ʿurf* is divided into two types: verbal *ʿurf* and practical *ʿurf*.

From a different angle, with regard to the subject, *'urf* can be so generally wide-spread among the people of all regions or it may be limited only to a certain places, not others, or it may be specific to a certain group of people or employers or industries or sciences, but not among other than them. Thus, *ʿurf*, be it verbal or practical, is divided again into two, that is based on its generality and specificity: the general *'urf* or the specific *ʿurf*.

Herein is the explanation on these types and their examples.

First: The Verbal and the Practical *'Urf*

68/2 (a) The Verbal *'Urf*

The verbal *ʿurf* is the widespread usage among people in the use of certain words or phrases to denote a specific meaning, that whenever the word or phrase is mentioned bereft of any context or logical relations, those specific meanings or concepts are comprehended by them straight away.

For instance, the use of the word *al-darāhim* stands for circulating currencies *(al-nuqūd)* in certain regions, whichever its type and rate, including fiat money today, whereas the dirham was originally the silver currency minted with specific weight and value.

Similarly, the use of the word, *al-bayt,* in some regions means a room *(al-ghurfah),* while in other places, it means a house *(al-dār)* in general.

This kind of *ʿurf*, in fact, is among the category of the specific language used among certain people. Therefore if the comprehension of the intended meaning is dependant upon a context or a logical relation, then, it would not be an *ʿurf*, but it is included in the category of metaphors.

Example of context: If someone swears that he would kill someone, it is understood in the context that by killing, he means to hit grievously.

Similarly, if a person says to another: 'I grant you this thing for ten Dīnārs', certainly the context of exchange indicates that by 'granting' he means to sell to him, but metaphorically.

Example of logical relation: When we usually say, 'the court made judgement on someone,' it means that the judge has pronounced the judgement, because the court is where it is pronounced. This ascription is considered as permissible and it is acceptable when mentally related or linked between the situation and the place, thereby the action is considered to have occurred at the place, that is disregarding conveniently about the person who were there at the place, as is the case when you say: 'The Emir made treaty with x country or is in war with them', whereby you mean, 'the people or residents of the country'.

These kinds of technical modes of expression are metaphorical in nature, for they are based on the context or relation. They have nothing to do with that verbal *'urf* which is considered as a specific situational language where the meaning of words is exactly what it meant to be practiced.

68/3 (b) The Practiced *'Urf*

The practiced *'urf* is the customary practices of people or their civil transactions.

Customary practices *(al-af'āl al-'ādiyah)* means people's personal every-day activities, which do not involve the exchange of welfare and rights, such as eating, drinking, clothing, transporting, cultivation, agriculture, e.t.c.

Civil transactions *(al-mu'āmalāt al-madanīyah)* means 'those dealings aimed at establishing the rights of people, as well as their settlement and disclaiming, whether these are related to contracts or something else, as in the case of marriage, sale, and acquittal or in usurpation, appropriation and execution (See the notes on 48/1 and 59/13).

Some examples of *'urf* in practices are the customary practices of people having holidays on certain days of every week, the custom of people eating certain kinds of meats like sheep, goat, cows or wearing certain kinds of cloths, instruments and so forth. Examples of dealings are:

1. People's habit when selling heavy things such as word, coal and wheat that the seller has to deliver it to the house of the buyer.
2. Their habit of allotment of annual leasing of real estate into fixed installments
3. Their common practice in marriages where two or three parts of dowry for the women are paid earlier and the rest is delayed till death or divorce.
4. The dealing among them being done in only certain kinds of currency, not others
5. Their habit in certain occupations and industries that the manufacturer would get the fees from the employer or in certain others the employer getting fees from the manufacturer; as in the case of tailoring where the tailor is trained in tailoring, not just benefiting from his service, and as in numerous other habits related to various areas of transactions and the subsequent obligations.

Second: The General *'Urf* and the Specific *'Urf*

68/4 (a) The General *'Urf (al-'Urf al-'Ām)*

The general *'urf* is the wide-spread practice of any matter among all the people in every country, as in the case of production of most of the goods and basic necessities, such as shoes, cloths, instruments and others. People need them from the very past; no places are bereft of them and all the necessities, including needs for laboratories, steamships and buildings.

A widespread example is deferment of a portion of women's douwry as found in Islamic countries. It is customary to divide the dowry to one payable initially and the deferred payment whose proportion varies will be varying from country to country. At times, this proportion is fixed when an amount paid earlier is known between the two parties, the deferred one can be known accordingly, as it can be observed in the northern regions today. Thus, it is customary among us to derive that the deferred dowry will be half of what is paid earlier, unless otherwise is mentioned in the contract.

68/5 (b) The Specific *'Urf (al-'Urf al-Khāṣṣ)*

The specific *'urf* is exclusive to a certain country or place or among a group of people, and not found among others.

This specific *'urf* is of many kinds which emerges from time to time and in many forms. That is because the welfare of people and the means to easily achieve their needs and relationships are also evolving.

This can be noticed from the *'urf* of the traders in relation to any defect which should affect the price on that sold material, or it is not counted as defect. In some places, the *'urf* of the price of some wholesale goods should be paid in installment i.e. *'urf* that the large denomination replaces the small denomination in a transaction unless specifically attributed to.

It can also be observed in the *'urf* of contemporary lawyers, whereby, the part of money from charged fees for instance, part of the fees which is collected for lawsuits, represents the initial sum, and it is conditioned with the success of that lawsnit, and the conclusion of the judgment, and it issuance of the documentation of judgment, which is executable.

SECTION 69

THE AUTHORITY OF *'URF*

69/1 Verily, *'urf* in the view of the *Sharīʿah* stands is a source which has extensive application to many rules of disposition among the people in different aspects of jurisprudence and its chapters. It has far – reaching authority in begetting the rules and bringing it up to date, such as in modification, and pinpointing the rules, as well, in generalizing the rules and its limitation.

It is the evolving and progressive needs that generate *'urf*, which in turn becomes the decisive system on which the transactions among the people surronnd and depend upon; which reveals the meaning and goal of their speeches, pinpoints the horders of rights and duties and sheds light on the goals of judgment.

Thus, giving the *'urf* its due consideration greatly facilitates the dispensation of having extensive texts on all legalized rules and on transactional contracts; that is by depending upon what is well-known and habitual with regards to various possible events

69/2 *'Urf* would not suffice all texts on legal rules and stipulations, for it is not possible to include all the details and possibilities. However, although many of the detail commands are built upon *'urf*, the rulings on them change in accordance to the change in *'urf*, thereby, it is not possible to arrange for a constant rule based on *'urf*.

It is rare to find any chapter on Islamic jurisprudence where *'urf* is not linked to legal rulings, even in chapters on crimes and punishments.

In the case of criminal assault, the dignity, for instance, insulting and humiliating would be considered as offensive that the offender would be susceptible to the punishment of reprimand, if the insult and humiliation are as per the *'urf* among people.

The punishment of reprimand in itself is legalized only to the extent that it would suffice for prevention, according to the view of the sane person and to the *'urf* among them which is duly calculated to the degree of the offense; that is it should not exceed more than what the crime requires such that it is agressive and offensive, or should not be lower that it neglects the rights of the people thereby rendering ineffective the intimidating deterrent.

We will discuss as follow the jurisprudential theory in the authority of *'urf*, and its rule in different types of *'urf*, which have previously been mentioned, as follows:

First: The Verbal Authority of *'Urf*

69/3 The jurisprudential view on the ruling on verbal *'urf* and the extent of its authority is that: the words of every speaker should be understood based on his language and his *'urf*, which will be reverted to the intended meaning as per the *'urf* of speaking, even if the customary meaning was different from the original meaning of the word, as it was meant linguistically. That is, the emerging *'urf* has changed those words to denote other meanings, that in contrast to the linguistic reality these other meanings have become the customary reality as understood by the word.

If the word of a speaker is interpreted based on its linguistic meaning without considering the customary meaning, which its meaning can be understood due to the *'urf* of the speaker, it will definitely impose on the speaker in his transactions, his confessions, his swearing, his divorce, and the rest of his transactions, what he did not intend such as that people might not understand what he says.

Based on this, the jurists establish the principle which states: "the actual can be abandoned due to the indication of *'urf*" (Article 40), therefore, they set up the general principle which states:

"The word of the swearer, the oath taken, the testator, the endowment creator, as well all the contracting party, should be interpreted based on his language or his *'urf*, even if it contradicts with the language of the Arabs and the language of the legislator" (see *Majmū'ah Rasā'il Ibn 'Ābidīn*, 2/133, reported from *Fatāwā al-'Allāmah Qāsim)*.

In the original language the word may mean divorce, whereas in *'urf*, it may be used for reprimanding where no divorce is indicated, or *vice versa*.

The original meaning of the word in the language used might be an obligatory agreement, which may be a non-obligatory promise in the customary use. It might mean to sell and exchange, while it may become *hibah* which is customary use, and so forth. Thus, the crucial factor to measure this matter is from the customary meaning of the statement, in order to fix the rules and the duties for that purpose.

69/4 Based on this, the jurists determined many rules from it

1. If a person swears "that he would not put his foot in a person's house" definitely, the oath will be interpreted according to the customary meaning, not based on superficial meaning of the word, which is the basic literal meaning. For instance, if he enters that house by riding, whereby his foot does not touch its floor, definitely, he has legally violated his oath, and expiation is then necessary. If he extends his foot from the outer part of the house, then he places it inside without getting into the house, definitely he has not violated the oath (see *Radd al-Muhtar*, 3/84).

2. If the donor of *waqf* stipulates to appointing 'a supervisor' for his endowment *(waqf)* in the document of endowment, and it happens that during his time the supervisor in the customarily use means a person who takes care of levies, construction and expenditure of the endowment, definitely it should mean such a supervisor as to the *'urf* of those early days. However, if by 'supervisor' he means the inspector, it should be applied in that respect, as it is the *'urf* nowadays.

   Similarly, if he had endowed some amount for his descendants, and he stipulates the disburse of its revenue among them according to 'the *Sharīʿah* regulation' *(al-farīḍah al-sharʿīyah)*, then, the outweighing opinion of our jurists is that a male should be given what is equal to that of two females, because this is the customary meaning for the phrase 'the *Sharīʿah* regulation', and that is how the intention of the creator of the endowment should be interpreted, for it indicates the well-known precedence between the male and female in the inheritance. Thus, this expression would be interpreted based on its customary meaning, even though the legally preferred view is to observe the equality between the male and female children in gifts, because what is taken into account here is the intention of creator of the endowment to distribute the revenue of his endowment. Verily, his saying should be treated according to the language and customary use which interprets his respected purpose, but not based on the preferable route if it is contrary to his intention.

   The rule of bequest should also be treated in the same manner with the rule of endowment (see *Rasā'il Ibn 'Ābidīn*, 2/145).

If the creator of the endowment stipulates the provision of a certain number of *dīnārs* or *dirham* monthly or annually, while the Dīnār or dirham as per the *'urf* of his time were of specific weight, and afterwards there was change in the weight, the measure that was used during his time is taken into account.

3. Sale of the fruits on the tree materialises by using the words *taḍmīn* and *ḍamān* in the northern regions of our lands, because it is the used word in these lands today by the owners of fruit gardens (*basātīn*) and the vineyards (*kurūm*).

   Hence, the seller will say: *ḍamintuka* (I guarantee you) where upon the buyer would say *ḍamintu* (I took the guarantee), while these two words as per the language of *Sharīʿah* mean to impose and discharge the price of ruined properties and so on.

   Similarly, the sale materilises if one of the two partners sells his portion in a shared riding animal to the other partner using the word *muqāṣarah* (to confine), due to their customary use of this word in this type of sale. The seller would say: *qāṣartuka 'alā ḥiṣṣatī bi-kadhā* (I confined to you my portion for such and such), and the buyer accepted it (See *Radd al-Muḥtār, Kitāb al-Buyūʿ*, 4/9).

4. It is permissible for the seller to stipulate in the sale contract that he is not liable for defects, whereupon, the buyer is not entailed to send back the goods that has obvious defects.

   Accordingly, if someone sells something today and he expresses this defect liability disclaimer, with some customary expressions, such as like when he sells something he says: *ḥāḍir ḥalāl* (current as permissible) or *kūm turāb* (heap of mud) or *ḥarāq 'alā al-zinād* (burn on the firelock) or any other similar expressions which are prevalent within the populace today in such contexts, then the buyer would definitely not have any opportunity to return the sold item for obvious or hidden defect, because by these expressions, it is accustomary for people to stipulate the disclaimer of guarantee of any defect (see, *al-Majallah* 343 and its commentary written by al-Atāsī; see also *Radd al-Muḥtār*, 95/4).

5. If the people have customary adhere to divorce with several words or new expressions which are commonly used within their entire community, definitely, the divorce is executable with that

word, even if the original language does not mean it, as in the word: "The divorce is necessary on me" which most men use nowadays, when they aim to divorce, in of spite the fact that the divorce is an attribute that is legally applied to women, not to the man.[461]

69/5 It is obvious from the above explanation that generally the verbal *'urf* creates a new terminology, which will have to be considered when referring to what people say and while determining the implication of their verbal demeanor in the form of rights and duties according to the customary meanings.

The dialect of any place are of this category, whereby the conversation of people should be interpreted according what is well-known among them, and this will be different from one country to another, and thus every place will have its own specific *'urf* for communication.

Moreover, whatever modes of expressions related to deals, links, sealing of contracts, seeking approval, offering permission and so on which are common among the populace should be observed even though they contradict with grammatical rules of literal language (*Rasā'il Ibn 'Ābidīn*, 2/137-138).

Second: The Authority of the Practical *'urf*

69/9 Indeed, the observation in the writings of jurists show that the practical *'urf* in the field of normal act and civil transaction has the absolute authority and the complete dominance in determining some rules, limiting effects of transactions, and justifying the obligations according to the customary habits, in all aspects where the *'urf* does not contradict with legal text.[462]

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461 Even though, if a man says to his wife: "I am divorced from you", the divorce does not materialise even if he intends it, because the man is not the one who is divorced, but the one who divorces. However, the divorce with the word "the divorce is necessary on me" is accepted because this word has become the *'urf* and use of people, similar to his statement to his wife: "you are divorced" or, he says "I divorced my wife". See *Radd al-Muḥtār*, 2/433, 446; and *Bahjat al-Mushtāq li-Aḥkām al-Ṭalāq*, pp. 16-17.

462 Thus, if *'urf* contradicts with a legal text or with the analogical reasoning, the jurists have a stand in accoradance to the authority of *'urf*, whether the detailed view in considering it or not, we shall discuss that soon.

Therefore, *'urf* can be considered a source and origin for the rules, and the *Sharīʿah* evidence on these rules, if there is no other evidence from the legal texts.

Indeed, Imām al-Sarakhsī in his *al-Mabsūṭ* asserted that anything established by *'urf* is similar to what is established by the legal texts.

Al-Bīrī in his commentary of *al-Ashbāh wa-al-Naẓā'ir* by Ibn Nujaym said, as it is reported from the legislator: "Whatever is established by *'urf* is similar to what established by the *Sharīʿah* proof" (see *Rasā'il Ibn ʿĀbidīn*, 2/115).

Article 45 of the *Majallah* allnses to this point by stating: "What is specified through *'urf* like what is specified by the legal text" (see para 68/3).

Thus, we mentioned that the practical *'urf* comprises two types: the *'urf* of normal practices of life and the *'urf* of civil transactions (see para 68/3).

What follows is a set of rules that Islamic jurisprudence has derived taking the practical *'urf* (including its two types) into account. This in turn brings to light the authority apportioned by our jurists to *'urf* while justifying the rulings, and imposing obligations, and that too within the bound of the *Sharīʿah*.

A. The *'Urf* of Normal Deed

69/7 Indeed, the normal deed – even it is a personal activity, and it is not part of transactions and civil right relationship – when people adopt it, and their living styles run in its accordance, it will then obtain the authority and dominance in directing the rules of civil transactions, which relate to these actions to point where it will be in line with customary purposes.

Some of the examples on the authority of normal deeds, and its impact on the rules of performances and contracts in Islamic jurisprudence are in the following matters:

1. If the habit of certain people is to eat mutton, one of these groups swears: "that he would not eat a meat" definitely, his oath will be restricted to only the kind of meat which is common among their community. Therefore, if he eats beaf or camel meat or fish, he does not violate his oath, thus, he will not be asked to expiate his violation, even though all those are also called meat in the language of the oath taker.

If he swears "he will not ride" or "he will not ride any animal", definitely he has not violated his oath by riding any animal, as well by just riding on a human being, even though, the human being is considered a type of animal. It will only been violated, if he rides what is commonly rode on from the riding animals (see *Radd al-Muhtār*, on *al-Aymān*, 3/90 -91).

It means that if the swearer comes from the city nowadays, he has not violated by riding the camel in the city, he would have violated if he rode it when he was travelling, as the Indian would if he rode an elephant unlike the Arab.

The juristic reason in this case and its similarities, is the practical *'urf*, which limits the infinity of the word, and it interprets the oath to the common habit like the verbal *'urf*, based on the legal maxim, "customary practice" (Article 36), which means, it has the respective authority, according to the legislator's view, which controls the rules on performances. Thus, He establishes those rules according to what the tradition and *'urf* determines (see *Radd al-Muhtar*, 3/86, 90-91).

2. If a person instructs an agent to buy on his behalf i.e. meat or bread, or cloth, certainly, the authorization will be restricted to the kind of meat or bread which are commonly eaten, and the cloth which is commonly worn. However, if the agent buys for him another type which is not commonly consumed, the contract will not be forced on the principal, while the agent will then bear the responsibility (see *Rasā'il Ibn 'Ābidīn*, 2/115).

3. The maintenance of the bride is obligatory on her husband in the legal opinion of Ḥanafis according to the amount, which is commonly adopted within their community, and according to their levels in wealth and poverty. If they are both average, definitely, the maintenance will be average, but if they are both wealthy, then, the maintenance will be based on wither rich or low (see *al-Aḥkām al-Sharʿiyyah fī al-Aḥwāl al-Shakhṣiyyah* by Qadrī Bāshā al-Miṣrī, Articles 173, 181, 184).

   We can observe that the *'urf* of people in the living standard and its level has formed a *Sharīʿah* regulations in order to apply the expenditure which the legislator had imposed on the husband.

4. If he hires a riding animal for the carriage, certainly, he is allowed to load it the common type and the weight, which will not harm the animal. However, he should never load it with heavier than its common ability such as it is not permissible to load it with heavy goods like metals and rocks, unless the owner permits whereupon, he should also limit the weight according to its common ability; otherwise, he must guarantee the animal if it suffers, because he will then be considered as an aggressor (see *al-Majallah* 555 and its commentaries, and *Radd al-Muḥtār* on *al-Ijārah*, 5/22).

5. One of the requirements in the leasing of real estate is to specify the type of intended usufruct in a way which is possible to prevent the conflict.

   Despite this, it is permissible to hire the home and the store without enquiring the objective behind it. It will then resort to judging according to *'urf* and the tradition in the way to control it, as it is possible to constrain the riding animals inside it. However, it should not be occupied with what might weaken and ruin the building, like the smithery and the bleacher and so forth, because the prevalent *'urf* is to forbid it, unless the owner permits (see *al-Majallah*, 527and 528).

   If the use of *'urf* is not specified, it must be explained in the contract, similar to the leasing of land for planting. Indeed, the conditions on what can be planted on the land must be explained or the mandate for the lessee to plant anything he prefers on it. This is because some types of crops nurture the land while others harm it (*al-Majallah*, 524).

   Despite this, jnrists judged the usage of the *'urf*, because people plant in the land different things which are suitable to it. Meanwhile, the willingness of lessees and the fees fluctuate according to the types of crops planed according to the level of the land's capacity to harbor the crops.

6. The branches of jurisprudence relating to the rules of neighbours indicates that it is not permissible for anyone who has the right in any facility goes to violation in claiming his right to the extent that it harms others, if he does that he will be held responsible for the harm caused.

   The criteria for the violation and otherwise is determined by *'urf* and tradition.

For example, if a landowner or the lessee sets the land ablaze and as a result, it burns a property belonging to his neighbor in threshing floor or else; if he burns it in the usual traditional way, he will not be held responsible, but if he exceeds the usual way or he sets the fire while the wind is blowing, he will certainly be held responsible for any damage caused (see *al-Durar Sharḥ al-Ghurar* on *al-Ijārah*, 2/240).[463]

7. The borrower has no right to go beyond what is known traditionally in the utilization of the borrowed property. If he does, he will be responsible for it if it is destroyed or damaged, despite the fact that the borrowed property in the beginning is considered a trust in his hand which he is not responsible for if it is damaged. However, (he is held responsible) because he has gone beyond the tradition in utilizing it and thus became a transgressor.

8. The implication of the trust contract is that the trustee should preserve the trust himself in a safe place and should not deposit it with another person, because the basis of the deposit is with the trustee himself.

   However, the jurists have permitted the trustee on an exceptional basis to keep the trust with any of his family, e.g. wife, grown child, or a non daily working employee. This is because they are indispensable to the trust, and thus the trustee will not be negligent in safekeeping according to custom. On this basis, the trustee will not responsible for the trust if it is damaged or stolen from them, but on the condition that he should not keep it except with whom he usually and customarily keeps. Therefore, he may keep, for instance, a horse given as a trust with its hostler or its attendant. Similarly, he may keep gold necklace with his wife. If he keeps precious necklace with his servant he will be regarded as being excessive and negligent customarily and will be responsible for it if it last or damaged (see *al-Majallah*, 780-782 and its commentaries).

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[463] This is in agreement with the thinking of today's law in the modern theory of right which is known as the theory of abuse in the utilization of right: *abuse de droit* and the *Sharīʿah* has preceded the modern law in the formulation of this theory in different branches of *Sharīʿah* rules which is known by the experts.

69/8 These are some of the examples in many different judgments with which the *fiqh* chapters in every section are in abundance. It is known as habitual activities such as drinking, eating, clothing, riding, preservation and utilization, etc. quantitatively and qualitatively, like an authority which restricts contracts, and defines the limits of obligations, and initiates responsibilities in the civil relations

B. *'Urf* of Civil Transactions

69/9 When the *'urf* of the people concentrates on the distribution of rights and obligations between two parties in some civil transactions without conflicting with an imperative legal text, it will be natural or rather self-evident to respect the authority of this *'urf* in the affirmation and denied of rights, because it will then be at the level of an initiative expression of the right, and the unequivocal permissible conditions due to the fact that the two contracting parties will forego declaring the familiar details by relying on the *'urf*.

There are also some legal texts from the Prophetic traditions in some parts of *fiqh* which are justified by *'urf* as we will observe in the following third branch.

On this basis is the previously explained principle: "*'Urf*-based specification is tantamount to textual-based specification". The other principle states that: "The well-known *'urf* is tantamount to the stipulated condition" as the jurist affirmed most of the judgment based on the *'urf* and dealings, and they have also referred to the *'urf* of transactions in most of the detailed particularly rights are subjected to the judgment of *'urf*.

69/10 Some of the examples are as follows:

1. The jurist resolved that a friend is permitted to eat anything he found in his friend's house in the latter's absence to use any drinking appliances or otherwise without the permission of the owner of the house. This is because it is permissible for him according to customary practice. If a vessel broke while he was using it as usual, or it is plagued by act of God, he will not be legally responsible for it as in the case of a usurper, because he is not regarded as transgressor.

   The jurist also said that it is permissible to eat the fruits that fell under the tree in the fruit gardens without the permission of the owner if the fruit is among the types which are likely to spoil

if they remain for a long time. This is because the *'urf* has made it permissible. Therefore, he will not be held liable for what is being eaten except if the owner has warned him against eating from it, or if the owner was there gathering the fruits, in this case, he should seek his permission.

Again, the *'urf* has made the money or property permissible here and is considered contradictory to liability.

2. It is soundly narrated in the Prophetic tradition about a maiden who has reached puberty. If her guardian seeks her permission in a marriage contract, the Prophet (s.a.w.) said: *"Her permission is her silence"*[464] that is her being silent without declining or is considered as both permission and authorization from her. Marrying her off will thus be regarded as being based on her silenced.

   It has been analyzed with reference to the *'urf*, since maiden shyness usually prevents them from revealing their desire in this situation, whereas they are not shy in their refusal as has been previously explained on the study of analogy (see para 3/7 (7)).

   The topic of *'urf* here is not a vigorous and common issue, but rather a civil affair which is the permission for marrying. The legal text has affirmed the delegating contract by silence based on this civil *'urf*.

3. Similarly, the handling contract (where non of the contracting parties utters a word) in which the jurists resolved that the contracts of exchange of counter values should be by collection and payment without uttering the offer and acceptance statement; just as if someone who wants to buy an item asks the seller the item's price and the latter explains, or the buyer saw the price written on the item and then pays to the seller, taking the goods and went away, while they were both silent, the sale in this case is legally concluded between them. The reference of the jurists in this is the general *'urf* which considers the taking possession (of goods) after having known the price as having a similar strength with the statement of offer and acceptance in the people's practice.

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464 The Ḥadīth, *"the maiden, her permission lies in her silence"* was narrated by al-Bukhārī (al-Fatih 9/191) in another narration: *"Her silence represents her permission"* and in his other expression: *"He says: her permission lies in her silence"*.

4. The subordinate obligations arising from the contract of exchange such as the fees of the broker and the writing of cheque, the fees for taking out the sold good from its storehouse, the fee of its measure or its weight for its delivery, the charge of weighing the price or transporting it if it is a type which needs a charge, and the wage of reaping the sold fruit from its tree, etc... in all these if the two contracting parties did not utter anything with which each of them should commit himself, the jurists have initially considered the tradition or *'urf* in it where each should be bound by what is known customarily.

   However, if it is not known traditionally they come up with a principle which stands on the basis that the buyer should bear any incidental costs relating to the payment and the seller bears any incidental costs of delivery of the goods which have been detailed out (see *al-Majallah* 288-292).

   They have considered the *'urf* in the distribution of these obligations on both the contracting parties in addition to jurisprudential principle in its distribution.

   An example of this is the well-known tradition of delivering the goods to the house of the buyer at the expense of the seller. In this case, the transport charge is binding on the seller with reference to the practice; otherwise, the basis is that the transport charge is to be borne by the buyer.

5. In the section of the inclusiveness of the sale, the jurists have determined that among the principles is that whichever thing that the *'urf* sees as being subordinate to the sale, it will be included in the sale without a need to mention it, and the buyer deserves it without an extra charge.

   For example, in the selling of camel its bridle will be included, and in the selling of a horse its halter will also be included, because people have known this as being part of animals that require a halter. On the other hand, the bridle of a donkey and a sheep is not included in the sale unless it is mentioned in the contract, because it is not known customarily. However, the collar of a donkey will be included (see *al-Majallah wa-Mir'atuhā* and the commentary of al-Bāz and ʿAlī Ḥaydar, article 232).

   In the selling of a house the key should be included, and in the selling of a bicycle its air pump and the main keys to untie its parts are included. Also, a bag containing its tools which is known

customarily is included, except its lamp unless it is mentioned (in the contract), because it is not in the *'urf*. Also, in the sale of a car today, *'urf* determines what should or should not follow it without mentioning it.[465]

6. Part of the condition which legally validates the sale is to know the cost, which means that to specify its type and amount in the contract or to specify by its essence as if it is present where it can be pointed to.

   However, the jurists have stated that if a sale is concluded for an amount of *dīnārs* or *dirham* for instance, and the contracting party did not specify its type, and there are different types with different values and circulation in the country. The contract will be according to the most circulated type, i.e. commonly use among the people in the country of the contract, and the contracting parties will be bound by it. Therefore, if the types are equal in currency with difference in the value, whereupon the sale will be invalid and revocable (*al-Majallah*, 240 and its commentaries), because it leads to a major dispute, for the seller will demand a high price, and the seller will stick to the lower price, and there is no *'urf* to which one can refer, because they are equal in the circulation.

7. The mode of paying the fee of the hiring will follow the condition of the contracting parties, but if there is no condition the mode of payment will follow the custom whether before or after the work is done or in installments.

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[465] On the easement rights of real estate such as drinking, the passageway and the ravine, the jurists are of the opinion that they are not included in the sale of a house and other, unless if it is mentioned in the contract, or it is mentioned that the house is sold with its rights and its convenience in totality, and some other general terms which are addressed (see *al-Majallah* 235 and its commentaries, and *al-Durar* 2/149).

However, Ibn 'Ābidīn issued a *fatwā* that the right of drinking is included in canals and rivers in the lands of Sham, even if its inclusion was not mentioned. This is because *'urf* of the country supports that (see *Majmūʿah Rasā'il Ibn ʿĀbidīn* 2/136).

I say: This is applicable to Damascus city today concerning its real estates such as *fijeh* water which is bought and piped, because the *'urf* determines it as inclusive without mentioning it. However, in the arable lands with rights of drinking from particular rivers, the right to drink will not be included in the sale of the land unless its rights and utilities are mentioned because they knew that the water in the lands is separated from the land whether it is bought or sold.

However, if there is no known custom, the mode of paying the fee will be according to the rental of the real estate, or individuals, or things and animals. There is a juristic detail in the Book of Lease and in Articles 466-483 in the *al-Majallah*. The study of this should refer to the tradition and will take precedence juristically in the absence of a contractual condition.

8. If a father provided to his daughter his money and he disputed with her on the amount he gave her as a loan, the father is entitled to refund it. However, if it is based on the transfered ownership, it will be her right. However, if the daughter dies, and the dispute continues between the father and her husband on his inheritance share; the consensus of opinion among the jurists on this issue is the arbitration of *'urf* according to the people's tradition and whether the father is notable and not:

    - If the tradition continues or prevails that a father usually provides this sort of paraphernalia on ownership basis, the view of the daughter prevails if she is alive.
    - If it is known that a father does not usually provide this sort of paraphernalia on a ownership basis, the father's view that it was a loan prevails (see book "excellent speech in response to who has the say"[466] in the section of donation, and the *Rasā'il* of Ibn 'Ābidīn, 2/143 taking from the main source of the Ḥanafīs).
    - This is the matter in some of the issues of "who has the say?" the jurists build upon the tradition in the judicial preference between the litigators, therefore, they will initially favor the statement of who *'urf* supports until his adversary claim otherwise with evidence.

9. In the matter of letters and cheques, the jurists stated that, in order to be considered and becomes current, it should be written according to the custom and *'urf* by being clearly drawn up.

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[466] Issues of "who has the say?" are the incident in which the issue of the sound judgment is obscured in the allegations of the conflicting litigators, and it requires a consideration and reflection in its juristic extraction and initial favoring of the one's say where his opponent upheld otherwise. The *al-Majallah* has related some of it in the section *"al-Qawl li-man"* (articles 1771-1783).

The meaning of its being clear is that it should be on what it will be clearly seen, so there is no consideration in writing with a gesture of the finger for instance on the air or water or wall, and no attention will be given to it.

The meaning of its being drawn up is that it should be written according to the common *'urf* and traditions.

Concerning written letters, today it has to be on paper and be addressed and initiated with the information of the sender and recipient such as from so and so to so and so, and should be stamped with a sender's stamp or signed with his signature (see *al-Majallah* 69 and its commentary by al-Atāsī, and *Radd al-Mukhtār* 2/428).

The contents of a document today are written on a bone or skin or barks of tree. No consideration is given to, be it a statement of sale and purchase or divorce and so on. Likewise, if the document is in a paper but did not carry an address, it will be considered as non-written.

I would say: In our present day, there is no need for initiating a document with the name of the sender, but rather it is enough to mention the recipient's name and the signature of the sender at the bottom of the document.

Among the current practice today is sufficient to draft a cheque with the signature of the bearer in it without any statement in its heading, and without explaining that the bearer affirm and admit what is therein. His signature on the cheque consists of a contract between him and other, or (represent) one of the individual willing dispositions such as divorce or will or endowment, and will be considered a written declaration from the signatory of the cheqne.

Even though in the commercial tradition which is upheld by commercial law, that an ordinary signature of the third person on the bill of exchange without uttering a statement and will be considered a guarantee from him, and the beneficiary of the bill of exchange, if he signs on its back an ordinary signature on a plane side and deliver it to a person whose signature is a transfer from him to the recipient, or to whom the recipient chooses. All these are the recognized traditions which affirm its legal judgment.

Another worthwhile note in the current tradition on the issue of cheques is that the signature on the cheque by the bearer, even though he is not the contracting party, it is considered in the

tradition of the people today as satisfaction with the contract, because the nature of signature is meant for documenting purpose, otherwise it will be futile, so it is traditionally meant to express the satisfaction and agreement.

On this basis, if a meddlesome[467] person contracts a rent on a person's property, and he drafts a cheque signed by the two contracting parties, and then the owner was aware and signed it also, the owner's signature is considered, according to the tradition, as a permission on the contract initiated by the meddlesome, thus, the contract is executable.[468]

69/11 These are different scenarios which we have related as examples, and we have excerpted it from various juristic areas from which the effect of the civil tradition permeates the transactions. It is few among the abundance and excess, from which will become known what the juristic opinion affirm for the tradition in the transaction in terms of authority and power.

Result

The ruling based on the custom change with the changing of custom:

69/12 It is obvious after what has been discussed previously that all rulings that are built on the custom is prone to change with the change of the custom, and revolves with it as it revolves. This is because what is affirmed in the jurisprudence that the ruling revolves with its cause. For this, they initiated the legal maxim which states that "it is considerable that the laws change with the change of times" (see *al-Majallah,* 39 and its commentaries).

There is no difference with respect to the custome where the law is based on it between the general custome and the specific custom. Nevertheless, for the specific tradition with a place, or group of people its consideration and authority are confined to the place or

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467 Meddlesome is one who acts on behalf of another without the latter's permission by saying such as selling and rent and others, therefore his contract will be contingent on the permission of the owner of the disposition right. So, if he approved it, it will be executed, but if he refused it will be invalidated (see what has been explained previously, index 38/5 (7)).

468 This is an event of the *fatwā* in the contemporary events. I was asked about it and I responded with this anwer.

the group that recognize the tradition, and will not go beyond them. The tradition can be verbal or action on a certain issue, such as the meaning of the word "legal compulsion" and such as postponement of a portion of dowry or installment of the real estate's charge, which is different from one place to another. Therefore, the people in a place will be bound by their custom. Details about that will be explained (see the commentary of *al-Majallah* by 'Alī Haydar and by al-Atāsī, Articles 36-40; and *al-Iḥkām fī Tamyīz al-Fatāwā 'an al-Aḥkām* by Shihāb al-Qarāfī al-Mālikī on *Jawāb al-Su'āl,* 39, p. 68).

SECTION 70

CONDITIONS FOR CONSIDERING THE CUSTOM

70/1 What has been explained earlier about the legal consideration of the custom, and its authority in the field of practical judgment among the people by generating and defining, which are conditioned with such conditions that are compulsory to fulfill them in the tradition in order to have this authority.

These conditions that have been mentioned by the jurists and the legists in its different occasions are summarized by in four things:

1. The custom must be prevalent and mostly approved.
2. The custom which is intended to be arbitration in the dispositions should exist upon its initiation.
3. Any declaration should not contradict its opposing tradition.
4. A legal text should not contradict the tradition in such a way that the pursuance of the tradition will mean a suspension to it.

In the following sections, we will clarify these conditions:

70/2 The first condition: "the custom should be prevailing"

What is meant by the prevalence of the custom here among its recognizers is that their working in conformity to it should continue in every event and should not fall behind. The custom, for example, on the division of dowry in marriage into the prepaid and delayed is considered prevalent in the country if the people practiced this division in every event of marriage.

The meaning of the prevalence of the custom is its practice by the people in most of the events.

Therefore, to make it a condition for the prevalence in the tradition means to stipulate the prevalent practice in it in order to make it the authority in the events.[469]

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[469] As for the numeral prevalence meaning that the tradition should be in circulation among the people or most of them, it is not part of the conditions, but rather a basic element in the formation of the tradition whose meaning cannot be realized without

The custom is called *'urf* when most of the people are used to it, even though not all practice their practices. If the practice and its absence is equal it is called a common or joint tradition, and this will not be considered in the transactions of the people, and will not be suitable as reference and proof to be considered in specifying the general rights and the obligations, because the practice of the people sometimes if it is suitable as a proof of their intention to arbitrate it, so to leave it at times or most often is contradictory to this proof.

Hence, it is among the conditions to consider the verbal and practical customs, that it should be prevailing with this meaning.

The unvarying or prevalence does not imply that the tradition should be generic, because the generality of the tradition is different from its unvarying.

The general custom *(al-'urf al-'ām)* is that which spreads throughout the country.

The specific custom *(al-'urf al-khāṣṣ)* is that which is known in a town or particular towns without others, or which is known among the craftsmen or industrial men without others as previously mentioned.

Each of the common tradition and the individual is on condition that it is unvarying or prevailing on the practice of the people in its environment before it can be recognised and arbitrated in general dealings. Even though if it is common, the tradition can or cannot be prevailing in the practice of the people with the meaning being described.

70/3 Second Condition: The Custom that is meant to be arbitrated in dispositions should exist before

The custom works only on what comes after it and not on what has passed before it. The governing tradition in auy of the issues among the people should be present with the presence of this issue in order to be suitable to judge with. This is a caution from the new tradition, because it has no consideration concerning the past and will not be made arbitrator on it.

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it. it is a quorum which has been explained earlier for realizing the meaning of tradition, because the individual tradition will not become tradition unless if most of the people are familiar with it in its environment, for the tradition is the *'urf* of the masses (see para 67/10-11).

This condition also encompasses both the verbal and practical custom:

a. In the verbal custom we have seen that the statement of the actor with an individual such as endowment, swearing, vow, will, and divorce, as well as the statement of contractor on the contracts will be considered according to its traditional meanings without its verbal meaning in the origin of language. However, this literal tradition by which the meanings of the word is considered is the existing tradition upon the initiation of this activities from their actors, because it is (the custom) that will specify the intention of the speaker.

   If the custom changes after that in the understandings of those expressions and the structures which appear in the endowments, wills and the rest of the cheque, there will not be a consideration for the new tradition in interpreting the verbal disposition that occurred within the frame of the old tradition. Rather, the only thing that can be interpreted based on the new verbal tradition is whichever activities that happen after it. So, the word "on the legal obligation" in the statement of the donors and the legators, its traditional meaning till today is that the male gets double what a female gets either the yield of endowment of the willed property. If the custom changes on this statement and its meaning becomes equal among the males and females, this change will not have effect in the rulings of the previous endowments and wills which follows first verbal tradition.

   Ibn Nujaym says in *al-Ashbāh wal-Naẓā'ir* (1/133): "The tradition by which the words are interpreted is the previous comparison without the later one. On this basis they said: there is no recognition for the casual custom" the same is said of the legal text also.

   The legal text should be understood according to its lingual and traditional denotation at the time of the issuance of the text, because it is the legislator's purpose, and there is no consideration for the change to understand the words in the late transitory custom, otherwise, it will not have meaning.

   For example, *"fī sabīlil-Lāh"* in the verse in which *zakāt* should be disbursed. It has a traditional meaning at that time, which was the interest of the war *(jihād)*, or for the cause of Allah that have disagreement among the scholars on that.

Also the used of "*Ibn Sabīl*" (wayfarer) is he who is away from the people on journey.[470] If the custom of the people changes in any of these expressions, and the meaning of (*fī sabīlil-Lāh*) becomes, for instance, searching for knowledge particularly, and the meaning of (*Ibn Sabīl*) becomes the foundling child of no known parentage. In this case, the legal text is held to remain to its first traditional meaning upon its issuance, and will be used within the boundary of that meaning, because it is the purpose of the legislator and there is no consideration for the new traditional and customary meanings after the issuance of the text.

Al-Qarāfī says: "The meaning of the custom is given precedence to the linguistic meaning, because custom abrogates language, and the abrogator is put before the abrogated, as was the case in the sale contract when the price was based on the customary money, and there was no consideration in this sale for the changing of the tradition after that in the money. The same issue is true of the legal text, and nothing will affect it except what the tradition that is related to it" (it has ended briefly).[471]

b. In the practical custom also is what exists during the activity and not what happens after activities that affect the traditions.

For example, if the custom of people change, in what can be considered as defective in the sale, or in the sale following the goods or in the installment of the real estate's rent, or in the year of the rent being solar or lunar, or in the dividing the dowry in marriage to prepaid and delayed, and so many other affairs. If the new custom does not go according to the past activities and none of its judgments and obligations change, the new activities that occurred within its premises will succumb to it.

70/4 The Third Condition: Any declaration should not contradict the opposing custom:

This condition is the basis in the previous principle in explaining the dealings custom, i.e. "The well-known custom tantamounts to a stipulated condition".

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470 See *Tafsīr al-Jalalayn*, al-Tawbah: 61, and *Radd al-Mukhtār* on *al-Zakāh*, 2/61.

471 See *Mālik* by Shaykh Muḥammad Abū Zahrah, para 93, p. 250 quoted from *Tanqīh al-Fuṣūl* by al-Qarāfī, p. 194.

It has been explained that the rationale behind putting the known issue in place of the conditioned is that the silence of the two contracting parties on the known tradition without stipulating it openly is regarded as being dependent on the practical custom (see para 69/9).

The affirmation of a known judgment on this issue is part of evidence but in the case of conflict, the evidence becomes invalid, because it is stated in the juristic principle that "no consideration is paid to influences in the face of explicit statements" (see *al-Majallah* 13).

Imām 'Izz al-Dīn ibn ʿAbd al-Salām al-Shāfiʿī says in his *Qawāʿid al-Aḥkām* (2/178):

"Whatever that is affirmed by custom, if the contracting parties declare otherwise which will agree with the purpose of the contract and it is possible to be fulfilled, it is valid. Therefore, if an employer makes a condition on the employee that he should spend the day of the work without eating and drinking and will terminate the benefit, he is bound to it. However, if the employer makes it condition on the employee that the latter should work for a month, night and day in such a way that he is unable to sleep at night or in the day, what I see is that the performance is null because it cannot be fulfilled, and it will be an aleatory contract which is not needed".

The grand Turkish scholar, ʿAlī Ḥaydar in the commentary of Article 37 of *al-Majallah* stated: "The custom will become evidence if it does not contradict a text or a condition of the contracting parties. If any person hires a laborer to work in the noon until *'asr* only, he has no right to force him to work from the morning till evening based on the evidence that the custom of the country is like that.[472]

On this basis, the loan is conditioned on the time and the place and the amount with what was made conditional by the lender, even though if the condition contradicts the *'urf*. This is because there is no consideration for the *'urf* in the face of opposing declaration. If a person borrows an animal, for instance for riding or to carry a load, it will be considered as being permitted for its riding or to load the usual weight in its like traditionally. However, if a lender openly warns him against riding it for more that a certain period, or to load it more that a specified weight, the borrower does not have right to

[472] See translation of the said *sharh* by Fahmi al-Husayni.

exceed it even in a usual quantity. If he exceeds he will be become a transgressor in the case of usurper" (see Articles 816-817).

70/5 The fourth condition: A legal text should not contradict the custom in such a way that the pursuance of the tradition will mean a suspension to it":

If the custom contradicts part of the legal evidence, e.g the legal text or its principles and fundamentals, the general basis which is extracted from the sayings of the jurists generally is that if the practiced custom results in a suspension of a legal text or of a conclusive basis in the *Sharīʿah*, the custom will not has any recognition, hecause the legislative term takes precedence over the custom.

However, if this suspension did not arise from the custom, and instead it makes possible the application of the legal text to it, or a quest for agreement between them, the custom in that case will be recognized, and will have a significant authority.

The distinction between the two circumstances depends on a detailed study on which results will varry according the custom being contradicted with a legal text or a conclusive basis, or to contradict the interpretative evidence. Similarly, it will depend on the custom that contradicts that textual evidence that happened after the episode whether the verbal custom or practical; general or specific.

This will be explained in the following sections (71-74) which will be discussed exclusively regarding the conflict of the custom with the legal evidences.

SECTION 71

INTRODUCTION TO THE SECTIONS 71-74

CIRCUMSTANCES IN WHICH CUSTOM CONTRADICTS WITH LEGAL EVIDENCE

71/1 The custom of the people and their dealing can encroach the basic legislative limit, and will therefore contradict one of the legal texts, or some of the interpretive opinions on it.

What is the stand of Islamic jurisprudence on the authority of the custom in such a situation, and what is the level of its tolerance with the custom on this encroachment?

This is an essential and critical issue, because it concerns with the meaning of legislation, its life and its authority.

Islamic jurisprudence has taken a wise stand combining between the necessary leniencies for the improvement of the judgments which has to adapt to the circumstances of life, and between the preservation of the deeply rooted fundamentals.

We will explain in the following this jurisprudential stand in detail:

71/2 The contradiction of the custom with the legal evidence lies on four circumstances with different results:

1. The custom may clash with a specific legal text such as the Qur'ānic and Prophetic sound terms, which preach against the current custom.

2. The custom may also clash with the general text under which fall two circumstances. The meaning of the specific text here is from the legislator concerning the issue which is the topic of the tradition specifically signaling a warning against it.

   As for the general term, its meaning is that which has an encompassing rule on the issue which in which the practice of the tradition is presumed, and which is also inclusive of other, in such

a way that the known issue is part of the term and its containment.[473]

3. It might go against the ijtihadic opinions that are the rulings affirmed by the jurists in the interpretation and comprehension through *qiyās*, or *istiḥsān*, or *istiṣlāḥ* on the new issues in which there is no clean legal text in the *Sharīʿah*. On this basis, the discussion will be divided in to four parts:

   - a case where the tradition clashes with the special legal term
   - a case of a comparative tradition on the related general term which opposed it
   - a case of an emergent *ʿurf* after a general text
   - a case where the custom and *qiyās* conflicts.

We will observe the detail of these cases in the following chapters:

A Case where the Principle Clashes with the Peculiar Legal Text

71/3 If the people are accustomed to one of the common or civil practices, and the issue accustomed with is forbidden or prohibited by a special text, that is a text that is related from the legislator to forbid this issue exclusively, as was the case of the people during the days of *jāhiliyyah* (ignorance) who were accustomed to adoption, for instance, and to apply the ruling of a real filiation (or filial relationship) to it, the *Qur'ān* prohibits this exclusively. Therefore, this custom not longer has any recognition and value. It is an inadmissible tradition which has to be changed and not to be affirmed. It is not to be judged with under any circumstance, whether the tradition is specific or general, and whether it surfaces new after the advent of the text or exists before it.

This is because when the custom clashes with the special purpose of the legislator on an issue, the jurist who is in charge of the implementation of the *Shāriʿah* law is put under two options:

- either to work in accordance to the principle, this is completely neglecting the legal text which is not justified except under emergency circumstances; or

[473] The generality and peculiarity in the terminology of the principles of *fiqh* are in the beginning among the attributes of the phrases with regard to their understanding.

- to work according to the legal text and neglect the custom. This is what should be resorted to.

It is indisputable that the *Shāriʿah* is obligatory, and was not legalized except to have its text implemented and to be respected. So, it is not permissible to neglect it by working against it, otherwise the legislation will become meaningless (see *al-Muwāfaqāt* by al-Shāṭibī, article 14, in the book of *Maqāṣid,* 2/283-284).

71/4 It has been mentioned earlier that part of the principles is what can be good and just, while another part can be hideous and unjust, it is also part of the *maqasid al-sharīʿah* which is established to affirm the good and to forbid the evil, and to guide the people in their works and their dealings to the general good. The authority in the distinction between the just filiating and the unjust repugnance is the legislator's command and its interdiction, because the legislator weighs the issues and looks at its results from its different angles and not from part of it. Whatever he forbids exclusively should be considered as harmful even though if it is beneficial for many people and many groups (see para 67/7).

All the legislation stands on restricting the freedom of those under obligation (*mukallaf*) in part of the fields of work and its generalization in other, according to what the legislator sees and evaluates in terms of the public interest. The limits of this generalization and restriction may vary between one law and other. This is affirmed in the legal theory today also, so the legal texts cannot be changed by a contrasting *'urf*.

Similar to this is the view of the positive law today on issues and rules which is seen by the law maker in the "general system" on this basis the freedom of the one under obligation is limited to every agreement or tradition which contradicts with it, and will be considered invalid.[474]

71/5 On this basis Islamic law prohibits many deals and contracts which were well-known during the period of ignorance without any

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[474] Like the law relating to the leasing of the real estate and the labour law in our country Syria today, and in other countries in which the rent and the issue of labour submit to a special law, to cut off the problem of the employers and the workers, and the labourers and the workmen. Most of the rules are considered part of the issues of the public system and it is not permissible to agree otherwise.

disproval: so, the internal battle was forbidden, likewise the confiscation of people's property and their honor, and it established a nation and a moral and social system and right to which everyone is bound to. Despite that the internal battle was a common tradition in the pre-Islamic Arab, and remained an *'urf* of some tribes of Bedouin in the desert of our country and others.

The Prophet (s.a.w.) forbid the contracts which the Arabs were accustomed to in the absence of free consent in it, for what is likely to be fraught with deceit and problems. Part of it is its prohibition of the sale by casting, the sale by touch and the sale by throwing pebbles, and the selling of fetus and the selling of a hidden thing and the selling of a hunter strike and a pearl diver,[475] all these are known in the period of ignorant, so the Prophet (s.a.w.) forbade it and because prohibited and void, so if the people return and accustom to it, there will be no consideration for their custom.[476]

For example, the enslavement of the debtor is commonly known among the pre-Islamic Arab[477] and the Romans. Islām came and forbids it, and enforce on the creditor to relieve the less fortunate debtor temporarily until he is able to pay him back, with the clear text of the *Qur'ān* that *"And if the debtor is in a hard time (has no money), then grant him time till it is easy for him to repay"* (al-Baqarah, 2:280).

Also the custom of the philanthropist in the marriage by compensation is invalid which should not be judged with (see *al-Durar wal-Durr al-Mukhtār* on *Kitāb al-Nikāḥ*).

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475 The sale by casting, the sale by touch, the sale by throwing pebbles is the bargain between the contracting parties on bartering a commodity with a commodity. So, whenever one discards his goods to other or touches the commodity of his partner, the sale is concluded without a choice even though he has not seen the goods, as if it is an unimaginable folded cloth. The way to cast the stone in their tradition is that the buyer throws a stone on many clothes, i.e. whatever it strikes must be purchased without a choice similar to the case of gambling. This is similar to lottery in the modern day. The selling of a hidden thing is what comes out of the male camel, like offspring. The selling of fetus means what comes out of the she-camel. The strike of a hunter is what falls in the hunting net such as travelling and fishing. As for the strike of the pearl diver, it means what the diver will bring out from the sea such as pearl (see *al-Hidāyah wa-Shurūḥ* on *al-Bayʿ al-Fāsid*, 7/55, and *Radd al-Mukhtar*, 4/102-109).

476 On this basis, if the people are familiar in any time and any place on the selling of alcoholic which is forbidden in Islam, or interest which is prohibited by the legislator with the special text of the Qur'ān. There is no recognition to their tradition and their contracts are not valid in view of the Islamic law. The dealing among the people on alcoholic and interest, and judgment of the courts on it in many Islamic countries is based on the modern positive law.

477 See *al-Ḥaqq wal-Dhimmah* by Shaykh ʿAlī al-Khafīf, Professor of *Sharīʿah* at the Faculty of Law in Cairo, on *al-Dhimmah*, p. 82.

The marriage by compensation is the agreement between two people, so that each of them will let the other marry his relative and that will become a dowry for the other. It is known till today among the philanthropist in our country, the greater Syria, and other.

Part of their custom is that if any of the two women dies, her husband will take back his relative until the other party gives him another wife to marry in place of the deceased as if he is responsible for her life!

This marriage contradicts with specific texts of the *Qur'ān* and the *Ḥadīth*, becanse it made it obligation in marriage with the payment of dowry to the lady that she will possess, as it had made it permissible for her to choose her husband, and forbids her to violate the marital duties or to disobey him without a legal justification.

71/6 In summary, tradition can be used within the given freedom by the legislation to those who are under religious obligation in the field of work and commitments, except in cases where the legislator defines the rules in obligatory way, otherwise, it is possible for the tradition to turn upside down the fundamental of the legislation, and in consequence the Sharīʿah will have vanished and become a remain of a spring.

Therefore, the commanding specific text is the most regarded and respected if though if it clashes with the general tradition, so no contrasting tradition or agreement will be considered.

71/7 Exception of the traditional text

However, only one case can be exempted, it is when the text itself was justified and based on the existing custom during its initiation; the text then will become tradition. In this case, its rule will work hand in hand with the tradition and will change with the change of tradition.

The interpretative view might differ on the issue of the peculiar text being a tradition or not, and the discretion will differ base on that in the consideration of the contrasting emergence tradition, and its being alterative of the rule of the text or not.

For example, the issue of the measurement of the interest money which is juristically decided that money considered legally as usurious is forbidden to sale a portion of it for what is much and less than it if they are of the same type, because the remainder or the excess then will become a forbidden usury. On this basis, it is not lawful to

exchange wheat with wheat and gold with gold either unless if the exchange items are equal.

However, if the two types are different, such as selling of gold with silver or the wheat with barley, it is permissible to sell unequally without it being a sale on credit, i.e., to postpone one of the exchange. So it is compulsory to collect the exchange during the contract meeting.[478]

This is in accordance with the principle of "blocking the means" so that it the permissibility of the unequal sale will not be taken as a medium to the usury of the credit sale whenever the two exchange item are different, so that a person will borrow a gold for example to certain period and pay back with silver excessively equivalent to the intended usury.

Therefore, this rule as you have seen it stands on the basis that the quantity of the items exchanged must be equal if they are of the same type. So, what is the measure of this sameness, because two sizes can be equal in weight but not in measurement, and vice versa?

It is agreed upon that the sameness is legally considered with the traditional measurement in each type, so whichever one appears traditionally to be weight, such as oil and butter, the two quantities must be the same in measurement, and whichever traditionally measurement has to be the same by measure. Moreover, if the tradition changed in the measurement of something and became measured by kilo for example after having being by weight, or to become by weight after having being measured by kilo, the usurious measurement will change according to the tradition.

However, it has been related from the Prophet (s.a.w.) about the six types of usurious money (among which is the wheat), where similar items exchanged according to weight while others by volume.[479]

However, majority of the scholars among whom was Abū Ḥanīfah, that the measurement stipulated by the legislative text will forever be

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478 It is observed here that usury's rules are no longer considered in the current prevailing law in our country and most of the Arab and Islamic countries. So, the people today exchange with one another with the usurous money as they wish based on the rulings of law.

479 They are gold, silver, wheat, barley, salt and date. In the exchange of gold for gold and silver for silver, either by selling or by loan, the Prophet (s.a.w.) has made it obligatory that the two exchange must be the same by weight whereby the other four types of similarity should be by weight (see *al-Hidāyah* and its commentaries, 6/157, and following index, 73/8)

considered, and there will not be a consideration for the change of the tradition in it.

For example, in the exchange of wheat, the volume may be used and not a weight, even though if the people are accustomed to the selling of its kind by weight as it is in our modern day[480] because it is a special text for the usurious measurement in these types, so no contrasting tradition will be considered.

Nevertheless, Abū Yūsuf, a student of Abū Ḥanīfah, is of the opinion that the considered measurement even in the six items is the traditional measurement, and that it changes with the change of the tradition as it is in the other usurious money on which there was no term or text related concerning its measurement. He says again that: the text in the measurement of the six types is justified by the tradition, but the text stipulates only the similarity between them by either volume or weight, because this is their traditional measurement at the time of the Prophet (s.a.w.). If the tradition was in another measurement, the text will have recognized other measurement (see *al-Hidāyah* and its commentaries, 6/157).

The opinion of Abū Yūsuf as you have seen is evidence, and the most correct despite that he stood out alone with this opinion.

71/8 Furthermore, among the peculiar legal texts which are considered, according to my own view, are based on the tradition and *'urf*. So, its rule will change following the change of *'urf* and what we have previously mentioned about the saying of the Prophet (s.a.w.) on the maiden that has reached puberty: "Her permission lies in her silence" (see para 69/9 (b)) where her silence was considered when her guardian asking for her permission in marrying her off to a certain person, and with a certain dowry, being a permission from her and authorization (see para 3/7 and 69/10). There has been agreement of opinion among the scholars that this rule on the maiden is based on what is known of her shyness to show her wish in marriage when her guardian seeks her permission. Usually, she expresses her wish and permission by being silent. This shyness

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[480] The meaning is not to abstain from selling these types without the measurement stipulated when it is compared with its type, i.e. the measurement they wanted or without the measurement, that is haphazard, but its meaning is that if something of this is bought for its type such as wheat for wheat, or he borrowed something from it. It is therefore incumbent in the fulfilment in order to make it similar by measurement which was stipulated by the text.

prevails on them until today in most of the Islamic places according to the social and traditional training.

If we assume that the dimension of this training has changed, and the maidens no longer feel shy to declare their wish or refusal equally (just as was the case of the deflowered women). Therefore, their silence is no longer enough to be considered as permission in marrying them, but rather it requires explanation, such as seeking permission from the deflowered, in order to be considered as authorization on which the marriage contract will be based, since it is being initiated by the guardian. In a situation where she did not permit any authorization, her marrying will be considered as being meddlesome which is contingent to her permission before it can be executed on her, even though if she was silent during the time when her guardian was seeking her permission.

SECTION 72

COMPARATIVE *'URF* WHICH IS CONTRARY TO THE GENERIC TEXT

72/1 If the *'urf* contradicts a general comprehensive legal text with its all customary command,[481] the *'urf* authority therefore is in detail in accordance with the *'urf* compared to the incoming text (this is what we shall study in this chapter) or happening after it (it is the topic of the chapter 73 that follows).

72/2 The existing *'urf* with the legal text might be a verbal or practiced *'urf*:

a. If it is verbal, there is no disagreement amongst the jurists in its consideration. The general legal text will be set on the boundary of its common meaning when it is free from the contexts, even if its semantics as being used by the Lawmaker is wider in linguistics than its customary connotation. Due to that, the general verbal *'urf* is a language of conversation, the words would be directed to their meaning in their familiar boundary, if there is no context indicating that the lawmaker intends a wider scope with its word.

   In reality, this is a branch of a obligatory principle of carrying its actual meaning without any context indicating the metaphor, as the customary word makes the common meaning a real meaning, which notifies the concept of the linguistic meaning which becomes according to the real meaning a metaphor that requires a context.

   The expression for buying, selling, lease, fast, prayer, pilgrimage, period of which women wait in divorce *('iddah)* or a period a widow wait *('iddah wafāt)*, all these aud the like in the texts carry their real meaning when they are connected with the

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[481] Except the previous situation in chapter 71 regarding a clash between *'urf* and text, verily, if the text is general, it will clash *vis-a-vis* with a contrary *'urf*. However, this situation is what we called a contradiction between *'urf* and text, because if the text is general, few of its comprehensiveness will be the subject matter of the contrary *'urf*, while the text is not specific with it, as if it clearly contradicts the contrary *'urf* in some of the general text. It is like two geometrical lines that are hroke up with a point.

texts, even if they differ from their positive meaning in the root of language.

b. If the existing *'urf* practically differ with the text, the scholars' individual *ijtihād* varies as whether it is suitable for the specification of the general text or not. Those who consider it fitting have the detail between if it is a general *'urf* or specific, which we will summarize it as follows:

72/3 (a) The general comparative *'urf*

If the existing *'urf* meets with its contrary general text to it is a general *'urf*, according to Ḥanafī interpretive adjudication it will specify that text, so it will then be considered a minor exclusive non comprehensive text without the accustom command as that has an existing context indicating that the lawmaker does not mean the comprehensiveness of that command with its general text which is contrary to it apparently.[482]

The juristic opinion on that is that if the text is generic, working with the *'urf* in its subject matter can not suspend the text, with respect to the text, rather, the text will remain practical in its other generality that deals with its comprehensiveness, so specifying the

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482 Specification according to the technical meaning in the science of *usul al-fiqh* is limiting the general word to its particular. This happens when a text comes from the lawmaker which contains a generic ruling, while there is another evidence saying that the lawmaker does not intend with that general text to contain all its rulings, and that there is/are other situation(s) exempted from its rulings.

This specifying evidence can be another in comparison to the first, some of its whole would be exempted from it, or an outstanding context indicating this specification, it means that the lawmaker expresses the general word not implying its whole for these situations with the proof based on its exception.

An example is the word of Allāh the Most High: *"Allāh allowed the sale and disallowed the Usury"*. The statement *"Allāh allowed the sale"* is a general ruling because of word (sale) general. It denotes wholly the permissibility of all sales inclnding the usnrions sales. However, in the second statement *"He disallowed the usury"* specified the first generality. It specifies the impermissibility of sale which contains usury. It denotes that the lawmaker does not mean its generality with the first general text indicating the permissibility.

Also, it is established in the principle of sharaiah from other texts the prohibition of trickery in dealings; those texts are available with the coming of this general text in allowing the sale, so it is considered specifying them, with this, the sale containing tricking someone is not included in this general text that allow the sale.

The Ḥanafī jndgment stipulates that the specifying proof must be together with its specified general text, to be another text, coming with it, or a context with it, so to be indicating that the lawmaker does not mean the generality of that general text.

text with the *'urf* will not be in negligence of the text, it is rather, the use of both text and *'urf* all together. The practical *'urf* pinpointing the peoples' need to what they have been accustomed to, if people decline what they are accustomed to , the situation becomes difficult and unbearable as it is previously explained (see para 67/6), working with them both is better for the need (see *Nashr al-'Urf* by Ibn 'Ābidīn, chapter one and section one).

Some examples that are mentioned by the jurists on the commanding *'urf* (see footnote para 3/4). It was reported that the Prophet (s.a.w.) prohibits selling what the person does not have and legalizes the payment in advance).[483] This text is general in prohibiting all type of sales which the item is not available in the possession of the seller, only *salam* (payment in advance) is exempted as it has interest to pay the cost in advance for assisting the product.

The general prohibitive text contains the contract for manufacture with proscription, even if it is not specifically stated in it.

The *'urf* order is a contract already known by everyone in all countries for the peoples' need to it, particularly the shoes and its like which has standards and attributes which a person varies other in it.

Based on that, the *ijtihad* affirms the allowance of contract for manufacture for the current *'urf* in it, this *'urf* is considered as a specification of the prohibiting general text, as if the text is stated for exempting the *'urf* order inclusively as the payment in advance is exempted directly, the practicability of the text remains in other types of non-existing sales. The consensus of the scholars agreed upon the validity of a commanding *'urf*.[484]

72/4 (b) The Specific Comparative *'Urf*

If the existing *'urf* that contradicts the general text is a specific *'urf* regarding a place excluding other or a group of people with the

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[483] *Salam* and *Salaf* are selling an unspecified thing which its delivery is deffered with an immediate price (Article 123), like selling a quantity of wheat or oil or currency which its attribute is described for two months. The extent of quickening its cost price is to be at the production time or taking (see my two books, *'Aqd al-Bay'*, para 137-139). The Prophet (s.a.w.) said: *"Don't sell what you don't have"* as reported by Ḥākim ibn Ḥizam. However, the statement *"He authorized the Salam"* is the statement by al-Zaylaʿī in *Naṣb al-Rāyah* which denotes that it was not reported with this word.

[484] It is remarkable here that selling non-existing commodity generally has been allowed with the stipulation that if its existence is not impposible, according to the second para of the Article 64 of the previous priciples of the Ottoman law and Syrain civil law.

exclusion of others, such as traders' *'urf* or manufacturers/producers in some countries or some similar categories, the most acceptable opinion regarding Ḥanafī scholastic effort is that it has no authority and power as the text is in contrast to any general *'urf*, so the specific *'urf* is not suitable to specify the contradicting general text even if it exists with the advent of the text, because if it is an *'urf* of some countries or people requires text specification, this *'urf* is absent in other places or people do not require it, thus, it cannot establish the specific doubt.[485]

We had seen before that specifying the general legal text is the aims of the lawmaker from it not an emergency modification on it (see footnote para 72/3), the specific *'urf* might be between a small group of people or in a small place, so it is not fitting to be a point that the lawmaker does not mean its general from his general text.

72/5 This is a report of the Ḥanafī *ijtihād* entails in this position.

There is a disagreement among the Mālikīs in considering the practiced *'urf* which specifies the general text. However, the specialists of this school of thought agree that the existing practiced *'urf* specifies the general text and as such, it confines the absolute text in contrary to what al-Qarāfī said in his *al-Furūq* (1/173) that the practiced *'urf* cannot fit to specify the text or confine it. They do not also declare clearly as which the *'urf* is general or specific (see *Ḥāshiyah Shams al-Dīn al-Dusūqī 'alā al-Sharḥ al-Kabīr*, 2/143).[486]

We will find from the ramifications of this principle with Imām Mālik that he said if the woman is of noble prestige, it does not compulsory for her to breastfeed her baby, if the baby can accept the breast of other women for its benefit as the *'urf* requires that she prefers to hire the breast-feeding mother for their babies. Ibn al-'Arabī said: This is a specification for the general word of Allāh the Almighty: *"Let the mothers suck their offspring for two whole years"*[487] (al-Baqarah, 2:233; see *Aḥkām al-Qur'ān* by Ibn al-'Arabī).

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485 *Al-Ashbah wal-Naza'ir* Ibn Nujaym last principle 6, 1/134; *Risalah Nashr al-'Urf* by Ibn Abidin, chapter 1, 2/116.

486 Aḥmad Fahmi Abu Sinnah elaborated the review of the Mālikī and Ḥanafī schools and others from the issue of specifying general lawful text with the practical *'urf*, in two articles 5 and 6 of his book, *al-'Urf wal-'Adah*, pp. 91-94 and 124.

487 Some Mālikīs considered this issue as branches of specifying the text for the *maṣlaḥah*. The *maṣlaḥah* they are taliking about is considering the ongoing *'urf* in protecting women who are honorable who find the assistance of others in breastfeeding and

SECTION 73

'URF OCCURRING AFTER THE GENERAL OPPOSING TEXT

73/1 If the *'urf* that contradicts to the general *'urf* occurs after that text, that *'urf* should not be considered and is not suitable for specifying the legal text according to the unanimous agreements of the jurists, even if it is a general *'urf* since the occurring *'urf* is an emergency after the determination of the concept of the legislating text and the intent of the law from it to the extent that its execution can be derived from the law. Then if its specification becomes permissible after that, with an emergent *'urf* which is in contrary to it, that will be an abrogation for the legislating text done by the (*'urf*). However, that is unlawful because if it is permitted, it would have lead to the exchange of most Islamic legal rulings for the emergent customs that can invalidate and replace them to the extent that the law will be meaningless.

So, there is no difference between the practiced *'urf* and verbal *'urf* in terms of validity of emergency in both of them for the specification of the previous text on it, rather the verbal occurring *'urf* is farer from validity for this specification.

If after the arrival of the Qur'ānic and Prophetic texts, the *'urf* of the people change in regards to the meanings of some words stated in those texts of the two sources, then there is no consideration for that change, rather the consideration will be for those meanings and the limitations which are comprehended from the two of them when they surface, because verbal *'urf* which is established with the arrival of the legislating text is that one that determines the purpose of the law from its statements.[488]

So, the technical meanings which were known to the jurists in their divisions for the regulation of issues and arrangement of rulings

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upbringing of their children. This *'urf* does not contradict the principle and text of the *Sharī'ah*, so considering thar it is the *maṣlaḥah* by so doing that the *Sharī'ah* will be specified with it. The *'urf* of the people in the time of ignorance was to look for someone who could breastfeed their sons among the villagers in order to find the bodily health and sound eloquence for thier sons.

488 See *al-Ashbāh wal-Naẓā'ir* by Ibn Nujaym, 133/1; *Tanqīh al-Fuṣūl* by al-Qarāfī, p. 194; *al-Furūq* by al-Qarāfī; and *Mālik* by Shaykh Muḥammad Abū Zahrah, para 93, p. 250.

like *fard* (prescription or imposition), *wājib* (obligation), *masnūn* (Prophetic recommendation), *mandūb* (permissible) and *makrūh* (disliked) [whether elevation or prohibition] among other invented intellectual terminologies, that the explanation of the texts of the *Qur'ān* and *Sunnah* cannot be valid on the conditions that they are meant by injunctions and prohibitions. Well, it is sure that the format of injunction in those texts signifies request that necessitates action at times, and in some cases, signifies its preference to others or its permissibility, whereas the prohibition signifies the opposite of that. Whatever term given after that cannot change anything from such original indications which were understood in law language while the modern terms would not create new meanings into it.

Likewise, the word *al-yamīn* (oath) which is found in both the *Qur'ān* and *Sunnah*, its connotation is 'The oath with Allāh the Almighty because that is what was known in the language of law and on it the word of Allāh the Almighty is based as follows: *"Allāh will not call you to account for what is futile in your oaths, but He will call you to account for your deliberate Oaths..."*[489] (al-Mā'idah, 5:89).

So, it will not stand good to conceive to be the oath invented through *ṭalāq* (divorce) and *al-'itq* (freedom), because it was not known during the period of *Jāhiliyyah* (ignorance), so no nonsense is pardoned thereby[490] (see *Risalat al-'Urf wal-'Ādah* by Aḥmad Fahmī Abū Sinnah, p. 95 quoted from *al-Muwāfaqāt* by al-Shāṭibī).

73/2 On this basis, the application of the texts of the jurists, the explanation of endowments cheques, wills, sales, gifts, marriage, all other contractual cheques and whatever occur thereby like conditions

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489 *Al-Yamīn* (oath) is also *al-Ḥalf* (swearing) on an action or discontinuation of action in the future so as to confide the decision with it, for examples, *"By God! I will surely do this, or will never do this"*. It will naturally be in feminine form. However, as for *al-Qasam* (vow), it is an act of swearing to emphasize information on the past or future matter, e.g. *"By God! I did not do that, or that will be"*. However, both *al-Yamīn* and *al-Qasam* may be interchangeably used in the meaning of each other permissively and leniently. Opinions differ in the explanation of *Yamīn al-Laghw*, but the best interpretation of it in our understanding, is that it is same as *al-Ḥalf* (swearing) which flows on the tongue of some people like dialect which was accustomed to and of which the contraction of oath is not intended like their statement in answering: *Balā wal-Lāh*, or *Na'am wal-Lāh (Yea! By God)*. This is what a group which includes al-Imam Al-Shafi'i sticks to. The Hanafis say: It is a swearing on the false information which the oath maker may think it is true. But if he is aware of its falsehood, it is then the unlawful oath which is known as *al-Ghamūs* because it plunges its victim into sin.

490 Rather divorce and freedom are parts of what jesting is considered therein as discussed earlier (see para 6/33).

and terms are also compulsory. All of them must be necessarily explained in lines with the *'urf* of the contractors who established them in their times based analogically on the texts of the law, its abasement in understanding on occurring *'urf* where their statement will be produced out of their intention.

For instance, the word ustadh has the customary meaning of *Rabb al-Ṣināʿah* (i.e. master of invention) which utilises a wageworker into his invention so as to teach him that invention (see *Kitāb al-Mu'arrab* by al-Jawālīqī, the word "*ustādh*").

Based on this *'urf,* the jurists have cited that if a person gives his small child to a teacher and then disagrees with the latter on the payment of fees. While the teacher may request a fee on the child from the father, the father may also request for the fee from the teacher on the child. In such case, who is more eligible to the wage between the two of them over the other?

They said: He will resort into the arbitrary judging with *'urf,* so if the *'urf* of the town favors that the teacher should take wage or pay it, he will follow the *'urf* (see *al-Majallah* 569; and *al-Qawā'id al-Fiqhiyyah* by al-Hamzāwī on *Masā'il al-Ijārah,* p. 76).

In this present time, the name of *al-ustādh* has to mean 'the teacher of knowledge or sciences', and it is not good again to demote that judicial text on this eventual meaning since this detailing cannot come up therein because the master of invention would teach it to the boy through the means of hiring him into it and as such be benefited from the service of the boy. For this reason, the *'urf* of the people in taking and giving the wage according to the need of production, to the wageworker, people's interest in learning it and its consistence on some secrets which could not be understood by the manufacturer except through indoctrination and special training. However, this cannot be applied to *al-ustādh* who imparts knowledge, because the teaching is a service from the teacher to the student.

Ibn Nujaym said in *al-Ashbāh wal-Naẓā'ir* under the sixth principle 1/133 as contained in the following: "The *'urf* on which the words are based is only that of previous comparison not latter one, for this reason, it was said: No consideration for the emergent *'urf*".

You have already known that inconsideration of the emergent *'urf* in specification of the meanings of the texts and its restriction are not limited to verbal *'urf,* so the emergent practiced *'urf* has no authority also towards text, even if it is a general *'urf,* except if the text is explained through the *'urf* or through a cause that can be removed by the *'urf* as we shall soon see (para 73/4-9).

73/3 This is the established judicial principle at time of the conflict between *'urf* and general legal text which can be summarized as:

a. If *'urf* is already available at time of the appearance of the text, there will be an authority for the general *'urf* in the *ijtihād* of the Ḥanafī school that can specify the text and indicate the restriction of the ruling on matter that was not familiarized with. And there is not the type of this authority for the special *'urf* except through what is based on weak opinion.

b. However, if *'urf* has just occurred, it is not then good to be reserved for the previous general text, rather the consideration is for the generality of the text not *'urf* even if *'urf* is general.

73/4 *'Urf* which can remove the cause of the opposing text is considered even if it is an incidental occurrence.

With the fact that the tracing of the Secondary Principles of Islamic jurisprudence and the viewing of its explanations which the jurists used to explain, indicate clearly that the incidental occurring *'urf*, even if it contradicts the clear legal text, is considered and regarded in two conditions:

1. If the legal text itself is explained through *'urf*, i.e. based on a practiced *'urf* which has already been established at its appearance, then, if that *'urf* changes, the ruling of that text will also change accordingly, even if the text is special with the topic. This opinion was made only by Abū Yūsuf among the followers of Abū Ḥanīfah. Although the majority may disagree with such an opinion, it seems to be the strongest opinion in terms of knowledge and proof.

   This situation has already been explained and exemplified in the research on the clashing of *'urf* with special text. It can be referred to para 71/7-8.

2. If the legal text is explained with a cause that is negated through the incidental *'urf*, whether the cause of the text is declared in it or deduced through *ijtihād*.

   In such a situation, the incidental *'urf* is considered and regarded even if it contradicts the text because such contradiction has become superficial not profoundly real as long as the cause of the text is being negated by the presence of the *'urf*. This is so

because it has been established in the fundamental principles that the legal ruling moves with its cause, so it is firm with its firmness and unsteady with its shifting.

73/5 Juridical Proofs on this Principle

There are many proofs on this principle in consideration of the incidental *'urf* which will be briefly discussed as follows:

73/6 First Proof

The Ḥanafīs mention in the investigation of the harmful condition in the contract of exchanges like selling, that it is part of harmful condition for the contract of compensation any condition that has a merit outside the original ruling for the contract and on what suits it, like the condition made by the buyer on the seller on the grinding of the purchased wheat, or carrying of the merchandise on his account, or the repairing of sold instrument if it breaks down and fails to work for the buyer, or stipulating that the seller would use the sold item for a range of time after the sale. All those stipulations in the origin of their doctrine are harmful conditions.

The Ḥanafī school has even opted for the apparent aspect of the narration from the Prophet (s.a.w.) in that regard, that he (s.a.w.) *"has forbidden selling made through conditioning"* as explained previously in the study of authority of the contractual will in the theory of contracts (para 41/7 & 42/3-4) and in *al-Hidāyah* and its commentaries 6/76-78).

They have even exempted two types from these contractual conditions in this text passing judgment that affirms their authenticity and adherence if they are made conditions in contract, both of them are:

1. The condition in which a legal text brings its permissibility, like conditioning of choice (see para 3/7(9).
2. The condition which people discover its manner of conditioning.

The conditions which are considered by the Ḥanafīs as corrupted according to their explanation for this text available in the Prophetic tradition if anything from it is discovered. It will turn into being obligate authentically good that must be legally regarded, even if the *'urf* in it is incidental.

Among the secondary principles of this idea is their correction of Selling of fidelity because of inflow of *'urf* with it despite the fact that it originally stands on the basis of a corrupted condition among them, although they have initially passed the *fatwā* on its depravity before the spreading of *'urf* in it (see para 16/9 & 46/8).

73/7 The instrument of the jurists in that regard is the studying of the cause of the Prophetic tradition which makes statement on the prohibition of condition in selling. They have even regarded that the legislating goal is the prohibition of the factor of dispute, because these excrescent conditions on the origin of the sale contract, its execution and method would mostly lead to dispute. So, they viewed that if *'urf* flows on some of them, the dispute shall be dispelled since it will make the matter known and familiar so that *'urf* will not stamp out the text, but rather in conformity with its goal and spirit even if it is an incidental *'urf* (see *al-'Ināyah Sharḥ al-Hidāyah*, on *al-Bay' al-Fāsid*, 6/76-77).

They did not stipulate for the correction of the known condition that the *'urf* should be general, rather the special *'urf* is sufficient for that since the possible conditions are variously numerous, available everywhere and every times according to the needs of such particular time. In fact, *'urf* of contractual conditions may be practiced in a city whereas it may not in another. So it is good that each set of people should make condition in their trades and in all of their exchanges, whatever they are accustomed with in couditions in as much there is not a text prohibiting a special condition specifically. If there is, then no *'urf* on contrary will be considered as it was known in the previous discussion on 'The clash of *'urf* with special text' (see *al-'Ināyah* and *Fatḥ al-Qadīr*, and *Radd al-Muḥtār*, 4/121-123).

73/8 Second Proof

On the issue of disparity of the weighing of *dīnārs*, Ibn 'Ābidīn established in his treatise, *Nashr al-'Urf* that if the categories of one type of money become manifold, while one of them is heavier than others like *al-Dīnār al-Maḥmūdī al-Jihādī* and *al-Dīnār al-'Adlī*, and like the categories of *al-Riyāl al-Firinjī* during his time, because this differeuce in measurement - even though it is apparent in all scales - it is permissible to pay the heaviest with it rather than lightest or in reverse order in terms of loaning, crediting and contracts.

This is not regarded as the unlawful interest in as much the value remains one,[491] that has even been explained that people "do not look at that disparity in measurement in as much the value has not been different with it, despite the fact that this *'urf* has concentrated in their minds whether knowledgeable or ignorant, so that fatwā can be clearly passed with it based upon the opinion of Abi Yusuf in the text explained with *'urf*".[492]

The meaning of this is that the *'urf* among people on the wastage of the groups of the measurement and on the unification of the value has negated the cause of the text which consider the addition as the unlawful interest, so it has become like the text that was explained through *'urf* in the opinion of Abi Yusuf that its ruling changes according to the change of *'urf* (see *Nashr al-'Urf* in *Majmū'ah Rasā'il* Ibn 'Ābidīn, 2/119).

If there is this influence for the incidental *'urf* that can remove the cause of ruling towards the general or special text as in these two previous proofs, it should therefore by the way of priority have this influeuce itself also towards the analogical rulings which are sourced from analogical deduction as it is obvious from the third juridical proof as follow:

73/9 Third Proof

The Ḥanafīs also proclaim, in the two chapters of Interest and Loan from the book of trading, that it is permissible to borrow bread from a number of neighbors, because that has become something popularly known among them as a result of the need to it. However, this is the opinion of Imām Muḥammad follower of Abū Hanīfah which is the superior argument that the formal legal opinion has been given in the school of Islamic law. So, it is permissible if the loaf taken is different from loaf returned, with the fact that the bread is interest from the category of taken stock. The texts of Islamic legal injunction have imposed equality in the exchange of the interest money with its kind in weight in taken stock and measuring in measurement, however the added favor in either of the two is a an unlawful interest and requires that its contract to be false or

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491 Reference to this issue has been previously made in the study of *Istiḥsān* (para 4/6 in *al-Ḥāshiyah*).

492 Because Abū Yūsuf was then saying that the ruling of the text rotates with *'urf* and changes with its change as previously discussed (see para 71/7-8 and 73/4).

improper. That is in six things which were previously discussed under the discussion on the customary text (para 71/7) while the jurists have taken measurements on those six things through what resemble them in prescription and cause like what the eatables or every two moneys that have combination of two partaken qualities which are unification of kind and of measure, like bread and other minerals except gold and silver. They also regard that suspicion in interest is similar to its identification in prohibition and forbidding by the unanimous agreement of the jurists (see *al-Hidāyah* and its commentary 6/154).

However this permission for the loaning of bread to many neighbors without looking at the disparity of the weights is what Imām Muhammad refers in it, to the common *'urf* with the proof that the neighbors have been acquainted to the wasting of parts of the weight and the consideration of the number only (see *Radd al-Muḥtār* 4/187).

With that, the dealing became invalid to take a way to the legally prohibited interests, so the cause of the general texts in the prohibition of interest became unidentified in this way, with the fact that the ruling rotates with its cause. There is no a special text prohibiting the loaning of bread to a number of neighbors on the method of particularization and specification in order that the this *'urf* can collide the clear text to the extent that the viewed measurement has become cause of general texts in prohibiting of interests, however this cause cannot be identified in this *'urf* among the neighbors since they did not regard the division of the weight among the loaves.

73/10 This group of established juridical proofs and its explanations which were transmitted from the jurists speak out that *'urf*, if it is being removed and the cause of the contradicting text is being proscribed, then it is legally regarded even if it an incidental *'urf*.

However, if the cause of the contradicting text cannot be negated by the incidental *'urf*, then there is no consideration for this *'urf* towards the generality of the text, because the consideration of the incidental *'urf* will then abrogate the text, while the *'urf* has not such authority (see *al-Muwāfaqāt* 2/283- 284 and *Fatḥ al-Qadīr* 6/175).

If people get used to some legally repudiated habits in line with general legal texts and they become acquainted with them in some seasons and obsequies like the habit of mourner on deceased person in a way that may trespass the Islamic legal limits in it like dancing of men together with women during jubilations and celebrations which

is legally considered a repudiated immorality. Also, examples of that is the habit of uncovering some parts of naked body in works or plays. They may also be acquainted with interest in some situations or some expressions, in such cases it will not be in their habit for that and its likes must be prohibited and curbed because the unlawful and repudiated things were only legally prohibited as a result of corruptions and evils that can spoil family and society and therefore affect the social life to the extent of pulling out from the cause of righteousness and perfection which *Sharī'ah* aims at guiding to. So, people's assimilation of anything among these evils and corruptions cannot legally remove the cause of prohibiting them since prohibiting them has never been from the reason of non-acculturating with them, but rather from slagging of their results. This, however, prevails and increases with its acculturation and has never decreased.[493]

[493] Ibn 'Ābidīn made a research on the ruling of a clash of *'urf* and text in *Nashr al-'Urf*, and summarized from the statements of the jurists that: "If the *'urf* contradicts the text from all aspects to such extent that the text becomes special on the subject so as to impose an action with the *'urf*, the text will be dropped and will be no doubt in retrieving of the *'urf*, like the acquaintance of people with much among the unlawful things which were prohibited through special texts on them. However, if it does not contradict it from all aspects like if the text is general and the *'urf* contradicts it in some of its applications, then the *'urf* will be considered if it is general *'urf*, because the general *'urf* is good to be specified for the text".

It has not been distinguished between the established *'urf* with the appearance of the text and the incidental *'urf* after it. Ibn 'Ābidīn relies in that on a text which he transmitted from *al-Taḥrīr* by al-Kamāl ibn al-Hammām. However, Aḥmad Fahmī Abū Sinnah, in his treatise *al-'Urf wal-'Ādah fī Ra'y al-Fuqahā'* which appears during the third edition of this our book, has responded to what Ibn 'Ābidīn cross checked in this issue. He explained that the word of the author of *al-Taḥrīr* is on the ancient *'urf* which is established with the appearance of the legalizing text. However, the emergent *'urf* is not good for the specification of the general text even if it is a general *'urf*. This is correct except that Abū Sinnah has selected another basis with its summary as follows: "That the Emergent *'urf* if it is backed legally from a text or consensus or a necessity, it will be considered even if it contradicts the special text, if not, then it will not" (see *Risālat al-'Urf wal-'Ādah fī Ra'y al-Fuqahā'*, pp. 94-100).

SECTION 74

CONFLICTING SITUATION OF *'URF* AND *IJTIHĀD*

74/1 First: On the *Ijtihād* that rests on speculative analogical deduction, legal preference or act of seeking human welfare

The reasoned rulings deduced affirmatively by the diligent intellectual jurists in the absence of legal texts can either be established through analogical deduction extracted from a ruling that has already been formulated and legislated by the legal text. This is so, because the rationale, sources, and subsidiary rulings have all met, or through the juristic preference or even the act of public interest when there is no similar legal text that may be compared with.

The Islamic scholastic reasoned efforts (known as *ijtihādat al-Islāmiyyah)* seem to have unanimously agreed that the analogical deduction can be dropped for *'urf* since the laid down regulation in that occasion is that this *'urf* has not been contradicted directly by either special or general text. In addition, the *'urf* is usually a sign of necessity and need, so it is stronger than analogical deduction (*qiyās*), and therefore, is given more weight in the cases of contradiction (see *Nashr al-'Urf* by Ibn ʿĀbidīn in *Majmūʿah Rasā'il*, 2/116).

Even Ibn al-Hammām has mentioned while explaining the word *al-hidāyah* that *'urf* is equal to be legal position of *ijmāʿ* (consensus) when there is no textual evidence [on a specific matter] (see *Fatḥ al-Qadīr*, 6/157).

Also, it is generally known that preferring the *'urf* over analogical deduction is regarded by the Ḥanafīs and Mālikīs as part of *istiḥsān* (legal preference) whereby the opinion based on *qiyās* may be dropped for other arguments like *'urf*.

So, if the preference of *'urf* over the legally backed analogical deduction is indirectly possible, it is therefore an obvious indication that it can also be given weighed over *istiṣlāḥ* which does not rest on text, but rather on chronological human welfare that can be easily reversed as times change in terms of new situations and requirements.

74/2 From among the branches of this principle in the Ḥanafīs processed legal efforts, are the following applications:

1. That the sale of bees and silkworms is not permissible according to Abū Hanīfah because he did not regard them as wealth, making analogy from other land beasts like frogs.

   However, Imām Muhammad who was among his followers, ruled that both can be wealth and possibly sold since people make business transactions and dealings with them.

2. That Analogical source has legislated that it is compulsory for the judge to listen to every lawsuit submitted to him, before judging in favor or against the claimant according to what might be established before him.

   However, the Jurists have disregarded this analogy (*qiyās*) in the case of the claim of a wife after consummation who claimed that her husband paid nothing to her from the forwarded part of her dowry, and so requested for judgment on the full payment of the forwarded dowry. They said that this claim must not be entertained; rather the judge should turn down her claim without questioning the husband on it. They explained this ruling through the principle of *'urf* because the human habit is equable as it could not leave behind that woman has not been married to her husband until he has, at least, paid part of the forwarded dowry or even all. So, this lawsuit can be nullified on the basis of the apparent situation after consummation, so she must not be heard (see *Radd al-Muḥtār*, on *al-Mahr* 3/363 and *Tanqīh al-Fatāwā al-Ḥāmidiyyah* beginning of *al-mahr*, 1/20).[494]

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[494] It should be noted here that this *'urf* is no more equable in Syrian cities nowadays, though it is still the most common as many women are still been given in marriages without taking anything from the dowry with the intention of simplifying things to the husband. So it is allowed to hear this lawsuit now.

Shihāh al-Dīn al-Qarāfī has even narrated in his book, *al-Iḥkām fi Tamyīz al-Fatāwā 'an al-Aḥkām* from Mālik that if wife claims that she has not taken her dowry after the consummation with her, then, the statement of the husband would only be regarded though the analogical source is 'not to take'. It has also been transmitted from Qāḍī Ismā'īl that this is based on the *'urf* of the medinites during the era of Malik that man would not enter with his wife until she has taken all her dowry; he said, "Nowadays, their *'urf* is on the contrary, as the statement and oath of the wife are only recognized on the fact that she has not taken the dowry because of the difference of the dues" (see *al-Iḥkām fi Tamyīz al-Aḥkām* on *Jawāb al-Su'āl*, 39, p. 68).

3. Analogical principles have ruled that refunding of debt to other than the lender is not allowed and its collection must not be carried out for him if the collector has no representational order from the lender to do so.

   However, the jurists disregarded the *qiyās* (analogy) in the case of an adult maiden girl whose father or grandfather collects her dowry from her husband during her wedding. They considered the collection that it was carried out on her behalf and protective to the conscience of the husband, in terms of *'urf* and manner, in as much as there is no prohibition from her on the payment of dowry to other than her.

   This is how the jurists used to mostly drop the ruling of *qiyās* for that of contradicting in various legal matters.

74/3 Second: On the *Qiyās* that rests on customary cause

When this authority of *'urf* in *fiqh* is against the *Qiyās* that rests on spontaneous similitude in the causes between stipulated rulings and analogically deduced rulings, it thenceforth signifies the method of preference to us, on the exchange of analogical rulings for the exchange of whereas the cause of analogy *'Illat al-Qiyās* itself is based on *'urf*. So, this exchanging matter will be liable for the exchange of *'urf*, in ruling and not against *qiyās* but rather in conformity with it.

1. In the Ḥanafī school, the opinion of Imām Abū Ḥanīfah was that if a garment usurper dyes it into black colour, that dying will still be regarded as fault finding to it. So, the owner will have to choose between leaving it for him so that the usurper has to give him the guarantee of paying it in monetary value which it should cost if he had usurped it without dyeing or have the garment back with the guarantee from the usurper to pay for the lack of its value caused by this dyeing, according to the general analogical ruling in the case of the defect caused on the usurped item by the usurper.

   So, when the People's *'urf* has changed in terms of black color which has become desirable for the reason that the Abhasids have taken it as slogan, the two colleagues said that dyeing done by usurper into black garment, is considered eventually as an addition into it not faultfinding to it. Therefore, the ruling of addition made by the usurper will now be applied on the usurped item, so that the owner can choose between leaving it for him

asking him for guarantee of paying its monetary value if not dyed or having it back while paying the monetary value of addition to the usurper, so that the rights of both of them can be cared for. The jurists of the school of thought however stipulated that this difference between Abū Ḥanīfah and his two followers on this issue and its likes, is just a difference of *'urf* and time, not a difference of insight theory and evidence. Even if it were to be that Abū Hanīfah was still alive, he would have ruled according to his two followers' view on the case of exchanging (see *al-Ghasb fi al-Kafālah Sharḥ al-Hidāyah,* 8/271; *Radd al-Muḥtār* 5/ 125).

2. In the other schools, we find al-Qarāfī al-Mālikī mentioned in his *al-Iḥkām*, that formal legal opinion (*iftā'*) with the rulings sourced from the dues after the changing of that dues is difference of unanimous consensus *(ijmā')*. He, however, described that term as: "Ignorance in religious education" of those who say:

   "We are unconditional followers, as there is no option for us except to make legal counsels only from the contents of the books that contain the rulings transcribed from the diligent effort making scholars".

   He even explained that the changing of those rulings in accordance to the incessant renewed dues is not a composition of an *ijtihād* that might nullify the *ijtihād* of the orthodox diligent scholars (*mujtahidūn*), but rather it was an application of a principle which was unanimously consented on by the orthodox diligent scholars in Islamic law. They even made it compulsory to abide with.[495]

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[495] See *al-Iḥkām* by al-Qarāfī on Question 39, p. 68; and *Nashr al-'Urf* by Ibn 'Ābidīn in *Majmū'ah Rasā'il*, 2/125 and *Al-'Urf wal-'Ādah* by Abū Sinnah, p. 105.

SECTION 75

PREFACE OF SECTIONS 75-78

COMPARISON WITH CUSTOMARY CIRCUMSTANTIAL EVIDENCE AND THE TIME VARIATION

75/1 On the case of *'Urf,* its authority and the extent of its acceptability in Islamic jurisprudence, the researchers were accustomed to the inclusion of the issues of *al-Qarā'in al-'Urfiyyah* (customary evidences) and *Taghayyur al-Zamān* (time variation) where the rulings are subjected to changes in terms of special couditions and general characters.[496]

We have seen that the two topics, with their positions in Islamic jurisprudence, as attributed to great influence in the establishment of the rules and its changes, are not valid for integration into the concept of *'urf,* since both of them can constitute independent topics aud a type of legal proofs that can be distinguished from iu its special juristic concept, even if with the presence of approximation and proportionality betweeu them and *'urf.*

Therefore, we have avoided making any exemplification from the examples of both of them in all of our previous discussions on the theory of because of this perception.

However, we shall explain each of them in the subsequent chapters for comparison; so that the difference between them and *'urf* can be apparently obvious.

Customary Circumstantial Evidence *(al-Qarā'in al-'Urfiyyah)*

75/2 The word *qarā'in* is the plural of *qarīnah* which means any apparent sign comparable with an esoteric thing to evidently indicate it. It is derivatively taken from the word *muqāranah* which literally means companionship and fellowship.

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[496] See *Risālah Nashr al-'Urf* by Ibn 'Ābidīn and *Risālat al-'Urf wal-'Ādah f Ra'y al-Fuqahā'* by Aḥmad Fahmī Abū Sinnah and the examples the two contain.

The indication of *qarā'in* on its meanings highly differs in strength and weakness. Its strength implication may even reach the level of conclusive indication *(al-dilālah al-qaṭ'iyyah)*, like the case of ash or smoke; because both of them are decisive indication on the existence of fire. While it may, however, be so weak that its indication may even drop to the level of mere probability.

The Circumstantial evidence (*qarīnah*) may be either reasonable or conventional:

The reasonable circumstantial evidence *(al-qarīnah al-'aqliyyah)* is that one whereby the attribution between it and its meaning is so firm that the intellect can always figure it out. The example of it is the presence of stolen item with who has been accused of theft.

The conventional circumstantial evidence *(al-qarīnah al-'urfiyyah)* is the one whereby this attribution between it and its meaning is based on *'urf* and manner followed by its indication whether available or not and which changes with its mode of changing, like a Muslim purchasing a goat shortly before *'Īd al-Aḍhā*. Definitely, that is a circumstantial evidence on the intention for the sacrifice for *al-Aḍhā*. Also, it is like the goldsmith or jeweler's purchasing of a ring. It is surely a circumstantial evidence that he has purchased it for the purpose of trade. So, if not the manner of sacrifice with the former and the trading manner of the latter, there might have not been any circumstantial evidence *(qarīnah)*.

75/3 Grades of the jurists' reliance on the two types of circumstantial evidences, in judgment.

The Islamic jurisprudence has considerably approved *qarā'in* (circumstantial evidences), irrespective of its type, as one of the affirmed proofs which can be relied on, in judgment at various levels.

a) If the circumstantial evidence is a conclusive one, it is solely an irrevocable testimony which is sufficient for judgment, as if a person is seen outside of a house while in the state of confusion, holding a knife contaminated with blood and at the same time, a slaughtered man is seen inside the same house in the state of disorder, the man outside would be considered as the killer (see *al-Majallah* 1741 and its commentary).

b) However, if the circumstantial evidence is not a conclusive one in its indication but predominant, the jurists accredit it as an original main evidence that can be used to overweigh the claim of

either of the two quarreling partners together with his oath until its opposite is established with a stronger proof.

Among this group is *al-Qarā'in al-'Urfiyyah* who consider it among what is regarded as *al-ẓāhir* (i.e. the apparent) which means one which its status is apparent and clear. The indication of those apparent evidences which are not conclusive naturally, are its power in front of the judge and therefore considered as premier factors of overweighing for the claim of whom it has supported among the two antagonists till different view is more established in its weight.

75/4 Examples of the Jurists' approved reliance on the customary circumstantial evidences in legal solutions

On this basis, the jurists have established many juridical solutions in various happenings, as they stipulated that:

If the two spouses disagree on some house stuffs, whether they are the husband's property or wife's and none of them has proof for their claims, the statement of the husband will be given weigh with his oath on those men naturally use like sword and men dresses. So, the judgment will entitle him to them in principle. Likewise, the statement of the wife will be given more weigh on the tools used naturally by women like women dresses and their appliances; that was out of the circumstantial evidence for the manner and *'urf* of the usage, even if there is possibility that any one of the two might really possess what are naturally parts of the needs of the antagonist.

However, this is so, when one of the two is neither a producer nor a trader in the type suitable for other. If it is so, then the judgment will then be in favor of his or her ownership of the claim accordance to the effect of the verse.

As for those things that can be equally suitable for both of them like furniture and cupboards, the claim of the husband would be approved in principle since he is considered the owner of authority over it, while authority is another circumstantial evidence among the indications of possessive manifestation (see: *al-Majallah* 1771 and its commentaries; *Mu'īn al-Ḥukkām* on *al-Qaḍā' li-'Urf wal-'Ādah*, p. 161; and on *al-Qaḍā' bil-Qarā'in*, p. 204).

Similarly, they said about the sailboat loaded with flours, that if the sailor and the flour trader disagree on the ownership of the sailboat with what it contains, without proof from the two sides, it will then be judged, in principle, that the flour is for the trader while the

sailboat will be for the sailor, until there will be another overwhelming proof to establish the truth of the opposite.

This is how they considered all the similar customary circumstantial evidences as premier factors of overweighing which the judgment approves together with oath on giving preference to the statement of one of the two antagonists (see *al-Majallah*, on *al-Qawl li-man?*).

This is also in the Mālikī school as the author of *al-Tabṣirah* has stipulated that if the perfumer and the tanner disagree on perfume and skin, or a jurist and an ironsmith disagree on something like jubbah and bellows etc... taken from the principle of judging with *'urf* and manner.

However, the Shāfi'īs did not accept judging with these circumstantial evidences on the assumption that it will contradict what the Prophet (s.a.w.) was reported to have said: *"Provision of evidence is recommended on the prosecutor, while swearing with oath is on the denier"* (see para 5/23).

Truly, there was not any difference between them as elucidated by the author of *Tahdhīb al-Furūq*.[497]

75/5 It is now clear to you from the previous examples that the circumstantial evidences are the juridical judgments whereby the reasoning is given preference with it possibly over another in a way that it relies there onto a relationship and a link supported by the common issue. So, its final reference is the mental judgment[498] and not from the main idea of the theory of *'urf* which rules in the specification of rights and adherences, limitation of dispositions, explanation of contracts and agreements, specification of texts and determination of the purpose of lawmaker together with every speaker. It has authority in directing the responsibilities as an agent of the lawmaker on every what the text of the law is silent.

This is so, on the condition that the authority of the indication in the customary circumstantial evidences is specifically the real *'urf*. So,

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[497] See *Risālat al-'Urf wal-'Ādah* by Abū Sinnah, pp. 118-119 as transmitted from *Takmilah Fatḥ al-Qadīr*, *Takmilah Radd al-Muḥtār*, *al-Baḥr* on *al-Taḥāluf al-Zayla'ī* on *al-Da'wah*, *al-Tabṣirah fī al-Fiqh al-Mālikī*, 2/58; *Tahdhīb al-Furūq* in the footnote of *al-Furūq al-Qarāfī*, Article 160, v. 3, p. 185; and *al-Muhadhdhab fī al-Fiqh al-Shāfi'ī* by al-Shīrāzī, v. 1, p. 335.

[498] We have related from the Uṣūlī scholars in the definition of *al-'ādah* (i.e. *'urf* or manner) that it is: "The repeated matter which is without any reasoning contact". This word *'ādah* is a sister of *'urf* (see para 67/8).

with that consideration, it is possible that it is subjoined and attached with the work on *'urf* as we have just done here, not for the assembling of its issues in the main idea of the discussions.

Moreover, we have pointed to the fact that the circumstantial evidences are of two types in the previous context of *istiṣlāḥ*:

1. Legal Circumstantial Evidences: It is the one accredited by the law, in imposing some rulings.
2. Juridical Circumstantial Evidences: This is what the Judge takes as a proof in clarifying and affirming the facts that the assessment of its indication can reoccur on the reality (see footnote para 4/8).

The Legal Circumstantial Evidences are mostly kinds of Intellectual Circumstantial Evidences, because the law has firmly established a rule on it and so compulsory that it stands on a firm proportion between indication and meaning as it is in the rule of prescription *Murūr al-Zamān* (passing time) and *Ṭalāq al-Firār* (divorce of escapre).[499]

However, as for the Juridical Circumstantial Evidences; they can be either Intellectual or customary, because the judgment has become acquainted with all the evidences, whether periodical or not, for the knowledge of the events which ruling would be based on.

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[499] *Ṭalāq al-Firār* is the kind of divorce whereby the husband would divorce his wife irrevocably without her pleasure, whereas he is either sickly about to die or mostly in state of perishing. The *ijihād* of the Hanafis has affirmed that this situation is a legal circumstantial evidence since the man has intended, with this divorce, to disinherit his wife when he has already despaired from living.

This is so, because if he had intended the separation out of evil companionship on which the *ṭalaq* was legally sanctioned, and this has only happened without real divorce since it only occurred during the sickness of death whereby he was by the door of eternal separation. For this reason, they have made it compulsory that she can inherit her husband with some certain conditions. However, this is an example of the most apparent theoretical pictures of prohibition of arbitrariness in the application of right in the Islamic jurisprudence. Meanwhile, the legal or juristic circumstantial evidences may also be from the customary type in which the indication of the evidence relies on incessant general customs as in the issue of disagreement between two spouses on the division of house properties and the issue of the boat etc.

SECTION 76

'URF AND TIME CHANGING: GENERAL VIEW

76/1 It has been established in the legal jurisprudence that there is a great influence for the changing of the situations and periodical conditions, in various diligent legal rulings. These rulings are nothing except a regulation necessitated by the law with the aim of establishment of justice, seeking welfare and prevention of evils. It therefore has confided correlation with the situations, chronological devices and common ethics.

The contemporary jurists from various schools of thought have legally given a formal opinion about this on many issues against the opinion based enactments of the former leaders and jurists of their schools of thought. They proclaimed that the reason for the difference in their legal formal opinions as against those of their predecessors is the difference of time and moral degeneration. Therefore, they were not truly in opposite of the predecessors among the jurists of their schools of thought. Rather, even if those first religious legal leaders were available during the time of these contemporary ones, and could see the difference of time and morals, they would also adjust to support the view of the contemporary scholars (see *Nashr al-'Urf* by Ibn 'Ābidīn in *Majmū'ah Rasā'il* 2/125).

On this basis, was the foundation of the Juristic principle which says: "Changing of rules through the changing of times is not deniable" (*al-Majallah* 39).

76/2 What are the rules that must be changed with the change of time?

The Jurists of the schools of thought have unanimously agreed that the rulings that can be changed with the change of times and human morals are the diligent efforts making rulings whether analogical or ameliorative, i.e. that were established by the diligent effort based on *qiyās* or factors of human welfare, and it is what was intended by the principle earlier mentioned.

But the basic principles on which the *Sharī'ah* came to establish and solidify with its original instructive texts like prohibiting of those

who are absolutely forbidden to marry, compulsion of mutual satisfaction in contracts, commitment of a man to his agreement, guarantee of damage, confession on self not on other, compulsory prevention of harm, suppression of crimes, blocking the pretexts of immorality, protection of acquired rights, execution of responsibility, avoidance of default of every responsible assignee and prohibition of torturing the innocent because of the offence of other. So, also are other rulings and legal established principles which *Sharī'ah* has come to establish and fight for. These cannot be changed with change of time, but rather they are the fundamentals that the *Sharī'ah* has brought for the reformation of times and generations. However, the facilities of its realization and the styles of application may be changing with modern times' variation.

For instance, the facility of rights protection which is the judgment, the courts would therein stand on the style of single judge that his judgment is at one irrevocable level. So, it is possible to change to the style of multi judgment and levels of courts, according to chronological human welfare which has required the addition of provision because of the degeneration of safekeeping.

Truly, the Islamic legal rulings which change with change of time, whatever changes occur to it through time changes; its legal principle still remains one. Therefore, it is the matter of making right the right, bringing human benefits and prevention of evils. In addition, there is no change of rules but rather change of facilities and styles that drive to the goal of law, because those facilities and styles, in most cases, were not confined by Islamic law but absolutely left to make choice of what productively benefits most in arrangement and the most successful remedy in evaluation, from it at all times.

76/3 Factors of change of time are of two types: degeneration and development

The change of time which imposes change of diligent juristic rulings may originate from the degeneration of morals, loss of piety and weakness of control, which is known as time degeneration.

It may originate from the happening of the organizational situations and new chronological facilities like ameliorative legalistic commands, administrative settings and economical systems etc.

Like the first, this second type also imposes changing of diligent juristic rulings established before it, if it cannot accommodate it, since it will then be like an ordinary play or an injury which *Sharī'ah* has

discouraged people from. Moreover, we have transitively presented from *al-Muwāfaqāt* of al-Shāṭibī the statement that: "No play in the issue of *Sharīʿah*" (see para 64/2) and we shall therefore explain the instances of changing of legal rulings through the two types of change of time.

SECTION 77

CHANGE OF DILIGENT LEGAL RULINGS THROUGH THE TIME DEGENERATION

77/1 Among the issues which the contemporary scholars changed their rulings established by the diligent effort *ijtihād* of the first religious leaders, with the explanation that it was due to degeneration of time, i.e. general moral degeneration, are the following issues:

77/2 **(a)** It has been conclusively established that it is in the origin of the Ḥanafī school that the debtor's actions may be executed on his wealth through gift, endowment and other types of donations, even if his debts could absorb all his wealth, in consideration of the fact that the debts are under his safekeeping as capital money which he can execute his action on. This is the requirement of analogical principle.

Then when the power of human safekeeping deteriorates, greediness becomes rampant, piety decreases and the debtors deliberately started slipping their money in the presence of the creditors through the means of endowing or donating it to their relatives or friends, the contemporary jurists of the Ḥanbalīs and Ḥanafīs gave a formal legal opinion (*iftā'*) that the actions from the debtors should no longer be executed except with whatever remains after the refund of the debts from his money as previously discussed in its place on the theory of mastership (para 65/5).

77/3 **(b)** It is in the original principle of Ḥanafīs that the usurper cannot indemnify the value of the benefits of the usurped item beyond the usurping period. He can only indemnify the real item whether it perishes or it is faulted, because the benefits to them are invaluable in themselves. They can rather be valued through the contract of rent, not contract in usurping.[500]

However, contemporary jurists of the Ḥanafīs critically looked into the range of people's ventures into the usurpation and the weakness of religious inclination in them; therefore they gave a

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500 The three Imams have even viewed the opposite of the view of Ḥanafīs diligent scholastic exercised

formal legal counsel on the possibility of incorporation of usurper (i.e. intruder or trespasser) into the waging of similitude for the benefits of the usurped item if it is an endowment money or money of an orphan or which is kept for trading. This formal legal counsel is in contrary to the original analogical principle in the school of thought, but done purposely so as to snub people from enmity because of the time degeneration. These three types of wealth are factors of greediness because of the personal motive on their protection.

On this, the work is established and *al-Majallah* was produced (see Article 596 and its commentary). Relying on the cause (i.e. *'illah*) itself, we can say that the principles of *ijtihād* (i.e. diligent scholastic effort) of the Ḥanafīs absolutely accept the rationale of incorporation of the exchange of the benefits of the usurper in all types of wealth, not in these three types only, because of the growing degeneration of the safekeeping, increased tendency of greediness to the wealth of others and the transgression on others' rights.

This generalization of the incorporation of the benefits is prescribed by the statutory texts to us nowadays, and it is beneficiary.

77/4 (c) In the original principle of the Ḥanafīs is that the wife if she collects the hurried part of her dowry, she is ordained to follow her husband wherever he wants.

But the contemporary jurists noticed the reversion of ethical manners, prevailing of oppression and that many men used to travel to distant countries where the women would not be able to find their relatives and any helper, so their husbands may use that opportunity to misbehave to and oppress them. For this, the contemporary jurists had to give formal legal counsel that even if wife has collected her hurried dowry, still she ought not to be forced to follow her husband to any place except if it is her motherland, even if the marriage has been contracted between them. This is so, because of the depravity of time and people's characters. On this, the *fatwā* and judgment in the schools of Islamic law are established[501] (see a chapter on *al-Mahr* in *Kitāb al-Nikāḥ* in *al-Durar* 1/347; and *Radd al-Muḥtār* 2/360).

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[501] It is noted here that Article 71 in *Qānūn Ḥuqūq al-'Ā'ilah al-'Uthmāniyyah* which was prominent to us, came to impose the following of husband to wherever he wants, on wife, that is in reference to the original principle of the schools of Islamic law since the husband is expected to know the roots of his own sustenance over the family.

77/5 **(d)** In the original principle of the Ḥanafī and other schools, the judge can judge with his personal knowledge on the events. That is, his knowledge on the events of disagreement is good to rely on, for his judgment. That knowledge even suffices the prosecutor who may not necessarily need to establish his/her claim again with any evidence. So, the knowledge of the judge on the real situation will serve as proof. As precedence, there were reported cases of such judgments about 'Umar and other predecessors. However, it was noticed afterwards that the judges were conquered by decadence, evil and bribe taking, to the extent that there were no confidence, chastity and efficiency in most judgments. Mostly, the judgments were full of cajoling to the governors for the purpose of satisfying them and making acquaintance on the course of seeking for jobs.

For this reason, the contemporary jurists have also given formal legal counsel that the judgment of the judge which is based on his personal knowledge on the events would not be acceptably good any more. It is henceforth inevitable that his judgment is supported by established proofs in the juridical council. Even if the judge witnesses a contract or a loan or any incident between any two outside the court of justice, one of the two launches a court claim on it while other repudiates it, it is not right for the judge to judge in favour of the prosecutor without a proof; because if that is applied after the degeneration of the safekeeping of many judges, they would have been misrepresented their claims of the knowledge of events with falsehood and tendency to the strongest means, among the two antagonists. This prohibition, however, loses some rights due to the loss of substantiation, works off many evils. This is how the work of the contemporaries has firmly settled down on the ignoring of the judgment made by the judge based on his knowledge of the incident.

Yet, the judge is still allowed to rely on his knowledge in judgment other than the matters of hisbah (i.e. price control)[502] and standby administrative arrangements like his knowledge of a woman's

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The cause of this reference is that the said law has opened, in the Article 130, the way out for woman to be eligible for the request for the juridical separation if she is no more comfortable to stay with her husband.

Then, Article 70 came from personal law issued in the year 1953 to us establishing: "The act of forcing wife on journey with her husband (is legally prescribed) except if the opposite was made as a condition during the contract or the judge has noticed an impediment to the journey".

502 See the meaning of the *Ḥisbah* affairs, as it has been previously discussed (footnote para 13/1).

proof on the continuation of mixing between her and her husband, or his knowledge of money usurpation. He, therefore, has the right to prevent the occurrence of divorce initiated by husband and the right to put the usurped money under the safekeeping of an honest curator until the time of fact establishment.[503]

77/6 (e) Among the fundamental principles in the origin of the school of thought is that a person must neither be hired nor paid on obligatory duty legally prescribed on him.

For this, if the usurper has refused to return the usurped money to its place except through payment which the oppressed pays it to him; he does not deserve it and must therefore be taken back from him. So, if wife refuses to perform the house duty which is religiously mandated on her and thus hired on it by the husband, she does not also deserve payment.

Among the secondary juristic principles of this, are the observance of worships and obligatory religious rites, like Imāmship, Friday sermon delivery, teaching the *Qur'ān* and spreading knowledge on which the wages must not permissibly be taken in the original principle of the *Madhhab*, rather it is incumbent on any competent personality to do either of them freely because it is a religious responsibility (see *al-Badā'i' Sharā'iṭ al-Ma'qūd 'alayh fī al-Ijārah* 4/191-192).

However, the contemporaries among the jurists of the same school noticed the declining zeal or slumping élan on these religious responsibilities and the stoppage of wages for the scholars which had forced them to seek for sustenance, until the performance of these obligatory responsibilities have become unguaranteed except with wage payment. For that reason, the contemporary jurists passed *fatwā* (i.e. formal legal counsel) on the permissibility of taking wages on it, for the interest of Qur'ānic teaching, knowledge spreading and the establishment of religious slogans among humanity.

77/7 (f) Verily, the witnesses whose testimonies are acceptably judged by, on incidents, must he fairly just, i.e. trustable, since they are the keepers of religious rites, known for the truth and honesty. Surely, the fairness of the witnesses is a condition made by the *Qur'ān*

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[503] See *al-Durr al-Mukhtār wa-Radd al-Muḥtār* 4/345 and 355; *al-Ashbāh* by Ibn Nujaym on *Kitāb al-Qaḍā'* and *Jamī' al-Fuṣūlayn*, v. 1, p. 26 and v. 10, p. 133.

for the acceptability of their testimonies, supported by the *Sunnah* and unanimously agreed upon by the jurists of Islām.

But the contemporaries among our jurists noted the infrequence of perfect justice which was explained by the texts, because of time deterioration, weak safekeeping and flagging of the religious inclined feeling. So, if the judges often require quorum of legal justice in the witnesses, the rights would lost for the abstinence of established proof. For this, they passed *fatwā* in favor of acceptance of the testimony of the most quintessential personality among people where the perfect justice is decreasing.

The meaning of *al-Amthāl fal-Amthāl* (quintessential personality) is *al-Aḥsān fal-Aḥsān* (i.e. the best of the bests) in condition among the existing people, even if he himself is not perfect in the legal concept of justice. This means that they have stepped down from the stipulation of absolute justice to relative justice (see *Muʿīn al-Ḥukkām* Section II, Chapter 22, p.145).

77/8 **(g)** Likewise, the contemporaries gave fatwā that the acceptance of the moon sighting of two persons is a must on the confirmation of the crescents for the fasting of Ramadan and the two Eids (i.e. the two festivals - *ʿĪd al-Fiṭr* and *ʿĪd al-Aḍḥā*), even if there is not any cause of impediment to the sighting like cloud, fog or dust. That is a new fatwā after it was in the original primary principle of Ḥanafī school that the sighting of the crescent could not be established with the clarity of the sky except with the sighting of a big congregation, because majority of people used to search for the sighting. So, according to them, the isolation of the two in the claim for the moon sighting is a suspicion of error.

However, the contemporaries explained the reason for the acceptance of the moon sighting of the two which is the declining élans of people to the searching for the crescent sighting. Therefore, the sighting of two among them could not be suspicion of error in as much as there is no suspicion or accusation calling attention into doubt and misgiving (see *al-Baḥr al-Rāʾiq* by Ibn Nujaym; and *Riṣalāt al-ʿUrf wal-ʿĀdah* by Abū Sinnah, pp. 111-112).

77/9 These are the few examples among other issues in which the juristic opinions, *fatāwā* and act of judgment change, not for a difference in peers and Juristic Principles on which the first rulings were built but rather out of time changing and general moral decadence like termination of interests in responsibilities,

degeneration of safekeeping in treatments, spreading of oppression and weakness of religious inclination which can debar from wrong taking of others' rights fallaciously etc.

Even, whenever there was something from among the rulings sourced from the Prophetic Tradition based on the auspice of human conditions and characters during the prophetic period, then their conditions changed and characters deteriorated, it would then become compulsory that such prophetic ruling be changed accordingly to what would be in conformity with the objectives of law in terms of bringing human interest, preventing the evils and protecting the rights. The noble companions (*ṣaḥābah*) also followed this principle after the prophetic era.

It had even been reported in *Ṣaḥīḥ al-Bukhārī* and other sources[504] that the Prophet (s.a.w.) was asked about the wandering camel whether whoever sees it, can pick it in order to acquaint it with people and eventually return it to its owner whenever such owner surfaces (like the cases of missing sheep and the likes that can be feared for being lost), so the Prophet (s.a.w.) forbade picking it (lost camel) because there is no fear of loss on it as it is, on others. Therefore, he prescribed that it should be left coming to water and pasturing herbages (grasses) until it will meet its owner. This ruling had remained practiced up to the end of 'Umar's era.

But during the era of 'Uthman ibn 'Affan, he ordained that the wandering camels should be picked and even sold, in contrary to what the Prophet (s.a.w.) had prescribed, and whenever their owner surfaces, he would be given their prices. That narration was transmitted by Mālik from Ibn Shihāb al-Zuhrī.[505] The reason for that

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[504] Al-Bukhārī reported in the book of knowledge (*Kitāb al-'Ilm*), chapter of Anger in Admonition and Teaching whenever something detested is seen (From Zayd ibn Khālid al-Juhanī that a man asked the Prophet (s.a.w.) about wandering camel, he angrily said: "What is your concern with it? It has its irrigating devices and shoes, he is capable to reach water and pasture the trees, so leave it until it meets its owner". He also reported it in the chapter of hand-picking *luqaṭah* (2436). Muslim also narrated it in *ḥadīth* number 1722) on hand-picking. Ibn Al-Athīr said in *Jāmi' al-Uṣūl* 10/702 that he only stressed point on wandering camel with his statement: 'it has its shoes', since that is what it uses to tread the grounds because he intended with that statement that it uses it to travel on the surface of earth. Also, with his statement *saqā'uhā* (i.e. its irrigating device), he intended to give information that it is capable of reaching water, pasturing trees and refraining from devouring carnivorous animals. Likewise, as it is in the meaning of camel, it is also in cows, horses and donkeys.

[505] It was reported by Malik in *al-Muwaṭṭa'* 2/759 in *al-Aqḍiyah* tbat Ibn Shihāb was heard saying: "The wandering camels were regarded as brushed aside camels, nobody would touch them during the period of 'Umar (May Allāh bless him) until the era of

new ruling was because 'Uthmān noticed that degeneration of morals and safekeeping had so crept into people that their hands have stretched into *ḥarām* (unlawful thing). Therefore, this devising act is more protective for the wandering camel and more preservative for the right of its owner in fear of stealing. With that, even if it seemed that he had already violated the order of the Prophet outwardly, it is in conformity with his focused intention, since if that practice still remains compulsory after the decadence of time, the practice would have changed for the inversion and against the intention of the Prophet (s.a.w.) himself in terms of security of wealth which can result into harming others (see *Tārīkh al-Fiqh al-Islāmi,* published by Faculty of Law, al-Azhar University, p. 48).

'Uthmān ibn 'Affān who ordered that such camels must first be acquainted and introduced, then sold out. And if their owner smfaces eventually, their price must be given to him. Ibn Athīr said in *Jāmiʿ al-Uṣūl,* 10/711: *Iblan Mu'abbalan* means when the camels are neglected".

SECTION 78

REVERSION OF THE DILIGENT EFFORT MADE RULINGS AS A RESULT OF THE DEVELOPMENT OF MEANS AND THE DIFFERENCE OF SITUATIONS

78/1 (a) In the Past

It was reportedly affirmed from the Prophet (s.a.w.) that he forbade the writing down of his traditions saying to his companions: *"Whoever has written anything down from me besides the Qur'ān, should delete it"*.[506]

For this reason, the *Ṣaḥābah* (Companions) and their followers used to transmit the prophetic tradition among themselves through the means of memorization and verbalization without writing until the end of first century of Hijrah in conformity with that prohibition.

Afterwards, the scholars parted, in the beginning of the second century, into the collection of the Prophetic tradition through the order from the Just Caliph 'Umar ibn 'Abd al-'Azīz (May Allāh bless him) because they feared that it may be lost with the demise of its memorizers. They also noticed that the reason for the prohibition of the prophet (s.a.w.) on its writing down was because of his fear that it may mix with the *Qur'ān*, since the companions were then busy with the documentation of what were being revealed from the *Qur'ān* on patches. Then, when the *Qur'ān* prevailed and spread through memorization and writing, to the extent that there was not fear any more for the mixture of *Qur'ān* with *Ḥadīth*, the impediment to the writing down of the *Sunnah* was thenceforth removed. Rather, writing it became compulsorily necessary because it was the only way to save it from missing, as it had been previously discussed that ruling circulates with its cause in terms of either firmness or proscription.

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[506] Narrated by Muslim, in the chapter of *Zuhd* (asceticism) [3004], Ahmad in the *Musnad* 1/171 and al-Dārimī in *al-Muqaddimah* 1/98.

78/2 (b) In the Present Time

1. Before the formation of official drug records which restrict drug trafficking giving each separate number, there was contract on the drug that was not present at the contract council that it is inevitable to cite the legal limits for its validity which means what is adhesive to it from the four directions so that the drug on contract may be distinguished from others according to the requirements of general principles in the knowledge of the place of contract.

   However, after the establishment of the drug records in many kingdoms and countries nowadays, it suffices as a law in contracts to only cite the manufacturing number of the drug not its limits.

   This is what confronts the comprehension of *Sharīʿah* because the situations and chronological arrangements had produced a new facility easier and more perfect in terms of distinguishing for the drug than the citing of the legal limits in the drug contracts. For this, conditioning of citation of the legal limits turned to be a frivolity, knowingly that we have previously pointed out that there is no frivolity in the *Sharīʿah* (see para 76/3).

2. Likewise, the delivery of the sold drug to the buyer could not be perfect except through the draining of the drug and actual delivering of it to the buyer or through empowering him with it whether by handing over its key to him or the like. If this delivery could not be complete, the drug is considered under the custody of the seller, so its perishing possibility on collateral agreement will be his responsibility in conformity with the general juristic rulings in the surety on sold item before delivery.

   However, after the presence of the legal rulings which subdue drug contracts for registration in the drug record, the juridical diligent effort was established with us on the consideration of occurring of the delivery with the mere contract registration in the drug record. Therefore, from registration history, the guarantee on perishing of the sold item would move from the custody of the seller to the custody of the buyer since the registration of selling in it is an empowerment for the buyer more than what is in the virtual delivery. This is so, because the lesson in the drug legal possession is for the limitations of the drug record not for the consumption and disposal. With the registration of the sold item, the seller would not be able again to

act freely on the sold drug with another contract based on the fact that it is available in his hand. All the rights and ramified claims about the ownership, like asking for the removing of hands and for the wages etc. will be transferred to the buyer with mere registration.

Based on that, it has become necessary in the legal jurisprudence that the ruling of actual delivery of the drug in regard to the new organizational legal situations must be considered for the registration of the drug contract.[507]

3. The Islamic law made it compulsory on every divorced wife to observe *'iddah* whereby she is expected to spend a specific period of time in which she is prohibited from marrying with another man. That is, however, for the sake of legal objectives which is considered part of general order in Islām. The most important of it is the confirmation of the emptiness of her uterus from the pregnancy so as to prevent the mixture of family lineages.

   On the situations in which the judge would pass the judgment for the compulsory divorce or breaking of the wedding, the woman would have been considered an entrant into 'Iddah and the counting of her waiting period would start immediately after the passing of the judgment for the separation by the judge, because the judgment of the judge in the past used to pass a compulsory vexing for execution immediately. This was so, because the judgment had already been legally established on one level, while the judge had none that was rightly superior to him in looking to the case.

   However, nowadays the juridical order has been making the judgment of Judge succumbing for the appealing and/or critical vilification. This new legal order does not contravene the law because it is among the affairs of human welfares yielding to the principle of *Maṣāliḥ al-Mursalah* i.e. seeking suitable human welfare (see para 5/7 onwards).

   Therefore, if the judge passes judgment nowadays in favor of separation between the two spouses, it is compulsory that the wife should not enter into *'iddah* until his judgment has become confirmed not yielding to any method among the methods of legal vilification whether through the expiration of legal

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[507] We have adequately explained that with its proofs in *'aqd al-bay'* where the division of the cited contracts started in this juridical series (see para 109/4).

indulgences without offence from the antagonist or with the confirmation of the vilified ruling in the court where the case of vilification was carried to and its rejection because of the vilification when the judgment is seen in conformity with the fundamental principles. Henceforth, it is compulsory nowadays that woman enters into 'Iddah and starts its counting, not from the time of the passing of the primary judgment, because if she started observing *'iddah* since the period of passing the primary judgment, her *'iddah* might expire and she may be free from the marital commitments before the separation through the vilification taken up on the judgment of the first judge to invalidate the wedding. Then this ruling may be nullified out of the defectiveness which the high court might notice in it, while this nullification can erase the previous ruling and necessitate the return of the marital commitments.

How will that be possible after the wife has been free from the matrimonial traces with the expiration of her *'iddah* with the fact that it is legally possible for her to marry another husband or she might have even been married actually?!

For that reason, it is compulsory that the first primary ruling on separation be considered as a suspended ruling by confirmation (i.e. considered as a separation project) while its results did not pervade, especially among it was 'iddah except after it might become confirmed.

Before that, marital commitments and responsibilities would remain considerably manifested with all its results despite the judgment of the judge on separation in recognition of the change of the juristic situations from its previous conditions when the judgment of the legal judge was being passed on only one level confirmatively and without any reviewing commentator over him.

No care is to be taken in considering the marital commitment firmly established before the sanctioning of ruling with separation, except that there is an analog to that in law which resembles it in this aspect; it is the *ṭalaq al-rajʿī* (reversible divorce) which the husband himself may cause to happen. This is because the marital commitment still remains legally firm with the reversible divorce from all aspects between the two spouses despite the existence of the divorce in as much the wife is still in her *'iddah*. Even the marital sexual enjoyment remains lawful between them while the reverse on divorce may occur. Likewise, if either of the two spouses dies during the *'iddah*, the second will

inherit the deceased. So, the reversible divorce in Islamic system is, as in the modern language, known as: "Separation Project" which is liable to uplifting and cancellation through reverse method. If the waiting period of the wife expires without voiding of the intention of separation from the divorcing husband, then the real irrevocable separation has occurred.

Therefore, the analogy of the above ruling must be considered, in terms of the beginning of the waiting period of woman during the instance of legal divorcing nowadays.[508]

78/3 From these comprehensive examples and the likes, it is clear that the issue of changing the rulings in conformity with the changing of time is not good for consideration as core theory of *'urf* as considered by some researchers. It is rather part of the theory of *al-Maṣāliḥ al-Mursalah*. This is so, because the negligence of degeneration of safekeeping, decrease in piety, increase in greediness and new inventions are not customs that people previously knew to build their practices and interaction. It is rather decomposition of moral characters that weakens the trust or a variauce in the facilities of the chronological arrangemeut. All these are the factors that form the rulings which were established by *ijtihād* in some circumstances different from new circumstances, invalid for the realization of the objectives of the *Sharīʿah* in terms of its application. So, it is necessary that it changes to the shape which is in conformity with the upright settings in the legal objective and purpose for the primary ruling could be realized.

This is an analogy of the sail ship which has a target destination into the Northern wind for instance; surely its sailing will be established on the shape that can be moving with the ship towards the intended destination. However, if the direction of the wind changes, the rectification of the setting of the sail to the shape that can guarantee the movement of the ship towards its intended destination will be necessary so as to avoid digression or discontinuity.

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[508] Another example from the act of religious rites: is that the ×ambali Scholars have stated a ruling for the unpleasantness in using fan to subdue the heat of atmosphere during the observance of *al-ṣalāt*.

This ruling does not include modern electronic fans which mobilize the air without any effort from the *Muṣallī* (i.e. prayerful person) that may contravene the status of such *salat*. That is a good example for the dropping of the cause of the ruling which is hereby the movement of the *Muṣallī* (the prayerful).

The erudite scholar Ibn 'Ābidīn (May Allāh shower mercy on him) has even said in his treatise *Nashr al-'Urf* as follows:

"Many among the legal rulings are subject to change with the change of time, because of the change in the *'urf* of such time, or of the occurrence of a necessity or degeneration of the people of the time to the extent that if the ruling remains in its previous condition, the hardship and detriment will stay with people and that contradicts the principles of *Sharīʿah* which are based on alleviation, simplification, prevention of damage and barring the depravation. That is why you see the scholars of the *Madhhab* in disagreement with what had been stated by the *Mujtahid* in many cases in accordance with what were practiced in his time, because of their knowledge that if he was in their time, he would have also supported their view as deducible from the principles of his madhhab" (see *Majmū'ah Rasa'il* Ibn 'Ābidīn, 2/125).

Al-Shihāb al-Qarāfī also said iu *al-Furūq* under *al-Firaq* 28, the third issue 1/177 as follows:

"Rigid Immobility on transmitted reports is an aberration in religion and ignorance about the aims of the Muslim scholars and the past predecessors".

Ibn al-Qayyim said in the chapter of "Changing of *fatwā* and its variation, according to change of times, places, conditions, intentions and dues":

"This is a chapter with an anormous benefit. Through the ignorance of it, a great error has occurred on the Islamic law which has necessitated irresistible embarrassment, hardship and charging. It is what is known that the overwhelming Islamic law is in the highest position of welfare cannot produce. The structure and fouudatiou of the *Sharīʿah* are based on rules and suitable for human welfare in terms of wages and paying back. It is total justice, mercy, welfare and wisdom. So, any issue that relegates from fairness to oppression, from mercy to its opposite, from human welfare to depravity and from wisdom to frivolity, is not part of the *Sharīʿah* even if it is interpretatively iufixed....etc." (see *I'lām al-Muwaqqiʿīn*, 3/1; and Faraj Allāh Zakīy al-Kurdī ed., 3/27).

78/4 This is the end of the second division of this entry. In it, we have shown the five basic juridical theories which are the greatest reinforcements to the Islamic Jurisprudence and its spans on which its structures stand in its various chapters. They are the theories of ownership, contracts, corroborations, guardianship and *'urf*.

It is rare to see the secondary principle of Islamic jurisprudence without relating to one or more of these major theories. So, if there is an establishment of ownership in a specimen or an interest, it must then follow the theory of ownership and its principles. If there is a contractual commitment in it, it will then submit to the theory of contracts. If there is either validity or spoiling or falsehood or discontinuation, it should accede to the theory of (*'urf*). Likewise, if there is conduct of an action or statement or affirmation of a truth or right or a commitment, it should also submit to the theory of mastership, guardianship and contract.

These greatest basic theories lay down a scope about all the chapters of the Islamic Jurisprudence which encompasses them, rules them, guides their rulings and each aspect of it holds fast with each side of these rulings.

78/5 The sixth important theory has remained as it was also in the blue-print of my research that I would treat it and such perfectly complete the contract of the greatest basic theories. This theory is the theory of guarantees, whereby the juridical principles are to be displayed in the security of money/wealth, rights and their commitments in safekeeping, causes of Islamic legal inclusion, types of guarantee like stationary and moving (it is that one that necessitates a right on credited guarantor to return what he has guaranteed on his fellow being), factors and controls of each type and the likes of such issues. However, I abandon the treatment of this theory now as a result of time constraint and narrowing of the scope of this part despite the fact that I had already expanded the issues discussed in this part more than the limit which I estimated for it. Well, whenever the matter expands, it narrows[509] and whenever it narrows, it expands.

Now, we shall move into the third division of this introduction which is the last division dedicated for the displaying of comprehensive principles in Islamic Jurisprudence *(al-Fiqh al-Islāmi).*

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[509] Before this new discharging for *al-Madkhal al-Fiqhī al-'Ām*, Allāh has made it possible for me to produce the theory of harmful act and published it in an independent book (Dār al-Qalam, Damascus 1409 AH/1988 CE). It covers a great side of the theory of guarantees which have some causes other than harmful act, although I may republish the theory of the harmful act in the next volume (volume 3) of this series.

PART

3

THE GENERAL PRINCIPLES OF ISLAMIC JURISPRIDENCE

CHAPTER TEN

THE GENERAL PRINCIPLES OF ISLAMIC JURISPRUDENCE

SECTION 79

THE MEANING OF LEGAL MAXIMS AND THEIR JURISTIC POSITIONS

THEME ONE:
THE MEANING OF THE LEGAL MAXIMS

79/1 The word *al-Qāʿidah* from the linguistic perspective means the foundation of building and so forth. It is based on the saying of Allāh the Almighty: *"and remember when Ibrahim and Ishmael were raising the foundations of the House"* (al-Baqarah, 2:127) (see *al-Miṣbāḥ*, and *Gharīb al-Qur'ān* by al-Sijistānī).

The lexical meaning of this word is 'the principle' which means the rule that is applicable to all its parts. For instance, it is said: The active word *al-fāʿil* in the sentence should be nominative *(marfūʿ)*, while the object (*al-mafʿūl*) should be accusative (*manṣūb*).

However, in the terminology of the jurists, the word *al-Qāʿidah* is used as a predominant rule which it is applicable to most of its parts (see *Ḥāshiyat al-Ḥamawī ʿalā al-Ashbāh*, the first subtopic from the first rule). The examples are the expressios "Actions are by intentions" and *"the basic of the existing entity is to remain as it was until the evidence disproves else"*. This is similar nowsadays to what is known in legal terminology as (*mabādi'*) plural of *mabda'*, that is principle.

Therefore, we can identify it in an easier expression, and accurate to the meaning that the juristic principles are:

The legal maxims formed in short constitutional phrases, which comprise some general legislative rules that are applicable to the cases, which are regulated in their respects.

It is distinct with its few words, which indicates a general meaning, and total absorption of its entire contents. Thus, the

principle is concisely formed of two words or several words taken from general expressions.[510]

79/2 It was previously indicated at the beginning of the discussion in the section of the basic significant theories, the difference between those theories and the general principles. We had mentioned there, that these principles are really fundamentals and juristic rules, where each of them comprises a general rule. As for the basic theories that we elaborated in that second section, each of those theories establishes an objective of the regulation in the jurisprudence and the law. Perhaps, the general principle might stand as the special rule in some aspects of those theories, as it was previously mentioned.

79/3 These legal maxims, as we mentioned earlier, are dominant rules which are not regular, because they merely describe the basic juristic thoughts which indicates the general standard method in treating the issues, then organizing its rules. Though, the juristic reasoning often actualizes matters, while it sometimes deviates from this actualization to solve some exceptional approbation in some special requirements for those legal matters, which makes the exceptional rule in that purpose better and nearer to the objectives of Islamic law, relating in establishing justice, acquiring interests, repulsing evils, as explained in the discussion on *al-istiḥsān*.

For this reason, all those juristic principles, none of them are free from exclusions in the extraction of various applicable rules. However, some jurists view that these exceptional section of rules are either suitable to be deduced from another principle or given special exemption rules.

The author of *al-Furūq* by al-Qarāfī states from al-ʿAllāmah al-Amīr: "It is commonly known that most of the juristic principles are prevalent" (see *Tahdhīb al-Furūq*, v. 1, p. 36).

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[510] The general expressions in the terminology of the science of *Uṣūl al-Fiqh* are linguistically topical expressions which indicate with their formations or their meanings unrestricted numerous entities, as way of absorption, i.e. the word *al-mu'minūn* (the believers). Indeed, successful are the believers, because the definite form of the plural indicates generality of the word. Also, the word *al-qawm, al-raht, minn, and mā* (the nation, the group, who and what), all these are used to generalize, even though they are singular words. However, the kinds of the general expressions are disclosed in the discussion of *al-ʿām wal-khāṣ* (tbe general and restrict expressions) in the references of the principle of jurisprudence.

On account of that, *al-Majallah* does not permit judges to limit their rulings exclusively based on one of these general principles, without consulting another legal text, either specific or general, whose generality covers the matter being judged because all these maxims, along with their values and quantities, contains many exemptions. Absolutely, they are codes to comprehend the rules, not a source for judgment (see the first article from the introduction on *al-Majallah*).

THEME TWO:
THE PLACE AND POSITION OF THESE PRINCIPLES IN THE BASIS OF *SHARĪʿAH*

79/4 These prevailing principles do overshadow their high position in jurisprudence, and their positive impact on the deduction method. This is because through these principles are skillful forms, and bright images for the basis and fundamentals of the general juristic rules. In addition, they reveal its horizons, and its theoretical aspects, as they regulate the subsidiary sections of the practical rules with parameters, which indicate in each group from these subsidiary sections, the unification of reason, and aspect of its relationship, regarding the conjunction word, which connects the relation, regardless of the variety of its functions and its categories.

If not for these theories, definitely, the subsidiary sections of Islamic judgments will likely be spilled all over. Perhaps, their apparent meanings might contradict, without any principle which will retain it in the minds, and figure from it the general reasons, and specify its aspect of legalizing, and pave between it, the comparison and identical approach.

Al-Qarāfī stated in the preface of *al-Furūq*: Verily, the Prophetic legislation constitutes some fundamentals and subsidiaries, however, its fundamentals have two divisions:

The first division is called *uṣūl al-fiqh* (principles of jurisprudence), which most of its discussions relate to the principles of the judgments, which are derived from the words. For instance, command indicates obligation, prohibition indicates the forbiddance, the general and specific forms is what relates to it, like the abrogation and the preference.

The second division is the normative legal maxims. They are absolutely exalted and plentiful from which there are many subsidiary ruling whereas none of these principles are discussed in

the chapter of the principle of jurisprudence. It is likely to be summerised in there.

In short, these principles are needed with regard to Islamic jurisprudence, indeed, they are useful. Through the ability of setting these principles, the jurist will then be credited, the methods of making legal opinions will be clear to him. Whoever deduces from the subsidiary rulings, their particular will definitely contradict each other, and get all mixed up. It will require the memorisation of infinitely many partial principles without ends.

However, whosoever perfect these principles, he can manage them without the need to memorize many partial principles, due to their inclusion in the context of the general principles, while many of the subsidiary judgments will be suitable for him, when they contradict each another for the rest people" .

SECTION 80

HISTORICAL BRIEF ON THE FORMATION OF THE NORMATIVE MAXIMS

80/1 Verily, the popular normative maxims in the Islamic jurisprudence are not developed simultenous, as the laws were formed at specific times which are authorized by some well known men. However, its concepts were started, and its texts were written step by step during the progress and developmental period of Islamic jurisprudence, through some prominent jurists of different school of thoughts, the scholars who practiced the deduction and preference. They derive it from the indications of the general Islamic sources, the basic principles of jurisprudence, the conditions of judgments, and the reasoning approach.

For this reason, none of these principles can be ascribed to any particular jurists. On the other hands, some are taken from the Prophetic traditions, for instance, the maxim, *lā ḍarar wa-lā ḍirār*, means "there should neither harm nor reciprocating harm". Also, some are taken from the statements of some of the Imāms of of legal schools, in addition to the reports from their great disciples, wherein these statements one used afterwards as prevalent legal maxims. For example, the statement by Abū Yūsuf, the student of Abū Ḥanīfah in his *al-Kharāj*, that he wrote for the Caliph Hārūn al-Rashīd: "It is not permissible for the Imām to take anything from its owner as tax, unless through the established right" (*al-Kharāj: Faṣl Mawāt al-Arḍ*; and *Radd al-Muḥtār*, 2/257).

Most of these maxims, their standard final forms are developed through the deliberations, the modification, and the refinement, from the great jurists, with regard to the moral deviation. Thus, the reasoning from the rulings, and the application of the analogical methods for deduction, are the most relevant source for formulating these principles, and mastering their forms, which is successfully recognized after the major schools of law have been established, and the majority of their great adherents have recorded their Imām's

legal opinions, and arranged their basic principles and evidences (see para 13/2).[511]

80/2 It is noticed that the Ḥanafīs, which is the oldest school among all the four schools of law, its first class from its scholars were the first people to originate those general basic fundamentals in the form of maxims, and use them as evidences where the rest of the jurists from other schools select from them.

However, these principles were known at that time as *uṣūl* (principle) as previously reported from al-Qarāfī. Consequently, we see some elucidations of the schools with regard to the reasoning of some judgments. Similarly, we see some authors the principles utter the word: "From the principle of Abū Ḥanīfah, or the principle according to Abū Ḥanīfah, so and so". Then, they mentioned some of these principles, as it can be typically referred to from the book, *Ta'sīs al-Naẓar* written by al-Dabbūsī, also from *al-Qawāʿid al-Karkhī,* both of which will mentioned soon.

80/3 Perhaps, the earliest information which related to the compilation of these general maxims in the Ḥanafī school, in the form of legal formulas, was narrated by Ibn Nujaym, at the preface of his book, *al-Ashbāh wal-Naẓā'ir,* "Imām Abū Ṭāhir al-Dabbās, who existed between the third and forth Hijrah, had compiled the important maxims of Abū Ḥanīfah school, in seventeen general maxims. Though Abū Ṭāhir was blind, he repeats these maxims every night at his mosque after the departure of the people". In addition, Ibn Nujaym comments that Abū Saʿīd al-Harawī al-Shāfiʿī had met Abū Ṭāhir who then narrated from the latter some of these maxims,[512] including the five normative maxims, which are regarded

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[511] Some of the evidences of this progression relating to the legal formation of these principles, the prevalent basic principle in applying the confession against the confessor, while that judgment would not be executed against anyone else, we can find its current text analyzed in the hooks of present authors. As shown in Article 78 from *al-Majallah*, that (the confession is a limited evidence), while the basis of this maxim is mentioned in the maxims of al-Karkhī, which it is reported in this following text: "The norm: A person should be treated according to his confession, as he would not be trusted on revoking the right of others, and this confession does not invalidate the rights of others". The same manner happen with the majority of these reported principles, when their latest texts are compared with their formal foundations.

[512] Ibn Nujaym narrates the story of this journey and the collection of some principles, in a peculiar way, which its details are not correct. However, the original story is not deniable, because al-Suyūṭī also mentioned it in his *al-Ashbāh wal-Naẓā'ir,* pp. 4-5, as it

as significant maxims, and formed the foundations of Islamic rulings, which are derived either through devine texts or *ijtihād*, they are (1) actions are by intention (2) harms must be eliminated (3) custom is a basis of judgment (4) certainty cannot be dispelled with the doubt (5) hardship begets facility.[513]

80/4 The earliest book which specifically compiles these general maxims was by of Imām Abū al-Ḥasan al-Karkhī. It is an annotated with some relevant illustrations by Imām Najm al-Dīn Abū Ḥafṣ ʿUmar al-Nasāfī al-Ḥanafī, who died in 537 A.H.[514]

Vividly, al-Karkhī has taken the maxims which are compiled by Abū Ṭāhir al-Dabbās, then, he adds to it, whereby the book of al-Karkhī constitutes thirty seven maxims while we have previously noticed from the report of Ibn Nujaym that the principles which are compiled by Imām al-Dabbās was seventeen.

Perhaps, the reader might observe from the book of al-Karkhī that some of the mentioned maxims cannot be considered as the maxim based on the definition of maxim since they can be counted as instructive thoughts framed by scholars in relation to their reasoning. Al-Karkhī says: "The norm: Any Qur'ānic verse that opposes the view of our scholars, it is either abrogated or susceptible to preference or interpretation in order to make it suitable and constant".

Verily, we can extract from this report that these principles are understandable and contributed great jurisprudent fundamentals which stipulate its dimensions. The process of their formation has started since almost the ends of the third Islamic century. As their juristic meanings had been reported from the qualified scholars that can be considered as their frameworks, they compare, constitute, and

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is mentioned by al-Kamāl ibn al-Hammām al-Ḥanafī in *Fatḥ al-Qadīr*" (see the introduction of *al-Ashbāh* by Ibn Nujaym, and *Ḥāshiyat al-Ḥamawī*).

513 Some of the Shāfiʿīs have compiled them in a poem, indicating their relevance to their school of view, with the sayimgs: Five things are proven as the maxims of the Shāfiʿīs, thus, you should observe them. Harm must be eliminated; Custom is bindind and that hardship begets facility; Doubt does not relegate certainty; Sincere intention attracts rewards.

514 Both Imām al-Karkhī and al-Dabbās were contemporaries, and they are both great jurists of the Ḥanafī School, but al-Karkhī is more famous. Al-Karkhī (260-340) is Imām Abū al-Ḥasan ʿUbaydullāh ibn al-Ḥusayn al-Karhkī, ascribing him to a province Karkh in Iraq.

Al-Dabbās is Abū Ṭāhir Muḥammad ibn Muḥammad al-Dabbās who was the Imām of the school of thought in Iraq. He is an excellent memorise of narrations and a contemporary of al-Karkhī, and a judge in Shām (see *al-Fawā'id al-Bahiyyah fī Tarājim al-Ḥanafiyyah* by Shaykh ʿAbd al-Ḥayy al-Laknawī, pp. 149 & 187.

reason in their accordance, although it is not designated a special book before. Also, they have not codified these current formations, except through the refinement and modification. Indeed, it is not the principle of jurisprudence which studies the instructional method of interpreting the texts, understanding it, and deducing from it.

80/5 Then, Imām Abū Zayd ʿUbaydullāh ibn ʿUmar al-Dabbūsī al-Ḥanafī follows their footsteps, he writes (*Ta'sīs al-Naẓar*), which he includes another important type of the juristic maxims, which relate to special topics and some types of the general maxims, including normative maxims and their clarification.[515]

80/6 Finally, al-ʿAllāmah Zayn al-ʿĀbidīn Ibrāhīm ibn Nujaym, the Egyptian, who died 970 A.H. comes after them, who compiled in the first section of his book, *al-Ashbāh wal-Naẓā'ir*, twenty five maxims. He divided it to two types:

1. Basic maxims, typically of the basis of the juristic schools, which there are six maxims: the five mentioned earlier and the sixth "there is no reward without the intention".[516]
2. The other nineteen maxims categorized under different topics, which are not so expansive and extensive which generate other subsidiary and rules. Although, Ibn Nujaym has set forth the explanation on what can be sub-divided from these maxims relating to the rule of actions.

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515 Al-Dahbūsī is one the great hanafi scholars, they quote him as sample in discerning and juristic argument. Ibn Khallikān mentions him as the first person who adopts the study of scholars' disputes. He means with this study, what is well known in our contemporary term as: comparative legal opinion (*al- fiqh al-muqāran)*. Therefore, al-Dabbūsī was the first person to arrange the research in aspect of the comparative legal opinions, which treats it as independent knowledge. His book, *Ta'sīs al-Naẓar* is published with the principles of Imām al-Karkhī by al-Maṭbaʿah al-Adabiyyah, Egypt.

516 The addition of this maxim, it is not necessary since it is just a derived branch from the normative maxim, "All actions are regarded with their intentions" which can replace it. While both of them are taken from the saying of the Prophet (s.a.w.): "The reward of deeds depends on the intentions, and every person will get the reward according to what he has intended". Despite the fact that "All actions are regarded by intentions" is the most fit with the statement of this *ḥadīth* in the aspect of general rule, because each i.e. *ḥadīth* and this principle, comprises the hereafter rewards on the actions, as it comprises the most consequences of the common disposals, and the conviction rules, which their rules are flexible according to the purpose of person, and his intention. However, the maxim "There is no reward unless by intention", is merely used for the hereafter reward.

Subsequently, in the mid of twelfth Islamic calendar, the Turkish Ḥanafi jurist, Muḥammad Abū Saʿīd al-Khādimī, the author of the commentary on the book, *al-Durar Sharḥ al-Ghurar*, he wrote a booklet on the principle of jurisprudence, called as *Majāmiʿ al-Ḥaqā'iq*,[517] where he sealed with a conclusion which comprises a number of the nornative maxims. He mentioned them with their forms without any explanation, and organized them in alphabetical orders, which totals to one hundred and fifty four maxims.

Some of these principles formed the basis of the foundation upon which some scholars in their solutions to issues like the reported opinion of al-Karkhī. Some of them are superficial while the rest are juristic principles, which have the general constitutional rules. Al-Khādimī took a number of them, from the book of Ibn Nujaym, *al-Ashbāh* and added some more.

80/7 Then, follows *Majallat al-Aḥkām al-ʿAdliyyah* which constitute some of these principles, which are selected from the significant principles compiled by both Ibn Nujaym and al-Khādimī, adding on to it some other relevant principles, which total up to ninety nine principle explained in ninety nine units (starting from the second unit to the hundred), it starts with the discussion of these maxims after the first unit which comprises the introduction to jurisprudence and the classification of its sections.

80/8 After the *Majallah*, Shaykh Maḥmūd al-Ḥamzāwī, the mufti of Damascus during the time of Sulṭān ʿAbd al-Ḥamīd explores the principles, the rules, and the fundamentals, in most major sections of juristic chapters which are indicated by the mentioned principles in *Majallah*. He compiled them in the book called *al-Farā'id al-Bahiyyah fī al-Qawāʿid wal-Fawā'id al-Fiqhiyyah*, he proves his comments with some illustrations, and arranges it accordingly the chapters of jurisprudence. Subsequently, this book is the latest and comprehensive compilation in principles and basis of jurisprudence to our best knowledge. He mentions within all these principles some basic laws, which are called *Fawā'id* which means uses. It is published in Damascus year 1298 A.H.

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[517] *Majāmiʿ al-Ḥaqā'iq* by al-Khādimī, with its commentary, *Manāfiʿ al-Ḥaqā'iq*, published by al-Maṭbaʿah al-ʿĀmirah, Constantinople, 1305 A.H. Indeed, the writer has followed the style in arranging in that alphabetical order of the eminent al-Zarkashī (d. 794H.) in his *al-Manthūrah fī Tartīb al-Qawāʿid al-Fiqhiyyah*.

However, the normative maxims with its meaning as defined in this book are very few, unlike the *Majallah* while the major sections of this book mentioned as principles are either particular rules, or basic rules relating to some specific topics extracted from some chapters of Islamic jurisprudence. Moreover, the author has another book on the mexims relating to the rules of *waqf*.

80/9 In brief, it is the general overview on the efforts used in formulating the juristic principles, and its extensive compilation in the Ḥanafī view.

Absolutely, it will clear to a person who inquires the art of writing in this special field, that the Shāfiʿīs and Ḥanbalīs as well as the Mālikīs have followed the footsteps of the Ḥanafīs until it extends to the Shīʿīs, according to historical order.

Surely, the eighth Islamic century had been abounded with this art of compilations, as it can be observed from the indexes, and from the books of popular libraries in that aspect.

It should be noticed that, most of these books which are titled with *al-Ashbāh wal-Naẓā'ir* as written by al-Tāj al-Subkī or al-Suyūṭī heave also comprises these principles. Even though Ibn Nujaym mentions in the introduction of his book *al-Ashbāh* that he intends to write in the same manner of the book of al-Subkī al-Shāfiʿī.

The illustrious books of the other three schools which are published in this respect are three comprehensive books:

1. *Qawāʿid al-Aḥkām fī Maṣāliḥ al-Anām* written by ʿIzz al-Dīn ʿAbd al-ʿAzīz ibn ʿAbd al-Salām (d. 660 A.H.).
2. *Al-Furūq* by Shihāb al-Dīn Aḥmad ibn Idrīs al-Qarāfī al-Mālikī (d. 684 A.H.), a student of ʿIzz ibn ʿAbd al-Salām al-Shāfʿī.
3. *Al-Qawāʿid* by ʿAbd al-Raḥmān ibn Rajab al-Ḥanbalī (d. 795 A.H.).

Unfortunately, all these books despite their great values do not constitute these principles according to its definition, which are legislating juristic phrases which express the general rules in some general form of words, where as, all those books comprise some sections and basic rules relating to great juristic courses.

a) As for the book by ʿIzz ibn ʿAbd al-Salām al-Shāfʿī, it emphasizes on juristic sections whereby he subjects the juristic course as a title for the chapter, he separates its relative laws, and elaborates it in

details which clarifies the reason of legislation. Thus, it is somehow similar to a valuable book in juristic introduction.

b) In *al-Furūq,* al-Qarāfī initially states in its preface that he writes the book in order to explain the differences of the maxims. He compiles five hundred and forty eight maxims in his book as he illustrates each of those maxims with the suitable sub-division of jurisprudence. The book is published in four volumes.

However, this book, despite its great value and its inclusion of some discussions which are not ever discussed, does not constitute the maxims according to the meaning which would be defined soon though he intends from the maxims the basic rules in relation to the great juristic chapters. Hence, he mentions these basic rules in two similar chapters which he points the differences between them.

For example, he says: "The difference between the two concepts informative and establishing expressions", and "the difference between the maxims where the uncertainty and deception can affect, and the maxim where these two things does not affect the transactions", also "the difference between two maxims of putting the interest in possession of others and granting the property for the benefit", as well as "the difference between the concept: the verbal customs and the actual customs", and so forth. Thus, he uses the word "maxim" and refers to the meaning of "the basic rules in specific topic" not the lexical meaning that we had mentioned.

Meanwhile, *al-Furūq* contained various legal maxims especially in the state of explaining the reasons from the judgments and establishing the rules.

c) Finally, as to the book of Ibn Rajab al-Ḥanbalī, he frames all his discussions on one hundred and sixty maxims and seals it with twenty one advantages.

He also includes under the topic "the maxim" some legal aspects which he explains in detailed clarification and impressive elaboration. Indeed, it is valuable book which constitutes the unimagined legal rich treasure. The author of *Kashf al-Ẓunūn* describes it as "it is one of the wonders". However, it is not a book of normative maxims which contains legal text as it is previously defined.

SECTION 81

PRESENTATION OF THE PRINCIPLES WHICH ARE MENTIONED BY *AL-MAJALLAH*, ARRANGED AND CATEGORIZED INTO BASIC AND BRANCH, WITH ITS VERY BRIEF EXPLANATION

81/1 The principles in *al-Majallah* from the basis of this discussion in this last section from the entire book are all general principles which is a typical formula of legislation according to the previous meaning.

However, some mentioned principles are similar or synonymous to others. Therefore, the following categorization is necessary:

1. *Al-Qawāʿid al-Asāsiyyah* (the basic principles) which each of them is an independent base, and it is not taken from another more general principle.
2. *Al-Qawāʿid al-Mutafarriʿah* (the branch principles) which are derived from those general principles.

Vividly, the committee of the *Majallah* did not arrange these principles as it does not consider the relation and coordination in its discussion whereas it states them in a disorganized order. Whereby, it separates and differentiates between the anonymous principles in the meaning and indication. For example:

- Article 60: "Acting on a statement is preferred over neglecting".
- Article 12 from the *Majallah*: "The norm in statements is the real meaning".
- Article 61: "When the real meaning is impossible to apprehend, it will then turn into the metaphor".
- Article 62: "If it is impossible to observe a statement, it will be neglected".

Meanwhile, all these four maxims are parts of a serial topic, which draws them in its group. To summarise, this arrangement which recently brings forward, including the organized juristic

constitution according to the understanding of the texts, the correct instructional way to interpret them, and the method of applying them. Hence, these general principles should be acted upon.

81/2 Since these normative maxims had been mentioned inside the *Majallah*, it is treated as part of it. Therefore, all the commentators of the *Majallah* had commented in various ways clearifying what are derived from these maxims in relation to the juristic rules and what can be exempted from it. Similarly, these maxims are also qualified with exclusive commentaries without the rest of the *Majallah* because specifically extracting these maxims and comment on them might provide the learner a quick juristic intellect and illuminates the wide Islamic jurisprudential horizons and its basis. Thus, the learner will progress in his understanding through the standard steps with a discerning perception.

81/3 It is part of my objective frameworks that I should discuss in the last third section of this book, the comprehensive comments on these maxims which this *Majallah* starts with them.

However, I noticed when I come to this last section, the first two sections from this book that these maxims are also explained in details in the known commentary books on the *Majallah*, although their approaches are not academic as we adopt in this book.

From this reason, I refrain from commenting on these maxims. I should depict over here that these maxims through presenting their texts, arranged and categorized in a new order, including elaborating some of them as brief and providing some illustrations from each maxim. It can indicate to its juristic implication in order to keep up the purpose of teaching objective in the Faculty of *Sharīʿah* and Law.

Absolutely, I distinguish in this categorization the basic maxim from other maxims which can be derived from it. Hence, the the basic maxims are forty, while the subsidiary maxims are fifty nine.

I also arrange these forty basic maxims according to their contents. Hence, I mentioned the maxims which relate to the guardianship and the rights of general management, then, the principles that relate to the process of proof at the end.

In addition, I make these maxims to forty basic types. Then, I write its range number in the form of words, not in the digit, also in black bold letters in order to distinct it.

As for the maxims which are derived from the basic types, I divide them under the basic maxim while I classify under each of the

maxims which can derided from it, with normal letter. I then indicate the number of these branch principles with the alphabetical series.

Furthermore, I indicate after each maxim, the exact number of its unit in the *Majallah*, in order to observe the difference in arrangement, so that it will become easy to revise in the original reference of the *Majallah* and its commentaries.

To make the revision easy, we shall list the ordinary texts of these principles, after the end of the commentaries, arranged in alphabetical order according to the alphabetical order. We point beside each of these maxims to the number of chapter and para where the maxim appears while explain it in this book and the number of its unit from the *Majallah*.

81/4 The First Maxim: *"All Actions are Rewarded According to Their Intentions"*

It means that the actions of human and his disposals either say or action, it has different results and Islamic rules, which regulate it, according to the intention of person on that actions and disposals:

- thus, whoever intentionally kills another person, definitely, there is a specific ruling for his deed. Similarly, if he mistakenly kills, it also results in a different another judgment.
- whoever says to another person: take these *dirham*, hence, if he intends with the word donation, it will be considered as gift, otherwise, it is loan which is his liable.
- whoever picks up an item with the aim to possess for himself, definitely, he is usurper. If he picks it in order to preserve and announce it, then to return it back to its owner whenever he claims it, he is then honest. Therefore, he is not liable when it deteriorates if there is neither any aggression from him on the article found, nor any negligence in its preservation and so forth.

The Maxims which are Derived from This Basic Mexim

81/5 ***"The effect in contract depends on the objectives and the meanings, not based on the words and sentence construct" (al-Majallah, 3)***

- *Bayʿ al-wafā'* is applicable for different types of transactions especially for the rule of mortgage for it is the main aim of both contracting parties in *bayʿ al-wafā'* (see para 46/8).
- *Hibah* is when he stipulates the payment in exchange, for instance, someone says to another person: I grant you this thing for so, or in condition you should pay so and so, that transaction will definitely be ruled with the rule of sale because it has become the same meaning, despite he is using the word as gift. Therefore, gift will be returned if it has a defect and the beneficiary may reclaim his paid amount after he has totally possessed it.[518] In this similar manner, the rest of selling ruled.
- *Kafālah* (guaranty), whereby he mentions that the owner should not demand any debt from the guaranteed debtor as the condition. This contract will then change to *hawālah* (transition of debt), hence, it will be judged with the rule of *hawālah* because it portrays the same meaning. The same manner in *hawālah*, if it is stated in the deal as condition that the creditor is authorized to demand for the debt from both the first debtor and the second debtor (the transferee who ensures the debt on his account) at the same time. It will certainly become the guaranty.

81/6 The Second Maxim: *"Certainty can never revoked with doubt" (al-Majallah,* 4)

That is, if a matter or an issue is certainly confirmed, with clear cut confirmation, afterward the doubt occurs to create the element which can revoke it. Definitely, the confirmed certainty will be the considered part, until the revoking element is also certainly verified.

This principle is a legal basic, which can be strengthen with the mind understanding, also with the *Qur'ān* and the *Sunnah*:

- from the aspect of understanding: Certainty is stronger than doubt since certainty proves absolute and definite matter which can never be revoked with doubt.
- from the aspect of the *Qur'ān*, Allāh says: *"and most of them follow nothing but conjecture. Certainly, the conjecture can be of no avail against the truth. Surely, Allāh is All – Aware of what they do"* (Yūnus:

[518] We had previously discussed the meaning of *al-Istiḥqāq* in the footnote of para 37/2.

36). The truth in this verse refers to the true state of matter like certainty.

- from the aspect of the *Sunnah*: It is reported in the authentic *Ḥadīth* that if the person performs ablution with doubts, the invalidity of his ablution will remain on his previous ablution. The prayer is correct in this state until he confirms the invalidating elements whereby the doubt will not be considered by then.

In consideration of this legal rule and its similarities, this principle is then formed in order to judge all matters in relation to the aspect of worshipping, transactions, punishments, and judging the rights and the duties:

- For instance, if a debt had been confirmed against someone and subsequently that person died whereas we doubted his discharge, that debt will certainly remain demandable.
- if it is verified that the debtor is free from debt while the doubt occurs from the response of creditor, the discharge will definitely be observed and the debt will be concealed.
- in addition, if a deal is verified between two parties while they doubt in the invalidation, the deal is certainly still existing.
- if the deposit is ruined at the hand of trustee while, we doubt that the deposit is deteriorated through either his aggression or negligence in the preservation, he will then guarantee it, or it is ruined with the will of Allāh, so he will not guarantee it. In all these options, he will not demand for the guarantee because the quality of trust is intrinsically confirmed prior to the deal. Therefore, it should not revoke with the doubt on either the aggression or the negligence. In the same way, all similar matters should be analyzed.

The Maxims which are derived from this Basic Maxim

81/7 (a) *"The Normal Rule Considers Anything Exists Should Remain As It Is" (Majallah, 5)*

This principle is called *istiṣḥāb* (the presumption of continuity) which is considering the constant situation in a period of time to continue on that state in all times till its stoppage or the transition is verified.

For example, if a debtor claims that he had discharged the debt to the creditor, or the purchaser claims that he had paid the cost to the seller, or the leaseholder (tenant) litigates against the owner that

he had paid the right, and the creditor, or the seller, or the hirer denies, certainly, the deniers should be declared the rights based on their oaths, it means, these debts are considered to be existing in account of the debtors since they have not proven the payment, because it is certainly demanded, and the basic is to remains on that state until the change is proved. However, the judges suppose to take the oath of creditors that will establish that they have not yet cash their rights, thus, if they swear, they should jndge for them.

81/8 (b) *"Anything Exists within a Period of Time should be Judged as Fixed Element until the Opposite is Proven" (Majallah, 10)*

This maxim is synonymous to the earlier maxim and all their illustrations are the same, and implemented in rules of transactions.

81/9 (c) *"The Principle of the Contingent Action is to Treat it as Non-Being" (Majallah, 9)*

We mean with the contingent actions, the actions which are basically or commonly non-existing, thus, the non-being is the certain part in them, because it is their natural state, while it is changing to the existing element is a doubted contingent.

- so, if someone litigates against another person that, he deals a contract with him, or he deteriorates his property, or he commits a crime, while that another person disproves that, definitely, the right is for the defendant, until the claimer will proof these matters, because they are contingent matters, while, the certain normal condition beforehand are not being.
- moreover, if two persons deal together, then one of them claims that he stipulates for himself right of cancelation, and he intends to revoke the contract and paid the return, while the second person disprove this condition, definitely, the right for the defendant based on his oath, until he proves his claim. This as reason that the condition is a contingent matter, whereas, the basic common situation in the deal is its free from these additional stipulations, therefore, its non being is the certain, while its stipulating is doubted, which needs a proof.
- similarly, if two contracting parties disagree on the healthful or the sickness of the purchased riding animal, the right should be

judged for the seller with regard to the healthful claim, because the sickness is a contingent state, while the healthful is the basic normal state.

- also, if the heirs of a contracting party claim that the deceased was insane at the period of dealing, so his transaction is invalid, while the defendant denies, definitely, the contract first part will be considered as sane until his insanity will be proved, because, the insanity is a contingent defect, and the common principle is the safety of brain, therefore, the apparent state proves the right for the defendant.[519]

Notice

The text of this maxim in *al-Majallah* is *"the common principle for the contingent descriptions is non-being"*, while the most juristic scholars commonly quote it in their reasoning with "actions" instead on "descriptions". However, it is the intention of the maxim because the maxim does not restrain exclusively on the description like the insanity and the sickness but it comprises also some indispensable actions i.e. transactions and deteriorations as clarified with earlier examples. For this reason, we selected this word to express this maxim as "the contingent actions".

81/10 (d) *"The Normal Rule Considers the Release of Deed" (Majallah, 8)*

Since the human is beget free from debt, duty, and obligation, every liability which curtails his freedom certainly happens due to some contingent reason after the birth, whereas the maxim concerns the contingent matters treats it as non-existent, as we observed earlier.

In this case, whoever litigates against another person a liability debt, or any duty for any reason, including dealing or deterioration or any other reason which can result in the guarantee, the claimant

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[519] The basic rule in the Ḥanafi School is that in the state of disagreement on the validity of the contract and its invalidity, the right should initially belong to the claimer of invalidity, and the defendant should then provide the proof on the validity, because the invalidity does not exist and the basic noun is non-existence.

However, it is clear that this is constrained with the state where the apparent situation does not prove the right for the defendant against the claimant of the invalidity, as it is shown over here (see *al-Qawl al-Ḥasan: Baḥth al-Ikhtilāf fī al-Ṣiḥḥah wal-Talji'ah min Bāb al-Bay*ʿ, al-Ṭabʿah al-Ḥijriyyah, 1276 A.H., p. 102).

should be asked for the proof, because the defendant is in the normal state of human being which is freedom from liabilities. Thus, the apparent situation is a proof of his freedom from liability since its opposite is not confirmed.

81/11 (e) *"The Norm is to ascribe the incident to the time nearest to it" (Majallah,* 11)

Most of the time, the rules of incidents and their consequences change with the changing of its time of occurrence. Thus, in the case where there is disagreement on the exact time of occurrence, it should be designed at the nearest time rather than the farthest since the nearest time is agreed upon by both though one of them claims it had happened before that time.

Therefore, the existence of incident at the nearest time is certain while its existence at the farthest time is doubted (extracted from the commentary of my father, may Allāh has mercy upon him). Indeed, this maxim has many applications:

- an example is that if the defect is noticed from the sold item after the possession, whereby the seller claims that the defect happens during the purchaser's possession, and the purchaser also claims that the defect happens during the seller's hand, this defect will certainly be considered as new under the possession of purchaser, when is not allowed to revoke the transaction until he proves that the defect had happened in the past under the seller's hand. Unless, if the kind of defect does not usually happen new, rather, it is natural i.e. *al-khayaf*[520] from a horse.
- if a man buys something, stipulating that he has the option for a main time, thereupon, he aims to return after the time has elapsed, claiming that he had rescinded the contract before the expiry, while the seller claims that the time has already elapsed, and that claimant (the buyer) was silent, the contract will be executed and the rescindment was deemed after the expirt. Thus, the claim by the seller was considered, and the buyer does not have right to return the sold item unless he can provide the evidence that he had rescinded before the stipulated time.

[520] *Al-Khayaf* is a type of horse which its one of the two eyes is black, while the other is blue.

However, this maxim has many exceptional cases for it is constrained at the view of the scholars. The incident can be only ascribed to its nearest time. It cannot be used to disprove a certain matter (see *Sharḥ al-Majallah* by ʿAlī Haydar under this maxim).

81/12 (f) *"No attention is paid to inferences in the face of explicit statement" (Majallah, 13)*

This maxim is applicable in respect of rulings that relates to the expression about the desire, like uttering an offer and acceptance, permission and prohibition, satisfaction and objection, and so forth.

Basically, the expression by the indication of circumstance about the desire is only a substitute for the apparent word when it is absent. Therefore, when the apparent word is found contrary to what is understood from the indication of circumstance, this indication does not remain as the substitute and replacement of the expression, because the indication of the apparent word is certain, while the indication of the circumstances and the contexts are at doubt state.

There is no difference between saying and writing with respect to inference.

- Based on this, the jurists state that the seller has a right to retain the sold item from the buyer until he pays the cost (if the payment is not postponed). However, if the buyer possessed the item before he pays the price and the seller is silent, it will be considered permission from the indication. Therefore, his right in the item is invalid, and he does not have any right except to request for payment from the buyer. However, if the seller frankly says to the buyer that, "I would not allow you to take any item before the payment", but the buyer takes whereas the seller is silent, this silence in that state is not considered as permission, and he has the right to the sold item and takes it back from the buyer until he pays the price.
- They also concluded that if the document written for an endowment (*waqf*) is lost, the proceeds from this endowment will be disbursed to its beneficiaries according to the method of former administrators, because their previous actions indicate that this method was stipulated by the donor.

On the other hand, if the recorded document regarding the endowment exists, but the administrators are working contrary to the document, their actions which are contrary to the apparent condition for the donor is not given any weight.

It can be derived from the previous explanation that this maxim is applicable when the inference contradicts the apparent meaning simultenously. However, if the inference is exclusively confirmed and it takes its role, and if afterwards the apparent meaning contradicts with the evidence, there would not be any consideration for that apparent meaning since the rule that is confirmed from the inference would not be abrogated. For instance, the plain statement from the seller to the buyer that, he does not agree on the buyer taking possession of the goods before the payment. In this case, after the buyer has taken the goods and the seller is silent, his apparent statement later is then not considered. We had applied this principle at some earlier occasion (see para 70/4).

81/13 (g) ***"No statement is to be attributed to a person who is silent but silence in a situation where the statement is absolutely needed is a statement" (Majallah, 57)***

Because silence is certain whereas the indication of silence is doubtful if the preferable contexts do not strengthen it:

- if someone for instance see some of his property is with another person selling it, whereby he remains silent, he can claim it later on, and his silence at that moment does not mean that the property is in possession of the seller, and it does not mean he permits the selling.[521]
- Also, in the case of the wife of an impotent for several years, her silence does not mean her consent to the marriage which can

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[521] This rule is applicable where the seller is not a spouse or relative to the claimant. However, if it happens that the seller is a spouse or relative, the silence of his spouse or his relative at the moment of transaction, would be considered as an approval from him which indicates that he does not have any right in the sold item. This is discretion of a legal matter in order to prevent people from cheating and decepting with the aid of the relatives. It is also because the connection is considered in context which makes his silence as an approval on the effectiveness of the transaction, while the analogical approach does not differentiate between the relative and the strange (quoted from the commentary of my father on the maxims, may Allah have mercy upon him).

abrogate her right in the legal separation between her and her husband.

The state of need where silence can be given the rule of explanation and expression refers to: every position, where the expression is needed in order to repulse any harm, or deception, or where silence is known as a customary way of expression. In this case:

a. If the judge asks the defendant about his statement concerning the litigation of the claimant, while he keeps silent, this silence will be considered as denial for the claim, therefore, he will ask for the proof from the claimant. However, if the claimant does not possess any proof, and the judge decided on oath-taking and he then asks for the oath of the defendant, while he also keeps silent, without confirming or denying, he will be considered as if he confirmed and the judge will pronounce against him, because the operation of court could depend on his statement, it certainly will harm the claimant if decided otherwise.

b. If the broker knows about the sale of land in which he gets the broking fees, then, he keeps silent from the demand, this silence should be considered as permission which overrules his right to the brokerage, so that the claimant cannot try to deceive the buyer with that silence, such that the buyer builds and cultivates the land, then the broker demands the return of the land.

c. If maiden lady is silent when her guadian asks her for the permission in marriage, or the guadian marries her to a person without asking for her permission where she is aware of the disposal and she is silent, this silence will be considered in the first case and the effectiveness will be necessitated in the second case due to the indication of circumstance, as discussed on several occasions.

81/14 (h) ***"No weight is given to mere supposition" (Majallah,*** **74)**

What is meant by supposition is perceptual probability which is unlikely to happen. Thus, this should not be utilised for the derivation of rule as it cannot disprove a rule and cannot delay rights.

- If witness testifies that the property of a deceased person is limited for a special heir or special heirs, and if it is said: "We do not know he has other heirs except these ones", the right will be given to them, and there is no consideration to imagine that other heir might show up since it is imaginary which should not frustrate the judgment.
- If the debtors prove their rights on a bankrupt or on his estate, while these witnesses confirm that they do not know he has other debtors, the property should be disbursed on those present.
- This is the status of the sincere witnesses. Their testimonials are accepted and they can serve as proof for judgment, and there is no reason to doubt their errors or misrepresentations.

81/15 (i) ***"There is no proof in a possibility that arises from evidence" (Majallah, 73)***

The basic form of this maxim is mentioned in *Ta'sīs al-Naẓar* by al-Dabbūsī (p. 19): "The accusation, if it is established from the action of man, will be judged unsound".

The establishment of accusation means it has evidence from the apparent state and was not only imagination.

- Based on this, the witness of the two spouses will not be accepted between them. The same goes for the witness of the ascendant and the descendants among them, as well as the witness of the special employee for his employer, because the establishment of accusation which originates from a connection is doubtful, which the witness has to be free from.
- If a person declares in his terminal illness a debt to some of his heirs, this declaration will not be recognised unless through the approval of the rest of the heirs. It is because the probability of the use of this declaration as a step to favour the beneficiary in the estate, where there is a strong possibility of terminal illness.
- Similarly, if he declares in his terminal illness, a debt which competes with another debt that was accrued during the state of health, while his inheritance is a few, the debt accrued during the healthy state will be preferred, which means, it will be discharged before the debt that do not have any evidence, albeit the declaration the terminal illness.

If the probability does not have any evidence, there should not be considered. Similarly, if the declaration takes place during the time when the person is healthy, it will be regarded as a normal action, and, it will be executed. These probabilities affect it since it is an ordinary imagination.

81/16 (j) ***"No effect is given to suspicion if it is proven wrong" (Majallah, 72)***

The suspicion *(al-ẓann)* is simply a greate probability which is clearer than the opposite through relevant evidence. If this suspicion reaches a stage where it is more probability than it is called the dominant suspicion, it is called the best probability.

On the other hand, the doubt *(al-shakk)* is equivalent to the suspicion with a lower probability.

The meaning of the maxim can be understood when a rule or a right was built on suspicion, then, its fault is confirmed. Thus, that suspicion is invalid.

- To illustrate, if a debtor discharges the debt and his authorized agent or his guarantor did not confine that the debtor has paid, but it was later discovered that it was paid, the creditor must return his payment.
- It is also applicable for every person who pays something in assumption of its compulsory, or it defends on the right which is litigated against him, which he did not confess with it. Later on, it was discovered that he was right, thus, he can get back what he has paid.

As for payment that is not given as an obligation, but with the intention of donation, the rule of donation will be executed and it will be subjected to the corollary of the first maxim *"actions are according to their intentions"*.

81/17 (k) ***"What is impossible by custom is equal to what is impossible in reality" (Majallah, 38)***

The real impossibility is simply a matter that is not possible to occur. Indeed, it cannot stand as proof for the claim, and it should be rejected, i.e. someone who claims that a person at his age is his son or he his father.

While the impossible in custom is the matter which does not usually happens, even if there is a possibility for its occurrence. Therefore, if a known pauper claims against another person some big amount and it is not really known where he gets such money either from inheritance or otherwise his claim is not valid and his claim will not be approved, if he did not provide the evidence for that money.

If a guardian or a trustee claims that he spent on *waqf* or on his ward some impossible amount, his claim will be rejected, and his claim will not be accepted.

81/18 The Third Maxim: *"There should be neither harm nor reciprocating harm" (Majallah,* 19*)*

Al-Ḍarar is to deteriorate to another person, while *al-Ḍirar* means to retaliate the harm with the same.

This maxim with its expression is a text of the *Ḥadīth*, which is classified as a *ḥassan ḥadīth*. It narrated by Mālik in *al-Muwaṭṭa'*. It is also reported by Ibn Mājah and al-Dāraquṭnī in their *Sunan*.

This maxim is part of the *Sharīʿah* pillars which conforms to texts either from the *Qur'ān* or *Sunnah*. It is basically a maxim to prevent the harm and its consequences in compensations and punishment, as it is also proof for the concept of reclamation which bring upon the interests and refrain from the evils. In short, it is one of the tools and standards at the disposal of jurists for their legal judgments on current issues.

a. Its text intrinsically disproved the harm, which necessitates the prohibition, if it comprises both special and general harms. It also comprises the repelling from the harm, before it occurs, through the possible protection, like repelling it after it occurs, through the possible measures which would relieve its traces, and prevent its repetition. It also indicates the obligation of selecting the lesse part of two harms, in order to repel the greater one, because it reduces the harm when total prevention is not possible. However, the declaration of legal punishments against criminals does not contradict with this principle, even though, it brings some harm against them, because it provides justice and repels harm.

b. The purpose in repelling from the reciprocating harm is to prohibit the thought of revenge, which increases the harm, as it

extends its dimension, because reciprocating the harm - even though it is reciprocal - is not an intended goal, and a common method, where it should only be used in case of extreme necessity, when other methods like prevention, and restraining are more preferable and beneficial in this respect.

Therefore, whosoever destroys other people's property as an example, he should not retaliate with the same destruction because that will extend the harm without any benefit. On the other hand, the best treatment is to fine the destroyer the cost of ruined property, due to its benefit relating to the recompensing the victim, and transferring the harm itself to the account of the destroyer, because, it is equal in his view both deterioration of his property, and giving him the damaged property for repairing. In this case, it is abundantly clear that reciprocating harm with harm is common stupidity.

On the contrary, the offense against the soul and the body where punishment is sanctioned, therefore, whoever kills, he should then be killed, whoever cuts a part of body, he should be amputated, because there is nothing that can stop these offenses, unless punishment of the same kind is mated. Then, the criminal knows that he is eventually treated like someone who kills himself. In this manner, every punishment which does not return back the victim his lost part, whether a life or a bodily injury, the hidden self temptation will result in retaliation, and it will cause some calamity and disaster. However, the legal punishment is the best way because it is just and preventive.

As for the destructive of property, the guarantee will be the best and beneficial treatment than retaliatingt the damage with the same damage. Therefore, jurists used this maxim to legislate several rules in different chapters, where they report that:

1. If the period estimated for the hired land has elapsed before it becomes ripe, this land will remain on hand of the lessee with the normal cost, until it becomes ripe in order to prevent the lessee from harm, by removing the plant before it becomes mature.

2. If a person sells perishable goods like fruits for example, while the buyer remain absent before the payment and collection whereas he fears the decay the seller can revoke the agreement, and sell it to another person, in order to prevent the loss (see *Radd al-Muḥtār min Mutafarriqāt al-Buyūʿ*).

3. If a person buys something and lease it to someone and afterwards, he suspects an existing former defect, it should be considered as an excuse which can permits him to revoke the agreement, returns the money to the seller, in order to prevent the harms from himself, because, the hiring contract can be revoked through the excuses as mentioned (see para 40/7).

4. Also, it is applicable for all kinds of urgency, which discharges the debt on behalf another person without his permission, where the payer can not be justified as a donor, while, he has right to get back what he had paid on behalf of the debtor to the creditor, in order to prevent some harm from himself as mentioned on this matter is part of the subsidiary sections from this maxim.

5. It is permissible to jail some known people with prostitution and evil doing, until they utter their repentance, even if they are not sentenced with specific offenses through the legal process, in order to prevent their evil to take precaution, spreading over the earth some evils and harms, which can not be carried through the judicial process (see *Muʿīn al-Ḥukkām, Qism al-Thālith fī al-Qaḍā' bil-Siyāsah al-Sharʿiyyah,* p. 215, 218).

6. These jurists also necessitate the preservation of the ancient rights, regarding some interests, benefits and disposals, even though, if the owners do not possess the relevant documents, because, if it is taken away from them, it might afflict them, since it is not illegally established, as well, if it does not create any harm to the general rights will be discussed later.

Including another rules from the several jurisprudence chapters.

The maxims which are divided from this basic maxim

81/19 (a) *"Harm should be removed as much as possible" (Majallah, 31)*

This maxim expresses the obligation of preventing harm before it occurs, with all sufficient and capable possibilities, according to the theory of public interests and legal policy, because prevention is better than cure. This should be considered as much as possible since the Islamic obligations are practiced according to the capability.

In the Aspect of Public Interests

Jihād is legalized in order to repel the evil of enemies, and the punishment is legalized to prevent crimes and creating internal security, while stopping the means of evils and their kinds like from all its types, and so forth from the necessary attempts to repel the evil and block its extension.

As in the Aspect of the Special Rights

- The right of preemption is legalized for some purposes, like preventing the harm of a bad neighbour.
- The limit the legal competence of a spendthrift is legalized in order to prevent harm of his bad habits against himself and his family.
- It is also legalized to limit the legal competence of the bankrupt debtor in order to prevent his harm against the creditors due to his bad disposals.
- It is allowed for the judge to ban the debtor to travel if the creditor demands that until the debtor authorizes another person in that conflict. However, the judge is not permitted to remove this authorized person from traveling in order to prevent the harm against the creditor.
- The judicial compulsion on dividing the company's property, which is divisible, based on the appeal from one of the participants, in order to prevent the harm of the partner.
- They also legalized forcing partner to contribute in the cash of constructing the joint real estate or its renovation when destroyed which it is not susceptible for division. However, if he refuses to execute, the other partner can construct it and restrain it according to the authority of judgment or he can utilize it until he gets back his right.
- Some of the right of options are legalized in the contracts in order to repel harms. Similarly, it is applicable on the right of stipulated condition, the right of view and the right of selection in the transactions due to extreme need from some purchasers to consider aud the consult others before they decide.

81/20 (b) *"The Harm must be eliminated" (Majallah, 20)*

This maxim introduces the obligatory of removing harm and reducing its effects after it happens.

As for the aspect of the public rights, if someone extends out his drain to the public lane, whereby it harms the walkers, it should be removed, similarly, if he transgrasses in constructing his building along the road or otherwise else well.

Concerning the specific rights, the destroyer should guarantee the compensation for the destruction because of harm he created.

- If branches of a tree owned by someone are very long, while they extend to the house of his neighbour and they cause the latter some harm, he should eliminate it either by raising them up or by cutting them off.
- Similarly, many options in contracts have been legalized in order to repel harms which can affect one of the contracting parties, i.e. the right of returning by the defect, the right legalized for cheating by deception, and the right of separation of contract.

81/21 (c) *"Harm cannot be removed by a similar harme" (Majallah, 25)*

This maxim restricts the earlier maxim absolutely. Eradicating harm does not warrant the creation of a similar harm. It is also deduced from this that it is not permissible to eradicate harm with greater harm in the sense of precedence.

- In this sense, if a needy does not have anything to prevent the harm of starvation unless the property of alike needy, therefore, he is not allowed to take it.
- The expenditure is not obligated on the needy for his relative, if he is also needy alike.
- The participant should not obliged to share the partnership's property, which it is indivisible, because, this division might result in a harm, which it is greater than the harm of partnership (in the nowadays constitution, this joint ownership's harms can be easily prevented through trading, and distributing the prices).
- If it is detected from the sold property the old defect, while the new defect occurs under the possession of buyer, therefore, this sold property should not be returned based on that old defect,

because the seller at then will suffer the new damage, whereas, the damage on the buyer can be relieved through obligating the compensation on the seller for that old defect, if he does not want to accept the sold property with that new defect.

81/22 (d) *"A Greater harm is removed with a lesser harm" (Majallah, 27)*

This maxim is apparently opposite to the meaning of the earlier maxim. Hence, the expenditure will become obligated from the rich to the relative poor because the harm of the rich with its obligatory is lesser than the harm of the poor for their needs.

- If the purchaser of land constructs a building on it or he plants it, later on, he confirms a real owner, thus, if the price of that land is the greater most, eventually, the seller can possess forcibly the land with its price against the right owner.
- If a hen possessed by someone swallows a precious pearl belongs to another person, therefore, the owner of that pearl has the authority to take over the hen with its price, which it can be slaughtered and take out the pearl.

We can indicate on this maxim, the matter narrated by the *Qur'ān* relating the issue of Prophet Mūsā (may peace be with him) with al-Khaḍir in *Sūrat al-Kahf* from the verses 65-82, when Prophet Mūsā accompanies al-Khaḍir, when he takes on him the condition that he should not ask him of anything, until al-Khadir will comment on it, hence, when they embark the ship, when he scuttled it, Mūsā says to him: Have you scuttled it in order to drown its people? Verily, you have committed a dreadful thing. Al-Khaḍir said: Did I not tell you that you would not be able to have patience with me. Afterward, when they depart, he then said: I will tell you the interpretation of those things over which you were unable to hold patience. As for the ship, it belonged to poor people working in the sea. So, I wished to make a defective damage in it, as there was a king behind them who seized every ship by force... and I did them not of my own accord". Indeed, Allāh the Almighty has inspired to him that he should scuttled the ship, in order to rescue the riders from the greater most harm, than when the oppressor king usurps it.

81/23 (e) *"Lesser of two evils should be chosen"* (*Majallah*, 29)

81/24 (f) ***"When there is conflict between two harms, the greater harm is avoided by the commission of this lesser"*** (*Majallah*, 28)

These two principles are anonymous in meaning to the earlier one. While, it can be derived from the two:

- It is permitted to operate the abdomen of dead pregnant in order to rescue the life of fetus, if his life is hopefully wishful.
- As though, it is permitted to be silent from disproving the evils, if it will result in greater harm.

81/25 (g) ***"The private harm may be endured in order to repel the public harm"* (*Majallah*, 26)**

- Therefore, the ignorant doctor should be banned, as well as the dissolute jurist, also the bankrupt talent, even though, if they are affected with that. In order to repel their harms against the public on their souls, their religion and their properties.
- The judge can sell on behalf of the monopolists their monopolized properties, even though, it harm them, in order to stop the disadvantage of monopoly against the public.
- The pricing is allowed,, which it is specifying the prices on the goods, when they exceed its common limits and immoderate it.
- As it is also permitted, even it is obligated to destruct the adjacent building to the fire, in the cause to repel its extension, when its movement is likely to extend.

81/26 (g) ***"Repelling evil is preferred over achieving benefit"* (*Majallah*, 30)**

Verily, the evils have the extension and dimension, simplified with the pestilence, and fire. As for the wise treatment, this evil supposes to be squelched it at first stage, even if it result in deprivation from some interests or delaying it. Hence, the *Sharīʿah* requirement to abstain from the prohibitions is stronger than its requirement to actualize the obligations.

It has been related to the Prophet (s.a.w.) that he said: *"What I have forbidden to you, avoid; what I have ordered to you to do, do it as much as you can..."*.

- Based on this, it is legally obligated to condemn the trading of unlawful properties, i.e. wine and drugs, even if it boosts the commercial incomes and profits.
- As the owner of the house can forbid the talents, who his window when it is opened, show the neighboring ladies in their abodes, even though, it has its interest.
- The neighbour can be forbidden to act freely in his properties, which his disposal can harm his other neighbors, like constructing a mill or a bakery, which will definitely harm the neighbours with the smells and the smoke.[522]
- It is also permitted to restrain the action of ignorant doctor and so forth.
- The monopolization and the exceeding charges as it earlier mentioned are also forbidden.

81/27 (h) ***"If the prohibitive contradicts with the demand, the prohibitive will be given the preference"*** (*Majallah*, 46)

It means if something or action has some dangers which necessitate to be forbidden, while at the same level, it also has some causes which necessitate its legality, its prohibition will be preferred, because repelling the evils is more preferable than achieving the interests as it is mentioned in the earlier unit. According to this rule:

1. It is unlawful for the partner to act with the joint account, in the way it will harm his other part because the right of his partner restrains, even if his own right necessitates it. Similarly, the one of two owners of lowest part or higher part of stories building.

2. If someone reports a right for one of the heirs at his last illness, and a debt, or joint property for a foreigner, this statement relating to the right of foreigner will also not be executed, because it has a restraint against the right of heirs.[523]

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[522] This is a great standard of todays modern constitutional thoughts relating to the theory of prohibiting "the abusive use of another people's property" (see footnote para 69/7).

[523] See para 15/81. Indeed, this issue is legalized by the dominant opinion at the Ḥanafī view relating to impossibility to section the report. If it is also allowed to execute the report at the portion of foreigner based on the possibility to section the report, it will then also prefer.

3. Also, if a person claims that the depositor authorizes him to withdraw the deposit, while he does not have any evidence to prove that authorization, whereas the depositor reports that he authorized him, definitely, the deposit will not be given to him, though, this report necessitates to hand over it, because the right of depositor necessitates to not hand over it, due to the possibility from him to deny the authorization (see para 4/4(2)).

4. If they state regarding the recommeudation of witness, [524] that if some of specialist recommend him, whilst the rest slander him, definitely the part of slander will be preferred, thus the judge will then reject his witness.

Notice

Verily, this maxim is useful when necessity if not greater than the prohibitive. However, if it is greater than the prohibitive, the necessity will be more preferred, because it is desperately rare to find a matter free from the danger whichever the opposite is best needed.

Basically, the measure in relation to the legal obligation and prohibition because of the dominance of anyone of contrast part, either the interest or harm, either the good or bad, on the other part.

In this case, it is permitted for the mediator between the conflict parts to lie in order to originate a peace between them (see para 5/5). Based on this maxim, the rule of emergency is legally regulated, while they generate the principle (the harms could legalized the unlawful things) as it will soon be proved (see para 81/32).

81/28 (i) ***"Old thing should be remained on its odness" (Majallah, 6)***

The old from of this maxim means anything that does not have the conflict of time for those who arrive at its beginning of its existence (see *al-Qawāʿid al-Fiqhiyyah* by al-Shaykh Maḥmūd Ḥamzah, p. 153).

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[524] The Islamic texts from the *Qur'ān* and the *Sunnah* state as conditions on accepting the witness, that the witness should be justice i.e. he should be honest when the forgery spills over. Therefore, the jurists obligate from the judge to ask about the witness, from the people who know him, if those people recommend him, his witness will be credited. Otherwise, it will then rejected. This survey and the qualification is know as the recommendation of witness.

Though, this maxim means anything found with people or under their possession in the past including properties, interests, and utilities, which are basically legitimated should remain for the owners, in the same state while their old time indicates them as a legal right.

On this basis, Abū Yūsuf reports in *al-Kharāj* that "neither anything should be taken from the hand of its owner, unless through a known verified right" as it is noted earlier on (see para 80/1).

Therefore, if the drain of someone's house cover up the house of another person, or he has waterspout, or sink, or passage on the land of another person else, or the trunk of his house falls on the wall of his neighbour since old time while another person wants to cut it down, he should not allowed, while his neighbour has right to retain it as it is, even though he does not know why it is placed over there. This is because its olden age indicates the legality of that state. Similarly, when these items are bought in that state, or through the division, and so forth from the legal reasons. Indeed, forbidding this action will affect the owner, while this harm does not have any excuse. Even if it is permitted, it might result in squandering the greater most rights, after some ages had elapsed on that state.

However, if that person makes something from those properties under another person possession, through its known beginning date, definitely, he will then demanded to prove its reason and its legal approval, otherwise, it is prohibited.

But, if that old thing is not amongst the legalized actions in the normal state, certainly, it is then a harm which should be repelled, without considering its old age. Hence, this principle is the same base of the following principle:

81/29 (j) ***"Harm cannot be antique"* (*Majallah*, 7)**

It means that this prescription can not stand as proof which does not mean the impossibility of its prescription.

Indeed, this maxim is simply like a constraint from the earlier maxim. It means these interests and utilities which their old time should be considered are types of property that cannot be basically legislated as the restraint dangers. If the case as it is described, it should be removed while there is not any measure for its old time.

- Thus, if there is a drain for a house, or a canal for some roughages which is constructed aside the lane and might harm

the masses, it should be removed though it seems long. This is because it is not intrinsically allowed while the *Sharīʿah* does not permit for anyone at whatever rate any right which might harm the public.

- Also, if there is a low window, which rise on the neighbouring ladies domicile, this window should be removed, even if it is placed at that state times ago, unless if that neighbour's home is the newly placed under the window.[525]

On the other hand, we deduce from this earlier maxim that the lane, the channel, and the sink and so forth, which are constructed in someone's land or in his house, their old existence should be regarded, even if their existence will limit his freedom of disposition, hence, it is a harm to him.

Then, what is the criterion to distinguish between what the old should be regarded, even though it harms others, and the old which it is not accessible for regard, because it is unlawful harm?

Actually, my father Shaykh Aḥmad al-Zarqā (may Allāh bestow His mercy on him) has derived in his commentary on these two maxims a criterion which can be proved with the reasoning from the texts of jurists. It sum up as anything which other people access to through anyone of the legal reasons, the old should be preserved, otherwise nothing.

Therefore, the passage and channel are the public needs, which can be accessed through the transaction or the division of the joint property and so on, from the legalized reasons. Thus, its old should be regarded when its cause is unknown. Also, the harm of claimant in limiting his freedom can benefit from it and similar through the commutative contract and so forth. This is because every right which people obtain from other person is an interest for its obtainment. However, other harm is special harm against others even though he supposed to benefit from him through this commutative contract and others. Thus, it will be possessed from his owner.

At that state of old, it can be interpreted that it is found in its first time through one of the legalized ways.

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[525] It can be easily noticed at this state that the implemented house planning in our country (Syria), since the period of French occupation, has introduced new rules in constructing the windows which had not respected these *Sharīʿah* considerations.

As for the cursing harm, the group of people and the threatening on their public places cannot possess any right which can be legalized at any rate.

Also, having the window which opens to the domicile of other people's ladies, it is transgression which he does not have any right, as the Islamic rulings do not approve it.

Similarly, if the sink of an old house pollutes the wells owned by the neighbours, this old at that state will not be appreciated, as the jurists mentioned in this aspect (because it is not legally allowed to pollute the clean waters without any interest, and neither anyone has that right, to portray the pollution). However, owner of the sink would be obliged to remove its harm through adjusting its watercourse and stopping it from leakage, whereby it will count as one of the interests which its owner can claim its right against any other person in a legal way. However, if it cannot be reformed and adjusted, or its owner does not come up with the immediate action, it can be removed.

81/30 The Forth Maxim: *"Hardship brings upon the comfort" (Majallah,* 17)

Verily, there is difficulty in the hardships, while the hardship is forbidden on human being according to the *Sharīʿah* texts.

This maxim is part of the major five maxims which are previously mentioned that they are considered as the basic rules for Islamic legislation in all the school of thought.

It is basically derived from His Almighty says: *"Allāh intends for you the ease, and he does not make things difficult for you"* (al-Baqarah (2):185). And also: *"And He Has not laid upon you the hardship"* (al-Ḥajj, (22)78).

The Prophet (s.a.w.) introduces this maxim, where He says: *"verily, the Almighty Allāh has forgiven for my nation (fellows) the mistake, forgetfulness, and what it had seemed difficult to them"* (see para 10/2 (b)).

Many of these types can be verified from Islamic texts which prove the bounty of Islām and its tolerance.

The meaning of hardship *(al-mashaqqah)* over here, which it is denied with these Islamic texts, as it legalizes the easement and the permission according to this principle, is the hardship which exceeds the common limit.

As for the normal hardship in the common limits *(al-ḥudud al-ʿādiyah),* which it commonly necessitates observing the obligations

and performing the efforts which are needed for the comfortable life, this is not avoidable, even the Islamic tasks cannot free from these kinds of hardship. In this sense, every obligation cannot be free from the hardship, i.e. the hardship in working, finding the cost of living, also *al-ṣalat, al-ṣiyām* at the healthy state, and spending the obligatory payments, *al-jihād* to exile the catastrophe of enemies. Absolutely, for each of these tasks and obligations, a kind of hardship normally necessitates each change accordingly. Indeed, this kind of hardship does not disprove the task, as it does not legalize the permission because the permission at that moment has some negligence and remissness[526] (see *al-Muwāfaqāt* by al-Shāṭibī, 2/119-123).

- Based on this maxim, the sickness and travelling are considered allowable for some religious obligations *(al-wājibāt al-dīniyyah),* which reduce some of them, i.e. the Jumuʿah prayer, as it delays at times some other part, like fasting.
- Also in the public rights (*al-ḥuqūq al-madaniyyah*); the prescription which disallow from appealing for the right, it can be abstained from execution and stop through the excuses, like the decrease of capacity, and travelling, if not, it might be difficult against the claimants of rights.
- The mistake in the actions, and the disposals can change the general rules, which are legalized at the state of willingness, because treating the mistake in the same way like the willingness done, a great hardship against the mankind.
- As in the rules of punishments (*al-jināyāt*), the blame on mistakenly done is very low in level, which is suitable with the assumption to only leave the alternate, from the erroneous.
- In the public rights, the mistake in transaction is sometimes revoked, while its necessity will be abrogated as it is previously mentioned (see para 36/5) wherever the fault in transaction is a kind of mistakes.
- The forgetfulness (*al-nisyān*) can relieve man from the responsibility which relates to religious obligations, even though it does not have any impact on the people's rights and the judgment prosecution.

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[526] Al-Shāṭibī (may Allah mercy him) makes some plain explanations and good comments in that respect in his *al-Muwāfaqāt*), 2/119-168.

- The compulsion (*al-ikrāh*) might revoke to force the obliged on his transaction, even if it is a retreat compulsion, because Islamic rules had found the excuse for the obliged on his attempts to some unlawful deeds, which he is obliged on.
- The ignorance state of employee (*jahl al-wakīl*) that his master had displaced him. Definitely, that contract will continue with him, and his transactions will be allowed in order, to repel the hardship (see para 40/16).
- The urgency need (*al-iḍṭirār*) can allow the necessary prohibitions, at that very moment it exists (see para 81/32).
- The least justice of witness (*ʿadālat al-shuhūd*) allows to accept the witnessing of the ideals with their levels as it is mentioned (see para 77/7).
- Considering the customs of people in the most times is also taken from this principle, since it does not contradict with the Islamic fundamentals, because if the customs are not considered, and its prevalent is not measured, it might result in great hardship against human being as it is mentioned in para 72/3.

In brevity, it is clearly proved that the hardship, in order to generate the easiness and simplification, is not constrained to become the extreme need, while any hardship and adversity at any level are suffice which might create apparent need till the level which will turn to the state of easiness and simplicity. Based on this, it is said "the need can placed as the necessity" as we will find that in the following subsidiary maxims.

Subsidiary maxims derived from this basic maxim

81/31 (a) ***"When a matter is narrow, it is wide"*** **(*Majallah*, 18)**

It also likes, "if it is widen, it becomes narrow" (see *Mir'āt al-Majallah*, under this principle chapter).

- It means that if the contingency matter happens to a person or to a group of people, or the exceptional condition happens, it will has the basic rule legislated for its normal conditions, which might overburden these people and exhausting them. It will then make the matter difficult to be applied. In that state, the application of rule should then be broaden and ease for them.

Since this urgency reason still exists, this means "the matter when it is narrow, it will become widen".

- Thus, if the urgency is removed and dispelled, the basic rule of exact matter will return to its normal, that is the meaning of "if it has become widen, it becomes narrow".

This recent maxim is almost similar to the first part of this maxim and what is elaborated there should be explained over here.

81/32 (b) ***"Necessities know no law" (Majallah, 21)***

This maxim is derived from the exemption in some contingent necessity occasions at some exceptional circumstances, mentioned in the Noble *Qur'ān*: *"unless under compulsion of necessity"*, after listing some types of unlawful things.

- Therefore, it is permitted for the doctor to look to another people's private parts, if their treatment necessitates it.
- Also, whoever fears the death, where he is hunger or thirsty or he is agony at a place, while he does not see anything to eat unless the dead meat or pig or wine or someone's property who does not necessarily need, it is permissible for him, even it is obligated on him, to eat some of it, in order to get rid of his dangerous situation.

Based on that, we can compare the rest. In my own view, the death is not stipulated for abstaining from the prohibition, though it is suffice that the abstention at that moment can susceptible to some weakness, which it is unbearable like health cancer.

The criterion for this case, the effects of abstention is danger than performing the unlawful work. Therefore, protecting life from the danger is greater and obligated than protecting the property for another person, and respecting his honour or eating the pig or the dead meat.

On the other hand, there are some types of unlawful matters which are not allowed in any rate, but the urgency might rednce their rate of sin, which relates to some other aspect of these nnlawful deeds. They are mentioned by our scholars which are three: the disbelief, the killing and the adultery.

- The compulsion against someone to pronounce the word of disbelief does not excuse him to perform the disbelief act, even

though he is threatened by killing while he can pretend with that disbelief, with the peaceful of his mind with *Imān*. However, it is preferable if he can tolerate the killing without any pretense, because, in the view of enemies, it is greater due to the might of Islām.

- The compulsion against someone to kill someone else, even if he is threatened with killing, is not permissible to kill that person. Though, if he did such, he will not be punished, but the punishment will be sentenced against the person who compels him to kill (see footnote para 34/5).
- Also the compulsion against someone to perform the fornication, even if he is threatened by killing, does not allow the legality to perform that, even though it will revoke the punishment against him, because the adultery is a disastrous in the family while the right of society is greater than death of person (*al-Durr al-Mukhtār fi al-Ikrāh*).

81/33 (d) ***"Necessities are determined according to its extent" (Majallah, 22)***

This maxim is like a restriction for the earlier maxim. Hence, the unlawful matter should not be permitted through the necessity greater than the tolerance. The necessity can merely legalize some unlawful matters in the same rate to the harm of the excessiveness in this issue which is prohibited. Whenever the harm is removed, the prohibition should be restored.

- If it is needed to medically examine the private part, it should open up in the sensible needed rate.
- As for the woman, she is not permitted to show up her private part to any man, either for the medical examine or for the delivery. If there is a woman, she can well observe it because seeing the gender of the same gender is lesser in prohibition.

81/34 (d) ***"Necessity can never nullify the right of others" (Majallah, 33)***

The necessity is only counted as an excuse to revoke the punishment of sin and it will wipe out the punishment of transgressing against other people right, while there is no decisive reason to revoke other people right.

- Thus, whoever needs to eat other people food, in order to drive away a danger from him, he will ensure its price.
- As for the person who he is compelled on deteriorating other people property, its price will be ensured on the person who set out for the compulsion because he is better to bear the responsibility than the doer.

81/35 (e) ***"Need takes place of necessity whether general or specific" (Majallah, 32)***

Necessity is more serious than needs. Therefore, necessity can result in harm if it is not obtained, as similar to the compulsion, and the fear of death from the starvation while the need (*al-ḥājah*) causes the hardship and difficulty if it is not fulfilled.

What we mean with the word general (*ʿāmmah*) refers to the comprehensive need required by the whole *ummah.*

However, special (*khāṣṣah*) refers to any need which is requested by a group of people, like citizens of a special province or a profession, it is simply similar to what was mentioned in the definition of the general and specific *ʿurf* and it does not mean its specialty on the individualism.

The meaning of this is the exceptional legal treatment which is not limited only to some states of situational necessities, rather the needs of the community if it is beyond the necessity, which also necessitates the exceptional legal treatment elaborated in these following corrollaries:

1. Based on this rule, some judgments are legislated with the basic Islamic legal texts from the aspect of exemption from the general rules because it is needed. For example, it is reported from the Prophet (s.a.w.): *"He prohibited anyone from selling what he did not possess, and allowed the salam"* (see para 72/3).

   Therefore, the *Sharīʿah* allows *al-salam* (deferred delivery sale) even if it is the transaction of the unknown items, which the general evidence forbids, but it is allowed due to the needs of people to trade their goods, and to obtain their payment before delivery, in order to assist in the production. In this case, the payment in advance is stipulated in the contract.

2. Based on this, the jurists also allow in reasonable matters to sell the fruits in succession when it ripens and becomes safe from

defect. Nevertheless, most of these fruits might not ripen yet, however, it is permitted because of people's need.

3. They also allow entering the public bathroom by price even if the duration time to take bath is not known. As the quantity of water to be consumed is not known, it is legalized based on the needs.

4. They allow the mortgage conditional sale exempted from the maxim, also because of people's need (see para 46/8).

5. All the rules which according to the jurists changes according to the changing of time or due to its spoilage, these kinds of matters will eligible for new rules and change according to the needs.

6. In addition, to consider either the public or the special customs, and to examine it in the legal opinion, it is also effective response to the factor of need as it is previously mentioned in the concept of customs.

In short, it can be derived from this and rest of the examples, that the necessity and the needs separate from each other in two aspects:

a. The necessity can legalize the unlawful things whether that necessity happens to the individual or the group. Unlike the need which cannot obligate the exceptional solutions from the general rules unless it is a need of community in general. This is sensed because every individual has his unrestricted needs and different from another person though it is impossible to specialise each individual with special rule. In contrast with the necessity, it is rare and difficult state.

b. The exceptional rule which originates from the necessity, it is temporal allowance for the unlawful thing prohibited by the *Sharīʿah*. This allowance will invalidate immediately after the necessity has come to an end, and it is exclusively dedicated for the compel person.

Though the rules originate from the need, this cannot clash with the legal text. However, it might contradict the maxims and the

reasoning. It is actualised in general in constant way which both the needy and others benefit from it.

Through these, the need also separates from the special *'urf* since the rule is established through the special *'urf* and eventually will be merely limited on the people of *'urf* as aforementioned (extracted from the commentaries of my father on the maxims with some commentaries and elaboration).

It should be noticed from the formation of this maxim that the word: "special need" might deceive someone from the first look that refers to the individual need. However, it correctly means the need of a group of people, not the need of people in general.

Shaykh al-'Izz ibn 'Abd al-Salām deduces in his book, *Qawāʿid al-Aḥkām* (2/188) that "the general interest is like the special necessity...".[527]

Therefore, the best form of this maxim and at this exact state, as follow: "The general need should be treated as the special necessity". Then, the general need can be explained as something contains all nations or the part of them, like the people of special occupation, or people of special province, for example.

In short, the merit of this modified form, is its indication on the basic of getting rid the hardship, which it is one of the basic characteristics in the *Sharīʿah*, in the aspect that it is the basic in the exceptional matters at the state of individual necessity, as it is simultaneously a base in relating to the general need.

81/36 The Fifth Maxim: *"Custom is a basis of judgment"* (*Majallah*, 36)

The tradition from this maxim means the prevailing *'urf* with its two types: the verbal and the practiced customs. This maxim expresses the important role of *'urf*, its rank in the *Sharīʿah* as well as its prevalent judge between the people in regulating the rights and the obligations of people, in their interactions within them.

Indeed, this maxim and its following collloraries are all used to prove and indicate several matters at different occasions, in relation to the theory of *'urf*, which is exactly suitable to be the meaning for tradition. The examples for its application, in that reason, should not be any need to repeat that over here (see para 67/9, 69/1-9).

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[527] *Al-Mulkiyyah fī al-Sharīʿah al-Islāmiyyah* by Dr. 'Abd al-Salām al-'Abbādī, 2/276. Amman: Maktabah al-Aqṣā, 1975.

Subsidiary maxims from this basic maxim

81/37 (a) ***"The Practice of people is an evidence which must be acted upon" (Majallah, 37)***

This maxim is similar in meaning with its basic maxim which is "the tradition is evidence". It also contains both the verbal and the practiced customs because the meaning of the usage is the tradition and the *'urf*.

81/38 (b) ***"Custom can only be considered if it conforms and is dominant" (Majallah, 41)***

81/39 (c) ***"The consideration is merely for the common predominant not the for rarrity" (Majallah, 42)***

These two maxims express some conditions to consider *'urf* which we had discussed in its special chapter. It is the condition of conformity and predominance which we have elaborated everything beforehand (see para 70/2).

81/40 (d) ***"Certainty should be left due to the indication of tradition" (Majallah, 40)***

81/41 (e) ***"The written stands as speech" (Majallah, 69)***

81/42 (f) ***"The usual gestures from the dumb is simply like the spoken explanation" (Majallah, 70)***

All these three maxims discuss the basic verbal *'urf* in the speech and what usually replace it in the expression through writing and gesticulation. Indeed, their applications have been mentioned in both theories of transactions and customs (see para 30/6-7, 69/3-5).

81/43 (g) ***"A customarily known (rule) is like stipulated condition" (Majallah, 43)***

81/44 (h) ***"The Specification through the 'urf is like the specification through the legal text" (Majallah, 45)***

81/45 (i) ***"The widely known among the traders is like the stipulated condition among them"* (*Majallah*, 44)**

All these three maxims discuss the dominance of the practical customs.

While the third maxim originates the basis in considering the special *'urf*, i.e. the *'urf* of the traders, the *'urf* of craftsmen, and the *'urf* of specific province, this *'urf* has a dominance consideration within them. As for the the general *'urf*, its function restricts within its special group which does not work beyond that. Furthermore, the details have also been mentioned in the theory of *'urf* which can explain these maxims (see para 69/6-9).

81/46 (j) ***"It cannot be denied that changes in rulings follow changes in time"* (*Majallah*, 39)**

The explanation of this maxim is detailed out at the end of the theory on custom.

81/47 The Sixth Maxim: *"To observe a statement is preferred over neglecting it"* (*Majallah*, 60)

"To observe the statement" means to judge it while to neglect it means; to not apply the effect of the text. Basically, this maxim means that any word pronounced in the legislating condition or on an action. If it is ascribed to any of its possible meanings, it cannot result from any judgment, and if it is ascribed to another meaning, it can. The rule is to interpret it according to its comprehensible meaning where it will result in a new judgment because the opposite of that is neglecting and obligation whereas the word of the sane people should shield from obligation as much as possible (see *al-Qawa'id al-Fiqhiyyah* by al-Shaykh Maḥmūd Ḥamzah, p. 155).

- Based on this, if someone confessed that he is indebted a thousand while he does not explain its reason, he later confessed that he owed another one thousand, he will be required to pay two thousand while his claim that they are one confession will not be accepted.
- In the same manner, if he wills out one hundred to be spent for welfare, then, he also made another will, the bequest will be disbursed for two hundred. This is regardless the claim of the

heirs that what he meant with the second will was exactly the first will.

- Also, if someone divorces his wife with his statement; you are divorced, you are divorced, this will be counted as two divorces, while the second divorce will not be assimilated in the first divorce, since there is not any context which indicates the intention of stress, because the basic measure of the statement is to establish and not to stress.

As to the religious rule, if what he intended with the two divorces is to stress, they will stand as one divorce. We mean with the word establishment *al-ta'sīs*; when the statement reports a new benefit, unlike what he had previously reported.

Indeed, it has branched out from this maxim several maxims, which address the method of using the statement that derived from this maxim, as it discusses the reasonable and preferable ways in that respect. These maxims are as follow:

Subsidiary maxims derived from this basic maxim

81/48 (a) ***"The norm in words is its literal meaning"* (*Majallah*, 12)**

Al-Ḥaqīqah means the literal meaning which is ascribed for the word. It is the opposite of the word *al-majāz* (metaphor) which means any other meaning which is not ascribed for the word. However, there is a relation between it and the literal meaning which allows the speaker to intentionally express with that word, based on the context, which indicate that he had meant with the word the metaphorical meaning, not the original meaning. For instance, the real meaning of the word *al-maḥkamah* (the court) is the place of the judge. However, if it is used for the judge himself, as we say: "The court has dictated", it is then the metaphor.

The literal meaning of the word *al-qatl* (the killing) is to put an end to someone's life. If it is used for the meaning of "painful striking", it is then metaphorical.

Meanwhile, the meaning of this maxim is: to apply the statement of the speaker, either the lawmaker, contractor, or oath maker, and so forth, which necessitates their words to be interpreted according to their literal meaning, when they are free from the contexts, which outweighs the metaphorical meaning.

- Therefore, if someone says to another person: "I give you this thing", and the latter accepts it, then, if he claims what he intended by the word 'give' is to offer to sell which is the metaphorical meaning, and he asks for the price, his claim will be rejected. This is because the basic norm regarding the statement is the literal meaning, and the literal meaning of gift is to grant to another person something without any payment. On the other hand, if he says: "I give this it to you for two *dinars*", his utterance of two *dīnārs* as a payment indicates with the word gift as selling is the metaphorical expression, hence, it is understood as those.
- Similarly, if a donor gives "his children" (*al-walad*), it contains both the male and female children, because the word "child" is used for both of them.
- Also, if he donates to "his grandsons" (*awlād awlādah*), it will also comprises the granddaughters.

Also, if he makes a will for another person's children, while the latter has both immediate children and grandchildren, the donation will be disbursed to the immediate children – the first layer from his generation – because, it is the basic meaning for the word "children".

81/49 (b) *"If the literal meaning is not possible, it shifts to the metaphorical meaning"* (*Majallah*, 61)

Because the metaphor will be the only method to observe the statement, and to refrain from its negligence:

- therefore, if someone donates for his children, and he has not get at the moment except grandchildren, the donation will be then interpreted through the metaphor, because the literal meaning for the word "the children" – which means the immediate children – is impossible, though the grandson is also metaphorically called child, hence, the word will be interpreted to that, and it is better than to be neglected.
- The same meaning is to the impossibility of certainty, its difficulty, i.e. if someone swears that he will eat from this tree, the literal meaning of eating is to eat its timber. However, it is difficult since it will indicate the metaphorical meaning, which indicates eating from its fruits. Then, the word will be understood based on that respect. Hence, this is also an example for the

verbal *'urf*, as well as it can be applied on the oath, as it is mentioned in the concept of prevalent *'urf*.

81/50 (c) ***"The absolute remains in its infinity when there is no proof on its limitation either through text as evidence" (Majallah, 64)***

The absolute and the limitation are characteristics of words. The absolute word is evidence on a matter which is free from restraints that can restrict it within some qualities or bounds, while the limited expression is the word which is restricted with restraints. For instance, the word (horse) is an infinite, while the (white horse) is restricted with the word (white), also the word (place), is absolute while (the place for food) is then restricted.

States of Absolute

If someone authorizes another person to buy for him a horse, whereas, the latter bought a red horse, and the employer said: I specially demand for a white colour, he will take as it is bought by the authorized employee, because his statement is infinite and should be applied accordingly.

- Also, if he authorized him to buy on his behalf a specific item, and he bought it with the normal price, then the employer said: I want you to buy it from the so and so market, or with the least cost. Certainly, there is no consideration with its statement, the sale will be legalized. Because his statement for the authorized employee is absolute, thus, its absoluteness will be then applied.
- As the iufinite loan contract, it really allows the borrower every ways of benefit within the normal bounds. Therefore, it is not restricted withiu a place or period or a way which does not have any proof.

States of limitation

If anything which identifies the limitation of absoluteness is conformed either from text or evidence indication through some restraints, it will then be restricted.

An example of limitation with the text (*al-taqyīd bil-naṣṣ*); if someone says to his authorized employee on the sale: sell for twenty, his disposal will not be executed with that little amount.

Also if the lender limits on the recipient specific period, definitely he is not permitted to has any benefit else.

The limitation through indication (*taqyīd bil-dilālah*): like if a person authorized another person worker (carrier), to buy for him a horse, but he buy for him the best horse from the precious racing horse, definitely this action will not accepted, because the state of authorized indicates the exact meaning, which it is the horse for carrying, even though, the word is infinite.

If someone authorizes another person to buy on his behalf the immolation ram, bnt he get for him after the period of ei`d anniversary, or he authorizes him to but for him a heater, but he bnys it after the period of winter, or he authorizes to rent on his behalf a home, but he rents that after a year for instance, all these states will obliged on the employer, because of the period of contract indicates the limitation.

In addition, the indication of custom (*'urf*) is similar to the indication of situation regarding to the limitation according to Abū Yūsuf and Muḥammad. For instance, if someone authorizes another person to by him something, which it is limited with the exact common price and immediate payment, therefore, he is not allowed to buy it below that amount or with the debt in advance, according to the *'urf*. Similarly, if he authorizes on renting his home, hence, he is not allowed to rent it for long period of years.

According to Abū Ḥanīfah, he has the authority to perform all those things according to the absolute though the view of his two students is more apparent in this respect.

They all agree that the authorized agent should observe the exact normal price, hence, if he buy it more than normal price, it might not accepted from him.

81/51 (d) *"A reference to a part of an indivisable thing is like a reference to the whole"* (*Majallah*, 63)

Therefore, if a person divorces a half part or quarter part from his wife for instance, she will definitely be divorced in whole. Also, when he divorces her with half a divorce, it will stand as a full divorce.

In the guaranty of life (*al-kafālah bil-nafs*) (see para 46/5), if the guarantee guarantees a quarter of himself for a person, he will stand as security for that person because he is indivisable.

In contrast, in the guaranty of wealth (*kafālah bil-māl*), if a person ensures someone to pay part of a debt, either one fourth or one fifth, or he ensures the specific amount, he has not guaranteed the major part, because it is divisable.

Also if the creditor frees his creditor from part of the debt, the latter will be from liability from that exact part only.

Exemptions

Meanwhile, they have exempted from this principle the matter; whereby, if someone says to another person: half of me is guarantee for you to ensure so person`s debt, definitely, the guaranty will not be executed.

81/52 (e) ***"The description on the present thing is inconsequential while on the absent is significant"* (*Majallah*, 65)**

We have mentioned the explanation on this maxim is the theory of transactions (para 36/5).

81/53 (f) ***"The Question is Repeated in the Answer"* (*Majallah*, 66)**

It means if the answer uttered with one of the concise words as in *"naʿam wa-balā"* (yes, indeed, surely!) after the detailed question, that answer contains some explanation in the question, because the indications of these words consider what is earlier mentioned before them.

For example, if a person was asked: "Does anyone has any debt against you, for the reason of so..., and he answers: yes, or he was asked; does he not have any so right on you? He answers: surely! He confirms everything stated in the question even though, he does not repeat it.

81/54 (g) ***"if no meaning can be attached to a statement, it would be disregard"* (*Majallah*, 62)**

It is impossible to attaché a meaning to a statement when a word is difficult to understand through its correct meaning, even

metaphorically. Thus, it will then serve as nonsense which will be disregarded. The impossibility might be either conceptually or legally:

a. The conceptually impossible: For example, if a person claims against another person that the latter cut off his hand or he confesses that he had cut off another person's hand, and the hand is seen. Similarly, if a person claims another person of the same age or if it is established that he is related to another person, that the latter is his son.

b. As for the legally impossible: For instance, if a person states that his sister is entitled to double his portion from their father's estate, the statement is disregarded.

In contrast, if he confesses for her that she deserves some portion from the estate which it is equal to his portion, or more than his portion, but he does not specify it that through the inheritance. This statement is correct, and obligatory, because the worthiness of a sister to possess auything that is vouched for her by her brother is possible, through some legal reasons, similarly, if she lends some amount to the heir before his death.

If he guarantees someone, while he does not explain whether it is guaranty of life or guaranty of property, this action is not correct, due to their different rules, and the intention is not specified, thus, the execution will be then difficult.

81/55 The Seventh Principle: *"There is no room for ijtihad (independent reasoning) where the divine text is available"* (*Majallah*, 14)

The divine text (*naṣṣ*): It is the statement of the legislator, the Qur'ānic verses and the established Prophetic traditions.

However, the meaning over here also contains the confirmed consensus (*ijmāʿ*) through the authenticated narration.

Ijtihād is the intellectual effort to derive the legal judgment from its evidences, and there are two types:

- the effort of jurists in understanding the Islamic texts
- their effort in comparing a matter which does have a text with a matter which is ruled by a text.

a. As for the reasoning in understanding the text, it is intrinsically needed from the text, in order to know its application. But it is applied when the text is obscure, and it has several different meanings in the interpretation and application.

If the text is clear and apparent in reporting the rule, which it relates to, in a clear word which does not need any interpretation, definitely, it should not be interpreted with any meaning which contradicts its apparent meaning, or might not convey the word.

For example, the Prophet (s.a.w.) says: "the proof is on the claimant and the swearing is on the defendant" is clear and apparent in accepting the proof from the claimant due to the testimony. Therefore, no one should reason against the understanding of the text, which contradicts this clarification, whereby the proof will then be accepted from the defendant, and it will not be accepted from the claimant, or it justifies the option for the judge to ask anyone of the two opponents for the proof or the oath, and to forbid from the other.

As for accepting counter proof from the defendant in order to outweigh between it and the proof of the claimant, it does not deny this legal evidence because it does not denies the claimant the proof which the text of legal evidence has dedicated for him, but it is really an instrument to establish the proofs and to judge with the stronger one.

b. As for the reasoning through the analogical approach, it is not permissible to use it when there is an authentic text in the needed matter, because analogy is only allowed when there is no text.

Meanwhile, it is possible that a *ḥadīth* exists on an issue, whereby some jurists might classify it as authentic legal evidence, and leave the dissenting analogy for it, while others might not view this legal evidence as meeting the level of authenticity, and will then leave it, and use the analogy. In short, the unlawful *ijtihād* alongside the text is the one which contradicts the authentic and clear text and apparent in meaning, in the way that does not need any interpretation.[528]

This is also the rule in the legal perspective which does not allow judges (lawmakers) to independently reason in their judgments, with clear constitutional text, which contradict their

[528] It is called in the study of the principle of jurisprudence as definite narration and indication (*qaṭʿī al-thubūt wal-dilālah*).

reasoning, since the duty of the judge is to implement, not to legislate.

81/56 The Eighth Maxim: *"An Ijtihād is not invalidated with a similar one"* (*Majallah*, 16)

Basically, anyone understands a current matter, declares, and judges accordingly, then, another similar case occurs, and his legal opinion then changes that contradicts the first opinion, the earlier legal opinion and the judgment do not replaced his last opinion in the new case. This is because if the opposite opinions are allowed to be replaced whenever the opinion of a *mujtahid* changes, any rule cannot be certain because the reasoning is often flexible according to the change of views in the text.

It has been related from 'Umar ibn al-Khaṭṭāb (may Allāh bless him) that he judged a matter with an opinion. After then, there is similar case where his opinion contradicts the first opinion, and when the plaintiffs in the first case confronted him, 'Umar said: "that was what we had judged and this is our current judgment". Indeed, this statement has been used as a similitude (see *Ḥāshiyat al-Ḥamawī ʿalā al-Ashbāh* by Ibn Nujaym, 1/141).

This is also adopted by the constitutional maxim and the supreme courts where the ratification and revocation takes place. If its judgmental reasoning changes concerning a matter or comprehending a legal issue which has not happened before, it should not revoke what had been pronounced whereas it is applicable according to its new reasoning in the new issues.

As the independent reasoning of a qualified scholar can never be revoked through the changing of his opinion, it cannot be revoked by another qualified scholar's opinion. Indeed, every qualified scholar has to respect another scholar's opinion, because there is no preferred one between the qualified scholars after they had achieved this position of independence in reasoning.

81/57 The Ninth Maxim: *"What is proven to be opposed to an analogy, others cannot use it for further analogy"* (*Majallah*, 15)

We have seen in several occasions that most of the rules are established contrary to the analogy by Islamic legislation; which means it provides the analogy the exceptional rule which is contrary

to the necessity of the general maxims and are valid for their kinds, due to special *Sharīʿah* considerations.

The will, for instance, is a donation assigned to the state which will applied after death. It is the state whereby all people rights will be extracted from his properties, while the rights of heirs will relate with it. Therefore, the will is applied in contrary to the analogical approach, because the lawmaker permits it in order to provide for the mankind the opportunity to rectify with it. His shortcomings are in relation to the welfares and charities which someone might stick to it at his lifetime, fearing from the demands.

Therefore, it is not permissible to deduce on it, to design any other disposals to him until after the death, like gift and loan, the selling and the renting as example, whereby the person will then seal the contract to the period after the death.

However, if he makes a will that specify thing from his property to be sold after his death to so and so person, for half of its normal price, for instance, this is allowed because it is a will with selling or loaning, not the current transaction which its application is adjourned to after the death.

Notice

It is necessary to notify that anything which proved in contrary to the analogy, it is possible to deduce on it, in comparing the reason which contrast with the analogy, i.e. repelling the difficulty, blocking the mediums whenever they are needed. Indeed, they said: The rules of endowment (*waqf*) are taken through the deduction of the rules of will. Therefore, the responsibility of the trusted person on the endowment can be deduced from the responsibility of guardians in relation to the execution of will.

81/58 The Tenth Maxim: *"When an inhibition is removed, it reverts back to its original states"* (*Majallah*, 24)

This maxim has been mentioned in the first chapter on the theory of transactions in the discussion on prohibitions (see para 28/7).

Subsidiary maxims derived from this basic maxim

81/59 *"Whatever is allowed by an excuse is invalid when the excuse is removed"* (*Majallah*, 23)

- In the religion affairs (*umūr al-diyānah*): If the weaken which allows the fast breaking within Ramaḍān is abate, the fast is then obligated in the rest of the month. Also, if the necessity that allow the prohibition, the allowance will then revoked, etc.
- Concerning the legislating affairs (*umūr al-qaḍā'iyyah*): If the fire blaze breaks out in a house, the owner of that house rescues what are secured under him, like the deposits, then, he gives it to someone from his neighbors. Later on, he is excused for that, and he would not ensure if it ruins. However, if the fire quenched and he left it with them until it deteriorated, he is then neglectful. Therefore, he will ensure its cost because the excuse has abated which allows him to put with them.

81/60 The Eleventh Maxim: *"What is forbidden to take is forbidden to give"* (*Majallah*, 34)

Because, the giving at that moment is a support and encouragement to receive the prohibited, therefore, the giver is a participant with the receiver in the sin. Based on this, it is prohibited to give bribe, interest, and the wage on lament, as well as the rest of evil deeds, as it is prohibited to receive it.

Exemptions

It should be exempted from this maxim is the wages given to the evil doers and the satirists in order to free from their harms and their tongues in a situation where there is no restraint power. It also applies to what the debtor pays as an interest in the necessity state in order to get the loan, as well as what the guardian pays from the money of orphan to the oppressor in order to free the rest, if it is impossible to free more than that.

Subsidiary maxims derived from this basic maxim

81/61 *"What is forbidden to perform is also forbidden to request its performance"* (*Majallah*, 35)

The silence against the prohibited work is not legally allowed though it is necessary to refute and change it. Therefore, the demand is rather prohibited.

Exemptions

If someone oppressed other people to perform an evil, he also deserves a portion from the punishment.

It is exempted from the maxim, the permissibility for the claimant to ask for the oath from his defendant even though he really knows his lying.

81/62 The Twelfth Maxim: *"Whoever hastens something before its time is punished by being deprived of it"* (*Majallah*, 99)

This maxim is regarded as one of the Islamic policy relating to the repression and blocking the means to evils.

- For example, the inheritance and the will, their legal periods are after the death. Therefore, if someone assassinates his testator without any legal reason, he will be denied the right from the property and will.
- Also if a man divorced his wife the second divorce at his last illness, then, he dies at her period of waiting, the wife will benefit from his inheritance according to the Ḥanafīs. This is because his last illness indicates that the husband intends to refuse the right of the wife from inheritance. Hence, this intention will then abate. This is called the escape divorce, because its observer intends with the divorce to abrogate to testate his wife.

This rule is part of the ways of refusing (arbitrariness in usurping the right) (see footnote para 5/27).

It is related from 'Umar ibn al-Khaṭṭāb (may Allāh bless him) that he gives a legal opinion to that woman who her husband divorces her, and she gets married to another man before her period of waiting from the first husband, that she is forbade from the second husband, if he copulates with her, the everlasting forbidden, in order to treat her in opposite to her intention, according to the Islamic policy in the public interest (see *Tārīkh al-Fiqh al-Islāmī*, Faculty of Islamic Law, al-Azhar Univeristy, p. 47).

Meanwhile, we really have a notice, concerning the formulation of this maxim, and inventing the new formation for it, in the appendix to this chapter, therefore, look up for that.

81/63 The Thirteenth Maxim: *"Whoever attempts to revoke anything completed through him, his attempt will be turned down"* (*Majallah*, 100)

- Based on this maxim, it is not permissible for the confessor to withdraw his previous confession, under the pretense of the mistake.
- If the heirs share the property and one of them claims that the property belongs to him, he intends to revoke the division, they will not accept his claim because since he attempts to participate with them on that division, it is intrinsically confession for their rights in that respect.
- If someone sells or buys, then, he claims that it was surplus from so person and attempts to revoke the contract, this claim will be totally rejected.
- As though if someone guarantee with overtaking the land buyer, he then assume to take the preemption or he will claim its possession, this will be rejected.

Exemptions

It might be exempted from this maxim, something which has relation with the right of incapable or endowment or the rights of group.

Therefore, the heavy shortage in selling the property of incapable or the manager is to loan the land of endowment, then, claim the occurrence of shortage in their disposals. This claim should be considered.

Also, if a person buys a land, he later on claims that the seller has donated for mosque or for burial ground, his claim will be accepted. All these are legalized in order to protect the rights of capable and nation. If these are truly confirmed, the contract will be revoked.

81/64 The Fourteenth Maxim: *"The continuation is easier than the starting"* (*Majallah*, 56)

For example, pushing is easier than lifting. Based on this maxim, some deficiency in the conditions of transactions can be overlooked when it continues in that state. However, it should not be overlooked as completed. Absolutely, this maxim can be fully explained in these following subsidiary maxims:

Subsidiary maxims derived from this basic maxim

81/65 ***"What can be excused in the remaining cannot be excused in the beginning"* (*Majallah*, 55)**

This is because the remaining is easier, as explained by the previous maxim.

- One of the examples is what we have mentioned earlier that the lending contract is conditioned before it could be valid, that the renter should be reasonable and should not be a spread share, also a donation which can be shared. However, the jurists pardoned the contingent publicity in both of them without comparison (see para 25/9-10; and *Qawāʿid al-Ḥamzawī*, p. 205) because anything contingent will be in a state of the remaining of the contract without its beginning.
- If there is a total cost for a group of thing and someone purchased one of them with his share from its cost, it is not valid because of the ignorance about the cost during the contract. This is what is referred to as the sale on share. However, if he purchased them all, and then he returned part of it, he can return the cost of what he returned to the seller, and the sale will remain on the rest on his share in the cost (see the meaning of *istiḥqāq*, 2/37).

81/66 The Fifteenth Maxim: ***"The subordinate follows the principal"* (*Majallah*, 47)**

This means that the subordinate to other in existence will follow it in the judgment, and as a result, it will affect what affects its root. A subordinate is considered a part in something else or like a part in the inherent connection, like an organ in the living things, and a fetus in the womb of his mother, and the wool on the sheep, and the milk on the udder, or to be uecessary part of something, such as the key in the padlock.

- If a sheep is sold, the whole is included (automatically) in the sale, and the seller does not have a right to it even though if they did not utter it in the contract. Again, if a person confesses to other the possession of a disputed sword, its scabbard and its handle will also be included in it.

- The increment of mortgage such as the offspring of a mortgaged animal will remain in the hand of the mortgagee (mortgage holder) following its source.

Subsidiary maxims derived from this basic maxim

81/67 (a) ***"Whoever possesses an object, possesses what is indispensible to it" (Majallah, 49)***

On this basis, the jurists decide that:

- The possession of land necessitates concomitantly what lies above it and below. Thus, its owner can erect, as he pleases, a storey-building to its height and dig in depth to its bottom.[529]
- Who purchases a house, lying on a closed lane shared between many houses, he possesses, as a result, share of the house on the lane from the road, even if it is not stipulated in the contract. And the rule of this principle is not confined to the possession of real right but also includes the possession of disposal right.
- If a broker exhibits what he is commissioned to sell to a shop-keeper and leaves it with him, and the latter absconded, the broker is not held liable, for what he did is part of the sales necessities. The broker is thus vindicated and will not be considered as negligent.

  (This is one of my father's interpretations of the maxims, quoting from chapter 33 in *Jāmiʿ al-Uṣūlayn*)

81/68 (b) ***"An accessory cannot be judged on its own" (Majallah, 48)***

This maxim is confusing in application and details due to its phrasing that seems more generic than its topic. Therefore, the interpreters have given it many exceptions.

a. The meaning of this, I suppose, is that the subordinate which is a sort of "part" or like a "part" of other, should not be solely

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[529] Juristically, this does not contradict with the height restriction of buildings in the cities according to the municipality's regulation and in line with the public interest *(maṣlaḥah ʿāmmah).*

commoditized (treated as commodity on which a contract is concluded). Therefore:

- The sale of an organ of a living sheep is void, even if it is slaughtered afterward and (the organ) was able to be separated from it.
- The sale of an animal embryo without its mother is void, and its exclusion from the sale of its mother nullifies the sale contract.
- (The rule is also applicable to) to milk in the udder and wool of the living sheep.

b. Otherwise, any "subordinate" that falls behind this range can be set apart with judgments, as in the case of transgression. Therefore:

- If a usurped animal gives birth, its offspring will not be judged as such, because the usurper does not remove it from the possession of its owner, it was just an occurrence (see para 23/9). If it dies without being harmed or neglected, he will not be liable for it, unless if he deliberately ruins it. Moreover, if he hits the stomach of a pregnant woman and she miscarries, the hitter will be responsible for *ghurrah* (the amount of *diyyah* payable for destroying an embryo), even though it is subordinate to its mother.
- It is also confirmed that an embryo has an incomplete competence of possession, and deserves on this basis four rights including: its right to inheritance from its testator, its right to the will on the condition that it is born alive as already mentioned in the theory of competence (see para 60/4).
- It is also permissible to sell a key without its lock, and the halter without its animal, even if they are both subordinate, they are necessarily included in the sale of the lock and animal without stating them in the contract. The reason is because this maxim, as has made known, is specifically meant for any subordinate in sort of 'part' or like 'part'. Hence, it will not be legally valid to be separated from the contract.

With this understanding, any confusion in its application will vanish away, so do many of its exceptions and the maxim will become solely applicable to 'subordinates.'

81/69 (c) *"What is excused in the subordinate is not excused in others"* (*Majallah*, 54)

This means that the required legal conditions in any activities should be fulfilled altogether in the first place, but were made easy on its subordinates.

In the *waqf* (endowment), for instance, it is required to be an immovable property, like real estate. It is therefore invalid legally to consecrate movable properties except what is commonly known like consecration of books and funeral materials (see para 67/5).

However, if one consecrates a real estate such as a country estate or a house including movable properties, the movable property is therefore judged legally valid in view of the estate.

81/70 (d) *"If the principal fails, the subordinate also fails"* (*Majallah*, 50)

This maxim does not imply a *vice versa*, i.e. the void of the subsidiary maxim does not necessitate the void of the source.

So, if a creditor exonerates his debtor, his guarantor in consequence is exonerated, and the guarantee is dismortgaged, if the debt is strengthened by a guarantor and guarantee (mortgage). Contrarily, if a creditor exonerates the guarantor or returns the mortgage, the debt of the mortgager is not waived.

81/71 (e) *"The subsidiary may be considered without the principal"* (*Majallah*, 81)

The phrase of this maxim, as it is in *al-Majallah*, is *"the subsidiary may be considered without the establishment of the source"*.

This maxim seems unusual and not reasonable in the first place, for it contradicts the natural law. According to the natural law, there is no subsidiary without its source. However, the issue of legal claims is tended to be affected by factors different from the natural factors. Therefore, this maxim indicates the affirmation of a right at the court, and does not signify its real existence.

As a matter of fact, the existence of a branch necessitates the existence of the source from which it branched out. Nevertheless, the affirmation of claim liabilities on the people may not be upheld by the source, but only by the subsidiary. For example:

- If anyone lodges a complain on two persons that one of them owes him an amount of money and the other person was his guarantor; if the guarantor confesses and the latter denies, and the claimant is unable to prove it. In this case, the guarantor will be responsible for the payment of the money. This is because a person is judged based on his own statement (testimony) as will later be explained.
- If a person made a claim of affinity that someone with an unknown parentage is his brother, this claim affects the right of the father because it implies an enforcement of a descent on the father, and his being the claimant's brother naturally derives from his sonship to his father, and this requires the father's certification; however, if the father denies his sonship and its impossible to establish it with an evidence, his sonship is therefore not confirmed on the father. However, the claimant will be judged by his claim of affinity, and his inheritance from the father will be equally shared between both of them.

81/72 (f) ***"When something is void, whatever within it is also void" (Majallah, 52)***

This is similar to the saying that "the void of the container necessitates the void of its content"

- If a contract is void, the conditions that it contains and the obligations are also void, because they are subordinated to the contract.
- If someone reconciles with his litigant on a reward, and then the litigant confessed after the reconciliation that he does not have any claim on him; the reconciliation is considered void and what it constitutes of a reward is also void, and the reconciler can therefore refund his money.
- As the content of a contract considered invalid, so does what is based on it.
- Therefore, if they struck a bargain and traded with goods and cost, and each of them exempts his partner from any right or

claim related to this sale; and then, the seller withdrew (*istiḥaqāq*)[530] the goods from the buyer, the seller must refund the cost to the buyer. The reason is because when the sale becomes invalid by the withdrawal of the goods the exemption which was based on it has also become invalid.

On this basis, it should be said in the phrasing of the maxim that "*...the content is void as does what is based on it*".

Exemptions

This maxim has a lot of exceptions which include: if a pre-emptor reconciles with his right of preemption on a sold real estate upon a reward, the reconciliation is not legally valid, and consequently, his right of preemption is void without compensation. The reason is because the right of pre-emption is legalized not to be exploited but rather to be used in forestalling a bad neighborhood.

So, it is observed that the reconciliation here is void without affecting its contents, i.e. the relinquishment of the preemption, because his consent to give up his right upon a reward is indicative of a good neighborhood.

81/73 The Sixteenth Maxim: *"When the original is not possible, it is replaced with its substitute"* (*Majallah*, 53)

On this basis, the essence of the thing extorted should be returned if it is available, but if it is damaged, an indemnity must be paid, either its equivalent or the value (price).

If the defective goods becomes difficult to be returned for legal impediment; for instance a cloth that is bought, after having dyed an old defect was found in it, the buyer has a right to refund a part of the cost to reduce the defect.

The way to measure this is to evaluate the goods soundly and defectively. What reduces from the price of the non-defective goods when compared to the defective is the percentage to be deducted from the cost of the defective. So, if the cost agreed upon in a transaction was fifty, and then the price of non-defective goods is a hundred, while the defective is fifty, the amount to be refunded is 50

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[530] On the meaning of *al-istihqāq*, see the previous chapter (2/37).

percent of the cost of defective, i.e. a half. Therefore, a half of the cost is equaled to twenty five.

81/74 The Seventeenth Maxim: *"The annihilated cannot be restored"* (*Majallah*, 51)

This means that any rights being disclaimed by a disclaimer will become inexistent that cannot be brought back, as was the case of a non-existent thing.

Therefore, if a creditor exempts his debtor, the debt is annulled, and cannot be reversed if a creditor later regrets.

If a seller delivered the goods to the buyer before the cost is paid, his right to keep the goods is nullified for the collection of the cost. In that case, the seller no longer has the right afterward to withdraw the goods for keeping except to chase the buyer for the cost. It was previously mentioned in para 51/5 and 81/12.

The easement right through a real property on the land of other or his house; if the owner of the land passage forgoes his right, his right has dropped and cannot be reclaimed

General Notice

There are many rights which cannot drop by being disclaimed, and if the claimant of the right disclaims it, he can still request for it. This is not because the disclaimed right can be reclaimed, but rather because it does not drop in the first place. Therefore, there is no contradiction in this maxim, neither can it be regarded as an exception to it, it is just because it does not apply to it.

An example is the possession of a real right: It has been previously mentioned under the characteristics of possession that it cannot drop by being disclaimed, but it can rather be moved by means of transportation (para 25/6).

Another example is the endowed right in the endowment revenue: if he give it up and leaves it for some times without the prescribed period, he can still lay a claim on it, for it does not drop (see *Qawāʿid al-Ḥamzāwī*)

Our jurists did not give certain rule to regulate the rights which can or cannot drop by being disclaimed.

However, during his explanation of this maxim, my father drew out a jurisprudential rule to distinguish between the rights that can drop by being disclaimed and that which cannot drop according to

the doctrine of the Ḥanafīs. He deduced it from the explanations of the jurists on the abatement rights and non-abatement. Thus, it comes as an all-inclusive maxim which is applicable to different sort of rights, including what drops and what cannot drop.

The rule in brief states that what can drop by being disclaimed should meet four requirements:

1. It should be available when being disclaimed, so it is not legally valid to exempt one from a debt before it is launched.

2. It should not connect with the possession of a real right, as has previously been mentioned.

3. The interest of its owner must be absolute or prevailing. Therefore, the right of the manager (custodian) of the endowment and the orphan's guardian in the disposition of endowment and the orphan properties cannot drop by being disclaimed, because they are not working for themselves.

   Moreover, the penal code (imposed on a criminal) cannot also be withdrawn for having been pardoned by the victim or his guardian, because it is the divine right which is referred to as the "public right" *(al-ḥaqq al-ʿām).*

   In contrast to *al-qiṣāṣ* (avenge for blood), it can drop by being disclaimed because the personal right prevails in it (meaning that his right to choose a kind of punishment he pleases, but the main punishment is a public right which is to be exercised by the ruler for public interest. Therefore, it cannot be withdrawn by being pardoned). If the right of *al-qiṣāṣ* is disclaimed by the claimant, the penalty will be switched to censuring as has been mentioned in the theory of sanctions (see para 49/15).

4. Disclaiming of a right should not result in an unlawful consequence.

   If a person sells something that has been rent out or mortgaged before the selling, the buyer has a right between terminating the sale contract and refund the cost, or awaits the passing of the rent period or frees the mortgage in order to collect the goods. So, if he drops his right of choice, it will not be judged as dropped according to the accepted views (*Radd al-Mukhtār, Bāb al-Taṣarruf fī al-Rahn*). The reason for this is that if he disclaims his right of choice, his right on the collection of the

goods would remain suspended. This is an absolute and unlawful damage. According to the fundamental of *Sharīʿah*, no one should be forced to endure a complete damage which does not apply to the contract, even if he is satisfied with it (*al-Durr, Bāb al-Bayʿ al-Fāsid*, 2/170).[531]

81/75 The Eighteenth Maxim: *"The gratuity is not complete except with delivery".*

Gift and other real right contract, such as loan and deposit, the handing over of the essence in it is an integral element in concluding a contract, but not a mere execution of it. An explanation about this has been previously made on its occasion in the theory of contract (see para 30/13).

81/76 The Nineteenth Maxim: *"A change to the cause of ownership is like a change in its essence"* (*Majallah*, 98)

The phrasing of this maxim as it is used in *al-Majallah* is like the change of something possessed. On this basis, the scholars deduce that:

- If a buyer sells a good purchased and buys it again from its buyer, but later on found an old defect which has been there from the first seller, he does not have the right to return it with the right of cancellation for defect, because the good has returned to his possession by a new way which is his later purchase. Therefore, his present possession doest not lay on his first purchase which he

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531 What I see is that the explanation with an unlawful consequence applies only on the mortgaged goods and not on the leased.

a. In the case of mortgage, it can he sold legally to pay the debt. If it is valid for the former buyer to disclaim his right on terminating the sale, his right on the collection of the good will become completely contingent, this is however an unlawful aleatory contract.

b. The leasing however has a specific time to end without an aleatory contract. The right explanation to me is what invalidates the buyer's relinquishing his right to terminate what he purchases, if he realizes that the good sold is under a lease, because the leasing is among the continual contracts in the view of our jurists scholars (see para 47/14) and they made it clear that it is in the category of the renewing contract on a gradual basis. Therefore, if a buyer disclaims his right to terminate the sales, he will have another right anew to terminate with the presumed renewal on the lease contract.

ought to terminate. So, the present purchase will be regarded as different from what he bought from the first seller due to the change of the possession.

- If the granted was donated for him or donates it to other, then, it came to his possession by purchasing or donates through another means, the right of the first donor has ended and cannot be recalled. It just like as if the present was different from the previous donation. In the modern western legal system, there is a relevant clause to this maxim. The theory of purge in the French law shares a similar concept with this.

  According to their law, the possession of a real right through a public means and with good intention such as buying it through a public auction or in a commercial center, where it is exhibited, is considered as purifier to it, i.e. to rid it from any real right belonging to other person. Thus, the owner of the real right would be left only with a right to pursue the person responsible for it with compensation (see *Mūjiz al-Ḥuqūq al-Faransiyyah* by Daluz, v. 2, pp. 1107-1114).

81/77 The Twentieth Maxim: *"Whatever is suspended with a condition is negated upon the establishment of the condition"* (*Majallah*, 86)

This is because the condition on which it depends will become the means of reward in view of the *Sharīʿah* and the intention of the speaker. In this case, the conditioned rule will be connected with it during its existence and absence, like the connection of effect to its legal cause.

On this basis, anything that is contingent on a condition will be regarded as inexistent before the existence of a condition, as conditioning can be valid only with the existence of a conditional issue along with the existence of its condition, so, it should not fall behind it. The illustration of that has been mentioned previously with its examples on the theory of contracts (see para 28/6, 43/3-6).

Subsidiary maxims derived from this basic maxim

81/78 *"Promises with conditions are mandatory"* (*Majallah*, 84)

Primarily, a promise is not mandatory to be fulfilled even if that is required religiously. So, if a person promises another for a loan, sale,

a grant, a cancellation of agreement, or exemption, or any other rightful issue, a right does not initiate from there to the promised person, and he cannot force him legally to fulfill his promise.

However, the Ḥanafīs is of the opinion that if a promise is conditioned it will surpass an ordinary promise and will therefore be deemed as mandatory and obligation, and will be binding to the promisor (see *Sharḥ al-Majallah* by al-'Allāmah 'Alī Haydar). This is to protect the promised person from being deceived after the promise has been made in the form of commitment.

Ibn Nujaym comments on the prohibited and allowed thing in *al-Ashbāh* 2/110, that "a promise is not mandatory until it is conditioned".

On this basis, the scholars decide that if a person says to other person, "Sell this to a person and I will be responsible for the cost if he does not pay you", if the person does not pay the cost after having been asked, the promisor will be held liable.

Moreover, if he sells something with an excessive fraud and the buyer said to the cheated seller, "If you return the cost I will cancel the sale", this promise is mandatory and the sale will become like a fulfilled sale in form of mortgage (see footnote para 16/9 and 46/8).

Note

The Ḥanafīs and the commentators do not give illustrations to this maxim on the contracts much more than that. Obviously, the maxim is not widely applicable to every sort of conditional promises.

In the opinions of the Mālikis, there are four juristic views on the fulfillment of promise on the contract but otherwise legally. The common view among these is that the promise on a contract is considered legally binding to the promisor when the cause is mentioned and the promised has fallen under a financial obligation by approaching the cause based on the promise. For example, if a person promises other to loan him certain amount for his wedding proposal in order to pay the dowry or to buy necessary commodity, hence, he married or he bought the commodity. However, the promisor later on desist from giving the loan, the promisor will be forced legally to discharge his promise (see *al-Furūq* by al-Qarāfī,

4/24-25, and *Risālat al-Iltizām* by al-Ḥaṭṭāb; *Fatāwā Fatḥ al-'Alīy al-Mālik* by al-Shaykh 'Illīsh on "study of the mandatory affairs".[532]

This is very reasonable because he based the mandate of promise on the concept which supports the elimination of harm occurring to the promised person from the deceit of the promisor. It is therefore among the faces of the Ḥanafī *ijtihād* which base the commitment on the pronounced form of promise; Is it conditional or not conditional, for the conditional and unconditional does not change anything from the real promise.[533]

My father, Shaykh Aḥmad al-Zarqā (may Allāh have mercy on him) says in his commentary to the *Majallah* maxim under this maxim (p. 358): "The form of this maxim is that unrestrained and generic in every promise which appears under a condition, but the situation is contrary to it...".

The grand scholar 'Alī Haydar says in his commentary under this maxim that the *Majallah* considers it with its phrasing from Ibn Nujaym.

Therefore, in view of the decision in the doctrine of the Ḥanafī, the promise initially is not mandatory, so the phrase of this principle is considered as indicating otherwise purpose.

It seems that the juristic concentration in this maxim is that the promise should be made in a way that will indicate its commitment and obligation (as pointed out by the Shaykh 'Alī Ḥaydar in his commentary on this maxim) because its deceitful to the promised person, and the issuance of promise in a conditional form signifies the meaning of commitment, obligation, and guarantee.

In the light of the previous explanation, I suggest that this maxim should be put in a new phrase as: "Promises, if issued in a form that will deceive the promised person and will indicate an obligation, it will be mandatory upon the promisor".

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532 Asbugh, one of the Maliki scholars, says: "It is enough to make a promise compulsory by mentioning the cause, namely marriage or building or others even if the promised person did not approach the cause".

533 In the modern western legal system, the promise is made compulsory within certain conditions (see footnote para 30/4), i.e. the clause 103 in the Syrian civil law issued within the third edition of this book.

81/79 The Twenty First Maxim: *"It is necessary to fulfil the condition as much as possible"* (*Majallah*, 83)

The Prophet (s.a.w.) is reported to say: "The Muslims are bound by their conditions" (see para 15/2 (b) and 41/7).

The condition meant in this maxim is a restricted condition and not contingent (see para 43/2). In this case, it has to be honored and executed as much as possible.

The meaning of "as much as expected" is that it should not contradict with the *Sharīʿah* rules of contracts.

We have said earlier that the doctrinal opinions by way of widening and narrowing are different within the boundary of this dispute and agreement, and in the result of the approved and denied issue in the contract agreements (para 42/1-5) though it has been expanded by the Ḥanbalī opinion, as we have briefly explained the theoretical opinion of the Ḥanafīs on the issue. It can be referred to in the para 43/12-14.

81/80 The Twenty Second Maxim: *"Legal permission is incompatible with liability"* (*Majallah*, 91)

Al-Ḍamān (guarantee) means a commitment to pay an indemnity to someone for the damage he has suffered.

The meaning of this maxim is that a guarantee does not apply to someone for having done or left something on which he has a legal permission. This is because the legal permission on the doing and undoing necessitate an exemption from its liability, otherwise, it will be deemed non-permissible. There are many subsidiary maxims on this:

- If a person digs a pit in his possessed land, then, an animal belonging to other fell into it, he will not be held liable because of the legal permissibility of his digging. On the contrary, if he digs on the public highway, he will not be considered as a violating the right of other not to speak of guarantee.
- If a leaseholder loads on a rented animal a usual amount of quantity and it died, he will not be held responsible because what he did is legally permissible. On the contrary, if he loaded an unusual weight, he will be held responsible.
- If a find refuses to deliver what he found to the owner until he payback what he has spent on it by the consent of the judge, and

the find perished while at his disposal, he will not be responsible, neither will the money spent be disclaimed. This is because his refusal is permissible. However, if he did not spend on it, he will be considered as a violator for his refusal and will therefore be held liable. This maxim is bonded with the fact that the legal permissibility is general permission, but if it is a restricted permission, it will not contradict the guarantying.

- A desperate needy person will however guarantee the price of other's food if he ate it to forestall death as previously mentioned (see para 81/34) with a fact that he is obliged and not only allowed to eat the food at that period. This is due to the fact that the permission here is legally restricted by the rights of other.
- The animal rider and the conductor on the highway will be held responsible for the damage caused by the animal's foot or its mouth. The reason is because walking on a highway, even if it is permissible, is restricted by the safety from whatever thing that might bring about danger[534] (among the commentaries of my father on this maxim, quoted for illustration and not literally).

With this inference, the exceptional cases of this maxim will fall low, and the commentators count these two subsidiary maxims and its kind as its exceptions. On this basis, the maxim should be rephrased as thus: "the unrestrained legal permissibility contradicts liability".

81/81 The Twenty Third Maxim: *"Profit commensurates with liability"* (*Majallah*, 85)

The tribute of something means its revenue is derived from it such as benefits and the animal rent. The meaning of guarantee has been explained in the previous maxim.

This maxim is a wording of a *ḥadīth* narrated by Aḥmad in his *Musnad* and the four *Sunan* scholars, and al-Ḥākim in his *al-Mustadrak*, and was judged as sound by al-Tirmidhī (1285).

The meaning of this is that the entitlement to the tribute resulted from the bear of responsibility, that is, to be responsible for the consequence of damage. So, the benefit of something and its revenue are entitled to by who bears the loss and damage of the thing.

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534 *Al-Durr al-Mukhtār* and its commentary in *Bāb al-Bahīmah min Kitāb al-Diyāt*, 5/386.

Therefore, the entitlement to the benefit is in return to the bear of loss.

The *ḥadīth* was related in an occasion which is summarized as there was a person who purchases a slave whom he exploited for sometime, and found afterward an old defect. He hence upon lodged a complaint against him to the Prophet (s.a.w.). He then passed his judgment by orderiug his return to the seller. The seller replied, "O the Messenger of Allāh, he had exploited my boy", to which the Prophet (s.a.w.) replied: *"Profit commensurates with liability"* (see *Kitāb al-Aqḍiyah Rasūl Allāh fi al-Buyūᶜ* by al-Qurṭubī, p. 76).

Al-Kharāj (the tribute) meant this rule is apparently what does not procreate, such as utilities, wages on the condition that it should be based on the legal circumstances, such as a purchase according to what the source of *ḥadīth* implies.

In the case of procreating things, such as the offspring of an animal, its milk and its wool as well as the fruit of a tree, they are all governed by another legal maxim, which judges them as belonging to the possessor of their source without considering the guarantee and non-guaranteed, since one of the reason behind the possession is to have the possessed things procreated as mentioned in para 23/9.

- On this basis, if an extorted animal gives birth at the disposer of the usurper, its offspring belongs to the possessor, not to the extorter, even though if the usurper is held responsible when it perished.
- If a purchased animal gives birth under the seller before it is handed over to the buyer, its offspring and milk belong to the buyer where the seller should not benefit from it or rent it out, even though if the seller is held responsible when it perished before he deliver it to the buyer.
- With this interpretation of tribute and its connection with guarantee, none of these rule can pose a problem on the principle and its exceptions, because it has falling outside the intended meaning with the phrasing of the *ḥadīth*.

81/82 The Twenty Fouth Maxim: *"Risk commensurates with return"* (*Majallah*, 87)

This maxim expresses the opposite view of the previous maxim, "profit commensurates with liability" and it implies that the

guarantee is also with tribute, that is, the expenses and loss which occurs from something will lay on who benefit from it legally.

- The expense paid to return something lend to the lender will be borne by the borrower, in contrast to returning the trust, for the cost is borne by the depositor, because the trust is for his benefit.
- The wage of the bill of sale should be borne by the buyer, because it is a document that facilitates the transfer of possession to him.
- The cost of constructing shared property and its renovation lies on the associates according to their shares.
- Treasury will bear the spending on the foundling, i.e. an abandoned baby of unknown parentage, and his inheritance will also belong to the treasury when he dies.

81/83 The Twenty Fifth Maxim: *"The benefit is proportional burden and vice versa"* (*Majallah*, 88)

- The first sentence in this maxim is synonymous with the maxim "profit commensurates with liability"
- The second sentence is synonymous the previous maxim "risk commensurates wuth return".

81/84 The Twenty Sixth Maxim: *"Wage and liability do not come together"* (*Majallah*, 86)

The wage is in return for utility for certain period and the liability meant here is the responsibility for the cost of the essence used (see para 81/80).

This maxim belongs to the Ḥanafī School and was not adopted by other school of *fiqh*. It is according to the Ḥanafīs that connected with their famous theory on the non-responsibility of a usurper for the utility of the thing usurped, the maxim that has previously mentioned with its critique (see para 77/3).

- Based on this maxim, the Ḥanafīs deduced that if a person rented an animal to ride on it to somewhere but he went on it to somewhere else, he will be considered a violator in the same manner with a usurper, and will no longer be qualified as a faithful which is the essence of being a renter. So, if the animal dies before he returu to its owner, he will held liable for the price without a wage since wage and liability do not come together.

- However, if the animal does not die and the renter returned it safely even after many months, there would be no wages on it also. This is because he was in a position to bear its responsibility if it perished (see the beginning of the study on *Ijārat al-Dawāb* in *al-Fatāwā al-Khāniyyah* and *Qawāʿid al-Ḥamzāwī* on *Masā'il al-Ijārah*, p. 82).

It is obvious from these sectioning and its other kind that the meaning of liability in this maxim is not an actual and real liability, like demanding from a renter to pay the cost of a real property if it perished. However, the meaning according to the Ḥanafīs is that the person is liable to guarantee the essence. This is when he is in a position where he can be considered as responsible for the price of the essence if it perished, whether it is really occurred or not, that is to say, he is in a state of responsibility.

This is very strange as you can observe. It is completely a speculative deduction whose practical aspect was not taken into consideration. It gives people opportunities to cheat in order to benefit from the properties of others without a return, so they concluded the rent not on their needed benefit. Afterward they committed a breach by benefiting with what they wanted without observing the compensation, and would not care to be liable for the damage of what they have rented.

If the Ḥanafīs confined the maxim to the occurrence of liability and its realization, such as when the animal dies, in this case for instance and the renter was obliged to pay its price it would have been accepted, because it is said that the guarantying of the source is inclusive of benefits, though that is also weak.

The majority of other scholars agreed on the theory of wage and liability. In this incident for instance, the renter will be obliged to pay the counter-value on the benefit that took in full without right according to the period, and will be held liable if it is more than that for the price of the source if it perished on the day it is perished (see *al-Mughnī* and *al-Sharḥ al-Kabīr, Kitāb al-Ghaṣb*, 5/402 and 436).

The Ḥanafīs however, restrict this maxim to the situation when the guarantee is not fixed on a person before reaching a stage to guarantee the essence of something. If a known price has been fixed on him earlier, such as when he has completely taken the benefit on one hand, then he overstepped until he becomes a violator in the manner of a usurper. In this case, even though if has become responsible for the consequence of the rent perished, it is incumbent

on him to pay the wage according to them if it has not perished. Nevertheless, if a rent perished after the violation before it is returned to the owner, he will be responsible for it without paying a rent, because of the inclusion of the benefit guarantying in the guarantee of the source.

81/85 The Twenty Seventh Maxim: *"No one is permitted to deal with the property of another without permission"* (*Majallah*, 96)

The expression of this maxim as it is in *al-Majallah* is "without his consent" that is, the consent of the owner. However, we have supported the omission of the pronoun in order to include the *Sharīʿah* permission.

Acting freely in the possession of other could be by action or by word through the way of contract.

a. The active disposition in other's property, by taking or utilizing, or digging the land and etc., without the consent is considered violation. So, the actor in the manner of an extorter will be responsible for the damage caused. The source of the permission might come from the *Sharīʿah* or *'urf*, such as when a herdsman slaughtered an inflicted sheep, which is unlikely to survive, he will not responsible for it (see *al-Qawāʿid al-Fiqhiyyah* by Shaykh Maḥmūd al-Ḥamzāwī on *Masā'il al-Ghaṣb*, p. 191.)

b. The verbal act through the way of contract, such as selling the property of other donating it, or mortgaging it, or renting it, or lending it or depositing it, and etc., the details concerning this is as follows:

   - If the actor executed it by handing it over, it will be regarded as an active disposition, and will take the rule of usurp.
   - If his disposition remains within the scope of utterance, it will be regarded as an intrusion. A deal of an intruder will be contingent on the consent of the owner. There is nothing on the actor since there is no harm on the owner on this verbal disposition so long as the choice is his to accept and to refuse. The permission goes with the actions and the utterances, so, the active disposition without the consent of the owner. If the owner permits afterward, it will turn to permitted. The

execution of the guardian's disposal or the inheritance executor on the underage person is not an exception to this maxim, but rather it is legally permissible, because it is base on the guardianship. It is evident that the impermissibility which was expressed in this maxim can be interpreted by two different meanings on the basis of the fact that the disposition is either by action or by utterance.

- In the case of the verbal disposal, the impermissibility will be interpreted as ineffective.

Subsidiary maxims derived from this basic maxim

81/86 (a) ***"Any order given for dealing with the property of others is void" (Majallah, 95)***

This is because, who lacks something does not give it; so, who does not possess a disposition right cannot give an order over it.

Based on this, if a person commands other to take a property of other, or to throw it into the river or to burn it, or to slaughter his sheep, there is no consideration to his order, so the liability lies with the doer. This is when the person been ordered knew that the property does not belong to the commander.

However, if he does not know and was confused by the commander that the property belongs to him, such as when he told him that 'slaughter my sheep for me' (with first person pronoun), the owner of the property should hold him liable, while the person being commanded should refer to the commander for having being deceived.

- Among the branches of *fiqh* for this maxim is that if a person deposited part of his property, and said to the trustee: "if I die, deliver it to my sou", and so he did, and the deceased depositor has another inheritance, iu this case, the trustee will be held responsible. The reason is because the deposit after the death of the depositor will become the possession of the heirs altogether. The order given to him to deliver the property to one of them is not valid. Also, if he asked him to deliver it to a foreign person who will not legally inherit from him. (This is among the commentaries of my father on the maxim, quoting from the chapter 28 in *Jāmiʿ al-Fuṣūlayn*).

- If a debtor says to the creditor that "throw my debt into the river", and he threw the portion he owes into the river, he will not be vindicated. The reason is because the debt is regarded as preoccupying a conscience and does not relate to the essence of the creditors money. He threw his own money into the river, so the order is invalid and he should pay the debt (see the commentary of this maxim by ʿAlī Ḥaydar).

81/87 (b) ***"It is not permissible for someone to take other's property without a legal reason" (Majallah, 97)***

This is because if the person does not have a right of a verbal disposal in the other's property without his consent as understood from the two previous maxims. According to the priority, he has no right to take the other's property without a legal warrant.

If he takes it, he will be responsible until he returns it. This is justified by the saying of the Prophet (s.a.w.): The hand is responsible for what it takes uutil it is returued". It was related by Aḥmad in his *Musnad* and the four scholars of *Sunan* (see para 10/2 (b)).

- Therefore, it is compulsory to return the conciliatiou fee,[535] if its collector coufessed after the couciliation that he does not have any right whatsoever.
- It is also compulsory to return what a persou paid on the assumption that he owes, as has previously mentioned (see para 81/16).
- If a person picked a find for himself, he will be considered as a responsible usurper. In this case, he should pick it with the aim of keeping it and introducing it and also with the aim of returning it to its owner whenever it showed up. However, if the owner does not show up, it should be given as *ṣadaqah* (charity).
- On this basis also, the prescription (passing of a time) can only prevent hearing a lawsuit for a right or an essence at the court of law. But the defendant will not be exempted from the right and cannot possess a thing with a prescription. However, he will rather return it in accordance to the religion. This is because the prescription is not a mean that gives right of possession as being

[535] Missing footnote, v.2, p. 1042.

part of the means through which one attain a status of ownership, but it is a legal barrier as mentioned previously (see para 23/4).

If taking other's money is depended on a firm right, it is permissible even without the consent of the owner of the property.

The later scholars have passed the judgment that it is permissible according to the religious view for the creditor to take, if it fell into the hand of the creditor even without the knowledge of the debtor, and even if it is not the type of the deb. However, this is not to be judged with, because of the nullity of the consciences as previously mentioned, even if the judicial system in *Sharīʿah* does not permit him to take it. This is where the ruling of religion defers from that of judiciary (see para 2/4 and footnote para 23/10).

81/88 The Twenty Eight Maxim: *"The responsibility for an act falls upon the doer, not the person ordering the act, provided that it is not forced"* (*Majallah*, 89)

This is because once the commander forced the other, the person being forced is regarded as a tool (see *al-Durr al-Mukhtār*, and its commentary on *al-Ikrāh*, 5/85). The meaning of deed here is that involves violation of a property of a life.

- If someone orders other to destroy the other's property, to dig a pit on the highway, and an animal fell into it, or he was asked to commit a crime and so he did, the person been commanded will be held responsible, because he was the doer and not the commander.
- And whoever asked other to conclude a contract relating to the person commanded himself, the commanded person who concluded the contract is responsible for his contract, even if the contract is not of his interest.
- In contrast to when he is forced by the commander on a contract, the commanded person has a choice to conclude or to terminate it when he is relieved and whenever a deed is ascribed to the commander for being the person that forced other. Thus, he will bear the responsibility of the person who forced other. The issue that was expounded under the study of coercion in the books of *fiqh* is the duress being resorted to or not for being coercion on the verbal disposal or action disposal. The summary on that has been mentioned previously under the study of coercion as a part

of contentment defect in the theory of contracts, and in the commentary of the maxims (see para 34/4, 81/32).

- The branches of *fiqh* indicate that the maxim is restricted on the condition that the action ordered for is not the interest of the commander, otherwise, the command will be considered in the manner of agency, where a commanded person will serve as a commander within the limit of the order, and his action will therefore be executed. This is like when he is asked to pay a debt on the commander, to spend on him, or to construct his house, the commanded therefore will be considered as a deputy who will refer to the commander with what he had paid or spent.
- The coercion which ascribes an action to the doer can be a discretionary judgment, such as when the commander is a ruler; his order will become compulsion (see *Qawāʿid al-Ḥamzāwī, Masā'il al-Ghaṣb*, p. 196).
- An example for this is that when a commander is matured and sensible, and the commanded person is underage or insane, the commanded person will be responsible first, but he will, however, refer to the commander. This is because the order of a sensible elder to an underage is treated as compulsion. This is in contrast to the situation when a commander is a boy like him. In this case, his order will not be considered and the responsibility will be fixed on the commanded.
- Another example for the compulsion is in the ruling of deceit, such as when he says to him: I have on this wall, on this, may wall (first person singular pronoun), and the wall belongs to other and the commanded does not know, the commanded will be held liable and will refer with the responsibility to the commander, in contrast to when he say to him: Dig on this wall, there is no deceit in it and the responsibility will lie on the commanded, unless if the commander resides in the house, hence, it will be considered as deceit. This reason for this is that the residence in the house gives an impression that it belongs to the commander.

On these bases, the maxim should be said as thus: "If the commander does not force or deceive".

Wherever a deed is ascribed to the commander, the litigation on the responsibility belongs to the commanded person, meaning that the complaint will be lodged by the victim against the commanded and not against the commander. So, the commanded will be responsible first because he is the one who was directly involved, and

it will then be referred to the commander. (It is among the commentaries of my father, may Allāh be pleased with him, quoting from *Risālat al-Taḥrīr fī Ḍamān al-Āmir wal-Ma'mūr wal-Ajīr* by Shaykh Muḥammad al-Ḥamzāwī).[536]

81/89 The Twenty Ninth Maxim: *"The direct perpetrator is liable even though not deliberate"* (*Majallah*, 92)

An immediate doer is a person whose action leaves an impact. The intention on this maxim is that who approach an action which is harmful to others. So, whoever directly destroys by any means will be held responsible whether it is deliberate or a mistake.

If a man pushed a person and the latter fell on a thing belonging to other and was destroyed or caused harm, or cause the spark from the shop of a blacksmith to spread out and burn a cloth of a person, or a child fell on a plate belonging to someone and thus broke, they are all responsible for what they have destroyed or damaged (see para 59/13 and 61/5).

81/90 The Thirty Concluding Maxim: *"The proximate causer is not liable unless he has acted deliberately"* (*Majallah*, 93)

A causer in an event is he who did what led to it, but not directly involved in it. The *Sharīʿa* view on the causative to harm other is that:

a. If a causative was alone on the scene, it is among the implication of liability, on a condition that the causer is a transgressor.

    - For example, when a person digs a pit on the highway without the consent or the permission of the person in charge or the person in charge neglects some conditions as if he permitted a man to dig a pit and ordered him to put barriers arouud the pit but he did not do it, and consequently, an auimal or a blind person fell into a pit, the causer will be responsible for the harm that caused to life and properties.
    - Also, if a person cuts off a hanging lamp string, then, it fell down, or the oil bottle broke, or he opened the door of a cage

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[536] The treatise was published in Damascus in 1303 A.H.

or a barn, and the bird or animal fled, the person will be responsible for them all.

b. If the causer is not a transgressor, like a man who dug a pit on his land and an animal belonging to his neighbour entered and fell into it, or he dug a pit on the highway enclosed by a wall on the instruction of the person in charge, then, a person or an animal fell into it, he will not be held liable (see *Sharḥ al-Majallah* by Shaykh ʿAlī Ḥaydar and others, articles 92-93).

The conclusion that can be drawn from this and the previous maxims is that the transgression is the basis considered for fining in case of both immediate and in causative, and that the transgression can be:

i. either the transgression of a doer over a victim or over his rights straightaway as was the case of immediate,
ii. or to overstepped the legally permitted limitation until it led to harming the other, as was the case of causative

Whenever there was a causative, there will be no further consideration on deliberation or intention, because the right of other is legally guaranteed in the case of both deliberation and mistake, even in the case of necessity that permits an unlawful, as has previously been mentioned (see para 81/35).

The branches of *fiqh* imply that each of the deliberation and causative for harming other necessitate a liability whenever there was a transgression in his legal meaning, whether the doer intended the action or harm in a considerable manner or otherwise.

Therefore, if an insane person called out to an animal belonging to other until it shrank and affected a property or a life, he will be responsible in his property, despite that he does not deserve to be purnished. He is in that case a causer but not an immediate causer, and no consideration will be given to his intention on an act or harm.

It will be clearly obvious that the phrase (deliberation) related from the maxim of (causative). It is only intended to produce the meaning of transgression but not the meaning of deliberation. It is not an apposite expression especially in a maxim, for it is illusory. I have never seen who will call for any notice on this among the commentators.

c. if causative was not alone but its rather with causer and deliberation, this will be the topic for the following maxim:

81/91 The Thirty First Maxim: *"When the direct perpetrator and the proximate cause are both presents, the ruling is on the direct perpetrator"* (*Majallah*, 90)

The meeting of a causer and the immediate doer in an incident will be materialized by the intervention between the deed of a causer and the occurrence of an incident with the work of other chosen person.

This person by then will become the immediate doer, and the action will be ascribed to him, because it was attached to him from the previous causer. He will become responsible for the harm caused, even if a causer is a transgressor, for having seen who is suitable to bear the consequence, which is the immediate doer.

On this basis, if a person dug a pit on the highway without a permission, and a person came and threw an animal belonging to other into the pit, the person that threw the animal will be held liable and not the urge.

In contrast to when an animal fell into it by itself, the urge will be responsible for it, because the causative was alone there.

Also if a person guides a thief to the other's property and he stole it, the responsibility lie on the thief and not on the guide.

This is in contrast to when a trustee guided a thief to the place where a deposit was kept and he stole it, the trustee will be held liable, because he had promised to preserve it. This guidance is a treachery or negligence. Therefore, he will be obliged to be responsible for it, and the depositor has a right to fine the thief, because he is an immediate doer and is responsible no matter how.

81/92 The Thirty Second Maxim: *"Damages by animals attach no liability"* (*Majallah*, 94)

This maxim is extracted from the *ḥadīth* that: *"Damages by animals attach no liability"*. It is narrated by al-Bukhārī, Muslim, Mālik, Aḥmad in his *Musnad*, and the four scholars of *Sunan* on the authority of Abū Hurayrah.

The beast is an animal, while the wounding is a harm that results from it.

The meaning of in vain is that no liability whatsoever be held on it. The following can be observed in this maxim:

a. The meaning of the maxim is what a beast does by itself.

   - Such as when its tie is cut off and ran away or startle or pull its leg and injured a person, its owner will not be held liable for that.
   - Also if a person's cat killed a bird belonging to other or two person tied down their animal in a permissible place, and one of the animal caused damage to other, there will be no liability held against any of them.

b. If a crime of an animal arose from a man action, as if a person was riding on an animal, even on his land, and it trampled down something belonging to other, he will be responsible for it, because he is considered as an immediate doer.

   - If it is frightened by a person and it kicked someone, he will be responsible for its crime, because he is the causer of its fright (see *Bāb Jināyat al-Bahīmah wal-Jināyah 'alayhā fī Kitāb al-Diyāt fī al-Durr al-Mukhtār wa-Ḥāshiyah*, 5/387).

81/93 The Thirty Third Maxim: *"The Individual guardianship is stronger than the general guardianship"* (*Majallah*, 59)

Therefore, the judge cannot act freely on the property of an underage or endowment with the existence of the trustee or the custodian. This has been previously discussed under the theory of competency and guardianship (see para 66/9).

Exemptions

- An exception to this is the right of the judge to lease an endowed estate for a long period when there is a need for construction, and the custodian has no right on this.
- Also the judge has a right to lend out the property of an underage, and the father or the trustee has no right on this (see para 62/6).

The reason for this is that the preservation of endowment property and that of the orphans is part of the public right. Overstepping the permissible limitation by the guardians, trustees and custodians depended on the presumption of a public guardian.

Therefore, the judge has the right to pass judgment on them and dismiss them from their post when the judgment based on the public view (the general guardianship), even if he has no right to directly conclude contracts on their behalf while they still exist (this is among the commentaries of my father on the maxims).

81/94 The Thirty Fourth Maxim: *"Management of citizen's affairs is dependent upon public interest"* (*Majallah*, 58)

This maxim draws the limits of the public administration and the legal policy on the authority of the guardians and their activities over their subject. So, it implies that activities of these guardians and their dispositions are executed over the subject, who is bound by it, in his public rights, and the individuals should be based on the public interest and should aim at its betterment.

This is because, the guardians - starting from the caliph and those below him among the officials in the branches of the government authority and self-employed people - are the agent of the *ummah* to work out a better management to instate the justice, to repel oppression, to preserve the rights and morals, to regulate the security, to spread knowledge, to ease the public utilities, to purify the society from corruption, to realize whatever seems good for the *ummah* in its present and its future through a good means, which are all referred to as public interest.

Therefore, any work or activity from the guardians, which contradicts this public interest, aimed at monopoly and despotism, or leads to harm or corruption, are not permissible:

- So, the guardian has no right to exempt anyone from penalties at all, neither from any other crimes or punishment, if it will later seem encouraging to commit more crime and to belittle its consequences.
- Also, he has no right to waste the individual rights of the victims under any circumstances, and he cannot nullify the judgments of the judges.
- Also, there is no right for an Imām, or a leader, or a judge to prevent the accounting the public properties or those of the underage i.e. the custodian of the endowment and the guardians.
- He should not allow any evil, such as lechery, alcoholic, gambling, even though it is at the pretext of raising money or tax collection.

- He should not appoint non-trustworthy, or incompetent to any work from the public works. The root of this is the saying of the Prophet (s.a.w.): *"No servant is entrusted by Allāh with subject, and dies while he was a betrayal of his subject, except he is forbidden from entering paradise"*, narrated by al-Bukhārī and Muslim.

  The Prophet (s.a.w.) also says, *"No one ruler who in entrusted with the Muslims affairs, and he did not take pains for them, and did not advise them as he advises and takes pains for himself, except not to enter paradise along with them"* narrated by Muslim and al-Ṭabarānī (the statement "like he advises and takes pain for himself" is the narration of al-Ṭabarānī).

  Also the saying of the Prophet (s.a.w.): *"who appoints a person among a group, while there was among them who is more pleased to Allāh than him, he has betrayed Allāh and his messenger as well as the believers"* narrated by al-Ḥākim in the judgments on the authority of Ibn 'Abbās.

  Also the word of the Prophet (s.a.w.) that *"there is no obedience to a creature in the disobedience to Allāh"* narrated by Aḥmad in his *Musnad* among the *ḥadīths* of Umrān and al-Ḥakam ibn Amrin al-Ghifārī.

81/95 The Thirty Fifth Maxim: *"The translator's statement is accepted at face value"* (*Majallah*, 71)

The translator is a person whose job is to translate a language with other.

If the language of one of the litigants or both of them, or the witnesses, or some of them is not the language of the judge, the judge will rely on a translator to translate the words to him.

This transaltor is trusty and his word is a proof, on the condition that he should fulfill two characteristics:

1. He should be just and not an immoral, because an immoral person is not trustworthy.
2. He should be conversant enough with the two languages to prevent him from mistaken and mixing up an issue.

It is not required to have more than oue translator like the number required for testimony, but it is enough to have only oue translator.

The meaning of generalization in the maxim is that the word of the translator will be accepted in all type of lawsuits and evidences, be him a man or a woman.

However, the scholars have exempted from these crimes that require penalties. They made a condition that a translator in all his suits and proofs should be a man in order to exceed the range of precaution.

81/96 The Thirty Sixth Maxim: *"In obscure matters, the proof of a thing takes its place"* (*Majallah*, 68)

The inward affairs are those hidden fact are very difficult to be known, despite the judgments on them are vary according to their existence and absence, and are also need to be established.

The legal view on this is whatever case does not require a search on its real existence. However, its signs will be considered, and its existence would stand for their existence, and the judgment will be attached to those signs according to their existence and absence, and no differing possibility will be considered.

- The real intention in the contracts is hidden. So, the known intention represent the offer and acceptance, and the contract will be concluded based on them, so long the non-existence of the real intention does not materialize, as has previously mentioned (see para 32/4).
- The use of a deadly tool by a killer is indicative of his intention to kill. So, no false claim will be accepted from him, but rather the deadly tool will indicate the inward hidden intention.
- To leave the claim during the prescribed period, when there is nothing preventing the initiation of a claim, indicates that the complait is not rightful. So, his complaint will not be entertained, unless his litigant confessed and to lift the doubt (see para 23/4).

How does that come about?

- Among the significant branches for this maxim in the activities of the public administration is the government staffs and the tax collectors for the treasury, custodians of the endowments and its clerks and others, seem to he wealthy and construct buildings with no knowing of the source of their wealth, that is indicative of their treachery and collection of bribery. Therefore, it is

permissible to dismiss them from their posts and confiscate their properties as long as they are unable to establish a source for it (it is among the commentaries of my father, may Allāh be pleased with him, on these maxims quoting from *al-Durr al Mukhtār* just before the study on the guarantee of two persons in the book of guarantee).[537]

81/97 The Thirty Seventh Maxim: *"A person is bound by his admission"* (*Majallah*, 79)

That is if he is sensible with complete competence, because he is supposed to know more than what he did by commitment and what right he has on him. He has anthority to enforce anything on himself through the mean of initiation and contracts, and any other initiating means. It is enjoined upon him to reveal the obligations binding to him, because the concealment of people's right and its exploitation are unlawful.

Among the evidences to this maxim is the Qur'anic verses on mutual loan in *Sūrah al-Baqarah*: *"...and let him (the debtor) who incurs the liability dictate, and he must fear Allāh, his Lord..."*.

He has ordered a debtor to dictate and considered that as documentation of the debt. This is the meaning of blame or

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[537] ʿUmar ibn al-Khaṭṭāb has practiced this whenever he appointed an officer where he will count his property in a document. Then, if he observed a surplus without a source, he will confiscate it or share it equally according to the strength of the accusation, and put it in the treasury. It has reported that *ʿUmar* passed by a building being constructed with a brick and gypsum, he said: "Whose house is this?" They mentioned an officer of him in Bahrain, and he replied: "The *dirhams* refuse but to showl its necks" and then he shares his money equally. He used to say: "I have two faithful against a traitor: water and clay". He has also confiscated the property of *Ḥārith ibn Wahb* and said to him: "Where did you find the camels and the slaves that you sold for a hundred *dinar*? He replied: "I traded with my money". *ʿUmar* responded: "We did not send you for trading, so hand it over". Ḥārith replied: After this, never would I work for you", to which ʿUmar replied: "Never would I appoint you after this" (see *Sīrah ʿUmar ibn al-Khaṭṭāb* by the two scholars, judges and brothers ʿAlī and Nājī al-Ṭantāwī, 1/231-233; *al-Iṣābah*, 4/220; *ʿUyūn -al-Akhbār* by Ihn Qutaybah, 1/53). This is what the comtemporary scholars called the maxim: "How did this come about?" and they ask for a law to justify it, when many of the judges and the government officials have become wealthy without knowing the source of their wealth other than treachery and exploitation of the job. It has been in this maxim and the *Sharīʿah* a required legal solution. It has actually been issued in both Egypt and Syria "a law of ill-gotten gain" in the year 1958 which enforced on every staff and who will be employed to declare their properties, his, and those of his wife, and his children. Unfortunately, it was executed for some time and was then neglected.

judgment by confession (see *al-Mabsūṭ* by al-Sarakhsī in the beginning of *Kitāb al-Iqrār*). There are also many textual proofs in the *Sunnah* on this maxim. Indeed, the applications of this maxim have been mentioned enough earlier in many occasions.

81/98 The Thirty Eitght Maxim: *"What is established by evidence is like what is established by witness"* (*Majallah*, 75)

The meaning of evidence is the established judicial proof which is referred to as *al-bayyināt* meaning whatever is established before the judge at the court with proof. In the events and their legal implication, it would be considered as a real issue as if it is sensate and witnessed. So, the judgment will be based on this establishment, even if there is a differing supposition owing to a certain reason, such as when the witness are all liars under the guise of righteousness, or the existence of a justified reason which is yet to be known to anyone and other suppositions. This is because each of these suppositions will remain within the range of illusions according to the clear evidence. It is previously mentioned that there is no consideration for imagination (see para 81/14). The duty of the judicial is to build upon what is clear and well established, and the judge is not obliged to take pain to initiate the fact, because that is beyond his ability.

The word of the Prophet (s.a.w.) has been mentioned earlier that: *"You sue one another to me, and it might happen that one of you is eloquent in presenting his argument than other, and I will base my judgment upon what I have heard him saying..."* (see para 2/3).

The results of what is established by evidence are like what is established by witness are three:

1. It should not be accepted from the litigant any renouncement after it has been established.
2. It should not be heard from him any complain that is contrast to what has been judged with, unless with a new reason (see *al-Ṭarīqah al-Wāḍiḥah ilā al-Bayyinah al-Rājiḥah* by al-Ḥamzāwī, on *Tahātur al-Bayyināt*, p. 229).
3. He should apply the establishment of an issue with evidence to anything other than what was judged with the issue that is connected with one another by a necessary cause. Therefore, the issue will be considered established based on them, as we will see later.

Subsidiary maxims derived from this basic maxim

81/99 ***"Evidence is a extended proof and confession is a limited proof"* (*Majallah*, 78)**

We have said in the previous commentary that the evidence is an established legal sign.

It has also been mentioned earlier that the confession can be a limited proof in many occasions, such as he who made a confession of a joint debt on him and on other, his confession will be implemented on him and will be used against him in his property and will not move to his associate so long he does not attest to it (see para 4/4, 80/1, footnote para 81/17, and we will explain it soon).

Every right that is established before the judge is considered the truth reality. It can even be considered as eyewitness according to the previous maxim. By then, it can be used as a proof on what was not judged with it.

81/100 **The Thirty Ninth Maxim: *"Evidence is to prove what is contrary to the manifested whereas oath is to ensure the continuance of the original states"* (*Majallah*, 77)**

We will see very soon in the following chapter the meaning of *al-ẓāhir, khilāf al-ẓāhir, al-aṣl*. The meaning of this maxim will be known through the following maxim that branched out from it:

81/101 ***"The burden of proof is on the plaintiff while the oath is on he who denies"* (*Majallah*, 76)**

This maxim with its text is a phrase of the Prophet's word as previously mentioned (see para 10/2).

The complainant is he who assumes what contradict an apparent status; it is incumbent on him to establish that with evidence as signified by the previous main maxim. Whereas the defendant is by his denouncement remains on his nature which is the guiltlessness of conscience, so his statement should be accepted until he is proven guilty by an incidental event.

However, for the possibility that the defendant might tell lie in his denouncement, his statement will be strengthened by an oath if a complainant asked him to swear upon his weakness to provide evidence.

This is a basic rule which stipulates that who owns the right of speech should succumb to an oath except in definite exceptions.[538]

81/102 The Forty Concluding Maxim: *"There is no evidence with contradiction, but the judgment of a judge should not clash with it"* (*Majallah*, 80)

Contradiction means the utterance of two contradicting statements (*al-tanāquḍ*).

Contradiction has a long discourse and detailed rules and applications and broad wide-ranging branches in the discussion of litigation, testimony and declaration in the books of *fiqh*.

The contradiction meant that of a witness in his testimony with which he establishes his claim. If there occurs a contradiction in the testimony of a witness before the used for judgment, as if he testifies in a debt claim that the debt, for instance, is a loan, then, he says, it is a cost of sale, the justification with his statement will be rendered baseless, and no judgment will be based on it.

However, if a contradiction was observed in the evidence after having been used in the judgment, as if the witnesses renounce their first testimony or they confessed with what disprove it after the judgment, the judgment that has occurred with not be revoked, but the witnesses will be held liable for what the convicted was judged on.

It is conditioned that a witness should revoke his testimony before the judge. If he denounces it outside the court, it will not be considered as neither before nor after the judgment (*Majallah*, 1731).

The judgment is not nullified because it cannot be ascertained that the contradicting statement of the second witnesses to the first testimony is the more valid than the first one. If nullification is permissible, it will be possible to cancel many judgment through deceiving the witnesses.

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[538] These exceptions include a case when a donor called back his donation and appeal to the judgment for its refund, and the donee assumed that the gift has perished. The statement is his without an oath (see *Qawa'id al-Hamzāwi* on the issues of donation, and *al-Durr al Mukhtar*). The jurisprudential basis in this exception is that whoever alleges as matter and he is capable of establishing it immediately, he own the statement without an oath. A donee here owned the utilization of the gift immediately without any liability; so long it is his own possession before it is judged to be returned to the donor. So, there is no reason in making him swear, because if he is telling lie by assuming that its perish, he would have a right to utilize immediately without been held liable.

81/103 The classification and the commentary of the ninety nine maxims that prefaced the *Majallah* has come to an end.

These last maxims of 35-40 and what branched out from it, they are the maxims that study the proofs and the distribution of the evidence and the oath between the two litigants in view of *al-aṣl*, *al-ẓāhir*, and *khilāf al-ẓāhir*, the confession, the evidence and its extension, and what is connected to it. They are the maxims that comprise the philosophy of the theory of affirmation in Islamic legal system, and the legal preference between the assumptions of the two litigants.

It is helpful to make these last six maxims (35-40), which depend on the affirmation, clearly understandable and clearly structured. With the clarity of purpose, it solves the structure of the preference and legal affirmation, and the primary preferences and the last confirmations, and the strength of each of them, with analytical research that will reveal its element, and the connection that is in between them, until this maxim which relate to the system of affirmation became apparently understandable, and also what is connected to among the previous which comprised what is referred to in the term of affirmation as *uṣūl al-ẓawāhir* (the fundamental or phenomenon) upon which the judgment lies in the way of affirmation. This is what we will attempt to study in the following eighty two chapters.

APPENDIX TO SECTION 81

NEW FORMATION WITH EXAMPLES FOR THE MAXIM *"WHOEVER HASTENS SOMETHING..."*

81/104 We have mentioned in the previous chapter the maxim 12: "whoever hastens something before its time is punished by being deprived after it" (para 81/62) and we have commented on it briefly. Two issues can be observed on this maxim:

1. Its conventional phrasing with which it appears in the *Majallah* narrows the horizon of the maxim and confines it bad intention relating to the hastening, whereas the fact is that the maxim is broader than that. It comprises all the activities that stand on bad intention and desire, even if a person justifies it through legal means, so long his intention is to attain the forbidden result.

2. The second observation on the maxim is the few examples that are mentioned in the commentaries of the *Majallah*. On these bases, we will bring forth more examples and additional proof. Then, we will suggest a better phrasing and extent maxim.

81/105 The first example: Imām Mālik is of the opinion that one who divorced his wife and then called her back before the end of her period (menses), and then divorced her again before he copulates with her, he will not count the new period if he intended to harm her by prolonging the period, but rather he will judge based upon the previous period.[539]

81/106 The second example: Imām Mālik opines that one who is forbidden to overtake the caravan and he does not stop, but rather returned to it, he will be treated with the opposite of his intention (see para 35/8) (his intention was to acquire more profit for himself rather than the traders). Therefore, his overtaken commodity will be

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[539] Dr. Fatḥī al-Darīnī, *al-Taʿassuf fī Istiʿmāl al-Ḥaqq*, doctorate dissertation, p. 262. It is observed that the other schools of thought do not agree with the opinion of Mālik.

sold, if he got profit, the profit will be shared between the other sellers. However, if he losses, he will bear the loss alone as a punishment for him.

This opinion is based on the view of Imām Mālik that the wisdom in the prohibition of overtaking a caravan is to preempt harm for all the rest sellers in the market.[540]

81/107 The third example: It is in the recommended jurisprudential rulings on the conclusion of the partnership contract (see para 46/14) that the capital will not be guaranteed by the active partner (*muḍārib*) because it is in his hand as trust. If he profits, he will share the profit with the sleeping partner according to their condition, but if he losses without transgression or negligence, it is the sleeping partner (capital provider) alone that suffers the loss and the active partner will loss only his labour. Nevertheless, if the active partner did not comply with the contract condition, as if he purchased a commodity that was forbidden to purchase, he will therefore guarantee the money as was the case of loan, he will have his profit as well as his loss, and he should return the capital to the sleeping partner.

However, Mālik (may Allāh be pleased with him) states in *al-Muwaṭṭa'* (as narrated by al-Laythī published by Dar al-Nafā'is, Beirut) that the active partner in the partnership, if he purchases the forbidden commodities which he was forbidden to purchase with the intention to bear the responsibility of the money so that he will alone have the profit. If he did that with this intention, the sleeping partner has a choice, if he likes he can join him in that commodity which he has purchased having his share in the profit according to the contract, and if he wishes he will have his capital guaranteed by the active partner who transgress. This is a treatment for the active partner with an evil intention, with the opposite of his choice being a punishment for them.

81/108 The fourth example: We have mentioned earlier (footnote para 15/6): The *Fatwā* of al-Mawlā Abī al-Saʿūd with which the decree of the ruler was issue to prevent the implementation of the debtor's *waqf* on the amount that the settlement of his debt depended on in his properties, to prevent the debtor from endowing their money in

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[540] Ibn Farḥūn al-Mālikī, *Durrat al-Ghawāṣ fī Muḥāḍarat al-Khawāṣ*, edited by Muḥammad Abū al-Ajfān and ʿUthmān Biṭṭīkh. Cairo: Dār al-Turāth, 1980, p. 245, issue no. 417.

order to run away from the creditors. This is also the treatment of a debtor of evil intention with the opposite of his intention.

There are many other examples, such as the concealment of the defective goods by the seller with his knowledge despite his assurance to the buyer that is free from defect that might appear on the goods. We have said earlier that majority of the scholars (excluding the Ḥanafīs) affirm the choice of returning defective goods by the buyer, and the deceitful aim will be returned to the seller of evil intention.

81/109 The new suggested phrasing for this maxim: It can be observed in the four previous examples that none of them correspond with the maxim which states that hastening the occurrence of something prior to its legal time, as described by the mentioned maxim, but this example is with what preceded in part 62 in the chapter co-existence of evil intention from the doer, and in his punishment by denying his objective. Therefore, the *fiqh* enforces that he should be treated with the opposite of his intention to protect the *Sharīʿah* law from being abused by an adult, and divert it from its purposes for which it was legislated, and will hurt others by so doing. In fact, this is the spirit of this maxim whose phrasing appears to be limited and narrow from its all-encompassing legal purpose.

In the light of this observation and examples, we suggest either of the following phrasing for this maxim: *"A person with evil intention will be treated with the opposite of his intention"* or *"who aims with his action an unlawful purpose, he will be treated with the opposite of his intention."*

SECTION 82

AN ANALYTICAL VIEW IN THE PRINCIPLE OF AFFIRMATION, THE PRIMARY PROBABILITIES AND THE LEGAL SUBSTANTIATIVE

82/1 Objective of evidence and its legitimacy

The evidence (*al-bayyinah*) is extracted from explanation, which means manifestation and clarity.

The meaning in the legal tradition is the conclusive special evidence which is supportive to the claim of a complainant. Some scholars say: The evidence like its name is an indicator of three types:

1. Personal evidence (*al-bayyinah al-shakhṣiyyah*) is a testimony with its known conditions.
2. Written evidence (*al-bayyinah al-khaṭṭiyyah*) is many and was detailed by the *Majallah* in the special chapter articles 1736-1738.
3. Certain presumption (*al-bayyinah al-qāṭiʿah*) is mentioned in the article 1741 in the *Majallah*. It is a sign that reaches the degree of certainty. Its explanation has been mentioned earlier under the study of presumptions in the theory of *ʿurf* (see para 75/3).

It will be known that the evidence is more generic than the testimony, because the testimony is one unit in the units of evidence. On this basis, we can say that if a complainant and the defendant disagree, there should be way to resolve the matter in favor of either of them with an authority that will give a weight to the claim to one of them; otherwise the preference without a probability is null. These authorities are of two types: primary probabilities and substantiatives.

TYPE ONE: THE PRIMARY PROBABILITIES

The primary probabilities are two things; (1) the source (*al-aṣl*) (2) the circumstance indication (*dilālat al-ḥāl*). Both of them are referred to as the weak manifest (*ẓāhirat al-ḍaʿīf*), meaning the one which does not reach the level of manifestation that will enable to cast away the contrasting presumption. The explanation of that is as follows:

82/2 The Source

Al-Aṣl literally means the bottom of something and its origin, but in the usage it means the affirmation.

The source is the general situation tantamount to a practiced law initially without a need for special proof on it and it would be regarded as incontrovertible. There are scholars who define it as a source upon which another is based but cannot be based on other". There are many examples of this in the *Sharīʿah*:

- One of it is their saying: "The nature of any contingent issues is inexistence, and of any original issues is existence. Among the offshoot of this root are many fundamental branches, one of which is "the nature (of mankind) is the guiltlessness of conscience" and the nature of (anything sold) is to free from any defect" and etc. as have previously mentioned.
- Also their saying: "The root of something during the disagreement on the invalidity of contract and its validity is to consider it as invalid, and during the disagreement on his nullification and its validity to consider it as valid". This reason is because the dispute on the invalidity means the dispute on the existence of contract and its absence. The inexistence is the known precedent, whereas the disagreement on the validity and nullification means to impugn the safety of the contract from any blemish after the acceptance of its existence and its conclusion, and that the feature of safety from any defects is the natural basic condition of all the existents, as we have mentioned earlier.
- Also their saying: "The basis (of something) is the ascription of an event to its latest periods, and the basis of something is to remain on what it was" and so on, like many of the previous principles that are regarded as fundamental in the shari'a. Another example is what branched out from the root that is more generic and also involved in its generality.

82/3 The indication of a situation

As for the indication of a situation *(dilālat al-ḥāl)*, it is the standing sign that points to it. The situation, that is referred to as "manifestation" in the view of the jurists, is of two types:

1. Weak manifestation *(ẓāhirat al-ḍaʿīf)* which does not enable to cast away the contrasting presumption as previously mentioned, in a root or the indication of a situation. This is intended here as the primary probability.
2. The strong manifestation *(ẓāhirat al-qawiy)* which will later be discussed.

Examples of the indication of a situation are many. It is what is known as the authorization of a situation.

- This is like when a renter of a grinder assumes after the end of the rent period that the water has stopped flowing and the quern ceased to function, so he asked for the exemption from paying the rent, the lender assumes that the water did not stop flowing but without an evidence. Thereupon, the judgment will have recourse to the situation in order to consider one of the two assumptions: if the water flows during the query, the manifested situation signifies the non stop of the flow of water after they have agreed that the water was flowing during the contract and delivering. So, the lender's assumption will be considered and thus nothing of the rent will be relinquished until the renter establishes the stoppage of water (*Majallah*, 1776).
- Also if a father spends on himself from his son's money which is deposited with him, then they disagree: the father assumes that he spent the money when he was having financial difficulty and was thus entitled to the being spent on, he will not be held liable. If a son assumes that the father spent the money when he was financially sound, then the judgment will have recourse to the situation of father during his easiness and difficulty at the time of query, so the judge will consider, based on that, the assumption of what the situation is in favour, and will be given a primary consideration until otherwise is observed (see *Radd al-Mukhtār*, 2/685 on *al-Nafaqāt*).

The jurisprudential view here is that in this kind of issues, there will be standing presumption in which there is a sort of indication. It will be considered primarily in the absence of a substantiative proof.

In contrast to the issues in which there are no presumptions such as a debt claim, so, in the absence of an evidence, those bases will be resorted to such a primary consideration. Such "the nature (of

mankind) is the guiltlessness of his conscience and the ascription of an event to its latest periods, and so on.

82/4 These are the primary preferences with which the assumption of one of the two litigants will be given consideration over other. It is a weak manifestation consisting of two types, be it a source or evidence of a situation.

It is jurisprudentially recommended that the manifested issue is suitable as refuting evidence and not as an affirmation an entitlement. It is a limited indication to retain an existing rightful status, and to refute one who claims otherwise without a proof, although the manifested condition is not enough to affirm a right over another.

On this basis, many laws emerge from different entrances, one of which is the law of the missing person.

The missing person will be regarded as alive based on a manifested situation, which accompanied his previous life. This is because the nature (of a thing) is to remain on what it was, as previously mentioned. This is enough to prevent his inheritor from partaking in his inheritance before his death is established. It is not enough for him to partake any inheritance from otbers if any of his legators die after his missing, but rather his share in the inheritance will be on hold: if he comes back alive he will receive it, otherwise, it will be returned to the other inheritors who have the rights to it on the assumption that the missing person died before the death of his legator.

However, there are a number of exceptions to this basis in some branches of *fiqh*, in which the jurists will judge him to be entitled to the inheritance depending on the manifested indication (see *al-Ashbāh* by Ibn Nujaym, 1/104)

TYPE TWO: THE SUBSTANTIATIONS

82/5 As for the affirmations, they are four types of various level of strength. They are:

1. Confession (*al-iqrār*)
2. Refusal (*al-nukūl*) is the abstention of a litigant from swearing when he was asked to do so by the judge.

3. The evidence (*al-bayyinah*) with its three previous types, they are the personal evidence (i.e. testimony), and the written evidence, and a conclusive evidence.
4. The strong manifestation (*ẓāhirat al-qawiy*) which we are talking about, and it is of the same strength with conclusive evidence.

If this has become clear, we will say that: the substantiative proof has become many on one issue and thus contradicting, so some of it will be a witness for one of the litigants and the other one for the other litigant.

The jurisprudential view thence in the preference will stand on the following details to which the branches of the law are indicated:

82/6 Contradiction of the legal proof

First, if the primary preferences contradict one another, such as when one of the litigants depends on one of them (the proof), and the other depends on other proof, to have a preference there is a detail:

a. If there is a contradiction between the two bases, the preference will be on the consideration of the root which is the more related to the subject of query and its essence, or to have it supported by another principle on the case subject.

   For instance, if contradicts the basis of the guiltlessness of conscience with other, the guiltlessness of conscience will be preferred, because it is more powerful and more substantiated.

   The example of that is when a trustee claims that the deposit has been returned, and the depositor disagrees with that without evidence, the preferred statement is that of the trustee, because the essence of this query indicates that the trustee will be responsible for the cost of the deposit with the assumption that he denies it, or to indicate that he will not be responsible for the assumption that he has returned it, even though if the query as it appears siguifies the return of the deposit or otherwise.

   In view of the obvious form which certifies for the depositor that the basis is not to return it because of being contingent and the basis of anything contingent is nonexistence.

   In this case, the basis of guiltlessness of conscience will be considered, because it is what the essence of the query related to, and because it is also supported by the principle which states that

"the trustee is trustworthy" in his statement, until his transgression and negligence is confirmed.

This will explain to us that many of the exempted branches from some of the previous principles, they are exempted because they are worthy to be divided based on other principles.

b. If there is a contradiction between a basis and the evidence of a condition, the evidence will always be considered, because of presumptions and instances which signify the occurrence of a situation that will change the original condition, and thus is tantamount to a proof of a false justification of who holds on to that basis.

   An example of this is an aspect of the disagreement between the father and son during the easiness of the father and his difficulty when he spent from the money of his son on himself, as previously mentioned.

   In this case, if a father during the query was financially sound, it will be an obvious sign justifying the claim of the son, and therefore, the statement of the son that his father was not needy will be considered.

   So, the father will be held liable for what he spent on himself from his son's money, despite that the basis is the uneasiness of the father's status. If the father during the query was needy, the issue will be vice versa, that is, the statement of the father will be considered acting upon the basis, because the wealth is contingent.

Here we observe that when the indication of a situation testifies in favour of the son (on the easiness of the father during the query), the consideration was given according to the basis on which the father depended which is the uneasiness. Also in every branch of *fiqh*, the consideration of a situation will be resorted to. This is what is called issues of "the reverse presumption on continuity" (*al-istiṣḥāb al-amqlūb*).

It is called a reverse because the natural presumption of continuity is the consideration of a previous existence continuous up to the present period (see para 81/7), although on this issue, there is a consideration of the dependence of the present on the past.

Therefore, the easiness of the father during the query depended on the past because it is considered an indication of his easiness when he was spending (his son's money).

An example of this will be observed in the case of the disagreement on the stoppage of the mill water, as mentioned earlier.

82/7 Second: If any of the four previous substantiations contradict with any of the primary preferences, it is no doubt that they will have recourse to the substantiative proof, because it is a clear evidence on the invalidity of the basis or the indication of a situation which the other part holds on to.

There is an extensive example of this, such as when a creditor lodges a claim a debtor, and the latter denies the debt, and the complainant established that with evidence, or the debtor confessed, he will be judged upon it.

Also if a complainant asked him to swear, and the defendant refused to swear, he will be judged upon it. This is because each confession and refusal is the final preference that will have recourse to in order to refute the manifested indication, and to establish the otherwise occurrence.

On this basis, there emerged the jurisprudential maxim which states that: "the evidence is to establish other than the manifested condition, and the oath is to retain the basis (of something)" (para 81/100).

82/8 The meaning of "The proof for affirming what is opposite to the apparent meaning"

What is meant by the apparent meaning is a maxim: "The proof is for affirming the contradictory apparent meaning". This is the aforementioned weak apparent meaning, from an origin or case denotation.

The meaning of the proof is established for affirming the dissimilar apparent meaning is that, it is established to affirm the difference of what the elementary denotation indicates.

This maxim is a cause and evidence for the maxim that says: "The proof is for the plaintiff and the oath is for he who denies".

That is, the claimer claims the affirmation of a right for him upon whom the claim is made against. This right in an accidental issue, the origin is that it does not, and that can not be firm except with affirmative. For this reason, the say of the person whom allegation was set against will hold to the apparent meaning, but the claimant will protect the right of affirming the existence of that right that which he claims against his opponent.

Based on this, the scholars decide that the testimony will not be accepted on the mere negative. The witness, for instance, will not be accepted when the bailee has not retnrned the bailment, or that thing is not for such and such, or that such is not a creditor for such, or has not done such.

That is, the negative is the root of apparent meaning, assuming that the root of the accidental matters is negative, the claims are needed to affirm the opposite of this; the witness upon negation is risk for apparent doubt, those witnessimg are unable to encompass all the time, day and night, the matter witnessed upon its opposite could happen in a time they are knowing of.

However, if the negative is limited to a specific time the testimony based on it will be accepted, as if someone alleges against other that the alleged borrowed an amount of money from him in a specific time and place, and the alleged brings the strong testimonies that he is not in that time at that place (see *Majallah*, 1699 and its commentaries).[541]

82/9 The claim for affirming the dissimilar apparent meaning is reasonable, because the apparent meaning is adamant on itself with the possibility of its difference, this possibility needs to be confirmed, and that confirmation is the claim.

Whoever apparently witnesses his statement does not need another instrument to defend himself from his opponent, so his antagonist is required to bring a stronger evidence he is capable of from the argument of his antagonist, but he will establish it to change the general origin which his antagonist claim to defend himself, he will then confirm the happening against that.

This makes it obligatory that the claim is thrown to the plaintiff the invader, not to whom the proof is made against the defender.

This principle is widely spread in legal right, and it has been taken by the modern common law, and generally applied in all litigations

82/10 It makes conditions to exist in the *Sharīʿah* which has the statement and claim for both parties, for a special reason.

[541] The jurists stipulate according to the Hanafis that the number of the witness for limited negation to be plenty so as to reach the level of succession, that is the reason for the code. However, the *Uṣūli* scholars do not stipulate that, they only satisfy with the proportion of the normal testimony, which is more preferable.

Of these: If the bailee claims that he has returned the bailment, and the bailor the owner denies him of not, the statement is that the bailee will give his oath as mentioned earlier (para 82/6). They also said that he has the proof for return. As the return is an affirmative occurrence subject to affirmation, and he has claimed it, his affirmation will be accepted for the witness.

The benefit of his proof despite of having the statement is to defend the oath for himself, as if there is no portion remaining for the oath with the proof establishment.

Thus, it is the ruling of every trustee if he claims of returning the trust (see *Majallah* 1774 and *al-Ṭarīqah al-Wāḍiḥah ilā al-Bayyinah al-Rājiḥah* by al-Ḥamzāwī in the beginning of *Masā'il al-Wadīʿah*; and *Tanqīḥ al-Fatāwā al-Ḥāmidiyyah* in *Kitāb al-Wadīʿah*).

There are other examples which we shall only mentioned the previous ones.[542]

It is clearly shown above the philosophy of legal evidence, and the level of indicative, and the rules that contradict it, as it is clear to us the meaning of *bayyinah, aṣl, ẓāhir,* and *khilāf ẓāhir* ?

Two Consequences

82/11 According to the above explanation, there are two results:

The first result: The proof is affirming the weak apparent meaning and not the strong.

The explanation of it goes thus:

The apparent meaning according to the definition that is formally known is of two types:

1. The weak apparent meaning that does not reach a level whereby its possible difference will be rejected. The apparent meaning is the root, or case denotation, as it is above.

542 It is remarked here that the systemic juristic principle for affirmation and proof has been abrogated by the proof of law that was passed in Syria in the third edition of this book. With this, the issue of proof and its proportion and the party commissioned with it and the person that will be accepted from, its establishment on negation or affirmation, its acceptance or refusal return to the judge assumption and his satisfaction. This bad administration is as a result of human rights if it probably worked to. It is generally like this as the judges are not clean as the Angels and have not the wisdom of (Prophet) Sulayman.

2. The strong apparent meaning that reaches a level whereby it is possible difference will be rejected. This is clear-cut, until even the testimony that the *Sharīʿah* considers its affirmation is affirmative. It does not accept affirming in its difference.

An example of that is what Ibn ʿĀbidīn refers to in the chapter of trusty from (revision) that if the trusty claims that he spends on the infant in a period of time a huge amount of money with his apparent lie he will not be accepted as being true in that, and his proof will not be accepted for that, except that if he explains a reasonable reason, like theft or conflagration or anything like that (see *al-Tanqīḥ*, 2/371 quoted from *al-Jāmiʿ al-Kabīr* by Imām Muḥammad).

Likewise, if one of the famous poor alleges a claim against one the famously known with riches that he afflicts him something in his life nearly to what could not be heard, the proof will not be accepted on that (see para 81/17 and *Kitāb Jawāhir al-Riwāyāt fī al-Daʿāwā wal-Bayyināt* by al-Qāḍī Muḥammad Salīm al-Bishtāwī, p. 28).

The apparent meaning is of primary evidence is that weak apparent meaning.

Second result is the proof which is the transitive argument and the confession is the intransitive argument.

The transitive argument is that which its affirmative power is not only established on what it is based on, but, it transmits to other.

The proof is transitive argument: that is, if it is established on considered legal way it will be adhesive to what it is established on, and also adhesive to other people.

Unlike the confession, it does not adhesive except to its confessor the owner, because the confessor has no guardianship except on himself, he can make adhere to himself what he wishes, he has no power to make it adhere on other.

The proof is transitive and confession is intransitive, because it is possible for the confessor to be a liar in his confession and agrees with the confessor in order to waste a firmly right of other, by this the confession is manifestation and information not composition; it does not free of being a mere claim from the confessor without no proof.

a. As it is a claim for its owner to make it compulsory on its owner, it is that human being has guardianship on himself, as it is assumed that his confession on himself is stronger and much more ascertaining on him than testimony of the witness. Therefore, he does not have the authority to make it obligatory on other,

whereby his confession does not even transmit to other except with the deputation from him.

b. The proof is an evidance assumed to clear up the real and open it up. The evidence is evidence according to all people, as the real is real according to them all. So it is not possible to consider a real something existing firmly according to a person, and non-existing according to other. That is why the firm support by proof is good for argument for all people.

82/12 Another example of that is whoever claims the possession of something in the hand of other, and affirms his claim with proof the possession is for him until the denier claims it as his own possession.

It can be extracted from that, if someone purchases something, and afterward clears to him someone else claiming the possession of that thing: if the purchaser believes him to be true and confesses him on that, he will be ordered to give it to the plaintiff. The buyer then has the right to return to the seller saying that the sale is clear to be deserved by other, then the seller has sold him what is not his own possession. That is, the confession of the buyer for the deserving person is the intransitive argument on himself with the condition that a person can be held responsible for his confession, the confession does not transmit to the original seller, and not a compulsory argument against him.

However, if the buyer denies on the alleged the ownership of what he claims to deserve, the deserver then provides the proof on his ownership for the sale that he claims, and the buyer was judged to give it to him, this proof will be effective on the seller and made compulsory on him, then, the buyer has the right to return to the cost price that will be paid to him without any need to return the affirming of deserving the sale at all.

It is related to this also, if the creditor claims a debt on the legacy at the presence of the hires, if the heir confesses the debt on the hired, his confession will be stick to. Only that this confession is intransitive only applicable on himself, that is, the claimer confessed will take a portion out of the heir who confesses him not from the portion of others; because the confession of their compauy will be effective on them.

However, if the creditor affirms that the loan is his right on the deceased regarding a proof he provided on one of the heirs.[543] This will be paid to him in reference to proof his debt will be refunded all from the legacy, even if it encompasses all the hire portions because his proof is effective on them.

It can be derived from that, that the hire if the claimer confesses with the debt from the legacy the claimer will be requested to slowly seek the rule until he provides the evidence. If the evidence is provided the judgment is for him not with the confession, that until the evidence generalizes all other hires not only those who confess, this does not need any new litigation affirming his right on them (with the confession according to the confessor it is considered a compulsion stronger than proof, until they say: If the opponent confesses in litigation after establishing the proof it needs his confession not proof)

82/13 Exemptions

It is exampted from the maxim of insufficient confession what the jurists mentioned that the matured virgin lady if her father confesses or her grandfather without the father, that she has received her dower during her marriage, his confession is effective on her and the receipt of the dower is established by that if she denies it afterward (see *al-Aḥwāl al-Shakhṣiyyah* by Qadrī Bāshā, article 95).

This is based on that the father has taken the dower of her matured daughter according to the *'urf* and culture, this also shows that, whoever possesses the right to take and possesses the right to confess, as it had been mentioned regarding the theorem of *'urf*.

This is what is intended from the fundamentals of system of confirmation and judicial affirmation in *fiqh* with the analysis in accordance to the principles related to the affirmation.

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[543] It is firmly established in *fiqh* that one hire will represent others in what they claim all of the account of legacy or anything of the rights as in this example. See *Majallah*, 1642.

APPENDIX TO SECTION 82

COLLECTION OF MAIN AND SUBSIDIARY MAXIMS OF THE *MAJALLAH*

ARRANGED ALPHABETICALLY ACCORDING TO THE BEGINNING OF THE WORDS

82/14 We explained that the previous 99 maxims did not follow the order of the *Majallah* as it is specifically arranged, but we arranged it in its presentation and explanation according to its subject matter and meanings, we divided it into main and subsidiary maxims.

We observed what needed to be revised from these maxims and the appendices as they might be difficult to locate in the *Majallah*.

For this reason, we saw the need to facilitate its revision, and to arrange the maxims alphabetically according to the beginning letters of the word after the Article.

We had put after each maxim two indicators, separated by a comma, between two parentheses:

- The first refers to the maxim relating to article number that appears in the *Majallah al-Aḥkām al-ʿAdliyyah*.
- The second refers to the maxim relating to the paragraph that appears in this book of ours *al-Madkhal al-Fiqhī al-ʿĀm*.

Before the reader are texts of those maxims according to this order:

1. The *ijtihād* (juristic opinion) is not invalidated by a similar one (Article 16, para 81/56).
2. Remuneration and liability do not come together (Article 86, para 81/84).
3. When the direct perpetrator and proximate causer are both present, the ruling is on the direct perpetrator (Article 90, para 81/91).
4. When a matter becomes void, whatever within it is also void (Article 62, para 81/54).
5. When proscription and prescription are in conflict, preference is given to the proscription (Article 46, para 81/27).

6. When there is conflict between two evils, the greater harm is avoided by the commission of the lesser (Article 28, para 81/24).
7. When the original undertaking is annulled, it is replaced with its substitute (Article 35, para 81/73).
8. If no meaniug can be attached to a statement it would be disregarded (Article 62, para 81/54).
9. When the literal meaniug is not possible, it shifts to the metaphorical meaning (Article 61, para 81/49).
10. When an inhibitor is removed, it reverts to its former status (Article 24, para 81/58).
11. If the principal fails, the subsidiary also fails (Article 50, para 81/70).
12. The practice of the people is like evidence that must be acted upon (Article 37, para 81/37).
13. The recognised gestures of the dumb person are like the explanation of the tongue (Article 70, para 81/42).
14. The norm of any new occurrence is associated to the time uearest to it (Article 11, para 81/11).
15. The norm is that of non-liability (Article 8, para 81/10).
16. The norm is that the status quo remains as it was before (Article 5, para 81/7).
17. The norm in attributes is uon-existence (Article 9, para 81/9).
18. The norm in statement is the literal meaning (Article 12, para 81/48).
19. Necessity does not annul the right of others (Article 33, para 81/34).
20. Observiug a statement is preferred to neglecting it (Article 60, para 81/47).
21. When a matter is tight, it is relaxed (Article 18, para 81/31).
22. The order giveu in dealing with the property of others is void (Article 95, para 81/86).
23. Matters are (judged) according to their intentions (Article 2, para 81/4).
24. Custom is (only) observed when it is regular or prevailing (Article 41, para 81/38).
25. The continuance is easier than the start (Article 56, para 81/64).
26. Evidence is an extended proof and confession is a limited proof (article 78, para 81/99).
27. Evidence is to prove what is contrary to the manifested whereas oath is to ensure the continuance of the original status (Article 77, para 81/100).

28. The burden of proof is on the plaintiff; the oath is on the defendant (Article 76, para 81/101).
29. The subordinate follows (the principal) (Article 47, para 81/66).
30. The subordinate is not set aside with a judgment (Article 41, para 81/68).
31. A change in the cause of ownership is eqnivalent to a change in essence (Article 98, para 81/76).
32. Management of citizens' affairs is contigent upon public welfare (Article 58, para 81/94).
33. A matter specified by custom is like a matter specified by a legal text (Article 45, para 81/44).
34. What is established by evidence is like what is established by witness (Article 75, para 81/58).
35. Legal permission is incompatible with liability (Article 91, para 81/80).
36. Damages by animals attach no liability (Article 94, para 81/92).
37. Need takes the place of necessity whether general or specific (Article 32, para 81/35).
38. The literal (meaning) is disregarded in the face of custom (Article 40, para 81/40).
39. Return commensurates with risk (Article 85, para 81/81).
40. Repelling evil is preferable to securing benefit (Article 30, para 81/26).
41. In obscure matters the proof of a thing takes its place (Article 68, para 81/96).
42. A reference to a part of an indivisible thing is like a reference to the whole (Article 63, para 81/51).
43. The annihilated cannot be restored like the non-esxistent cannot be restored (Article 51, para 81/56).
44. A question is (considered to have been) repeated in the answer (Article 66, para 81/53).
45. The greater harm is eradicated with the lighter harm (Article 27, para 81/22).
46. Harm cannot be removed by an equal harm (Article 25, para 81/21).
47. Harm is not (justified by) pre-existence (Article 7, para 81/29).
48. Harm is removed as much as possible (Article 31, para 81/19).
49. Harm must be eliminated (Article 20, para 81/20).
50. Necessities render prohibited things permissible (Article 21, para 81/32).

51. Necessity is determined by the extent thereof (Article 22, para 81/33).
52. Custom is a basis of judgement (Article 36, para 81/36).
53. The effect in contracts depends on the intention and meaning and not the words and forms (Article 3, para 81/5).
54. Effect is given to what is of common, not what is infrequent (Article 42, para 81/39).
55. Loss commensurates with gain (Article 87, para 81/82).
56. The subsidiary may be established without the principal (Article 81, para 81/71).
57. Things which have been in existence shall be left as they were (Article 6, para 81/48).
58. The written word stands as speech (Article 69, para 81/41).
59. Probability is not a proof even though it emanates from evidence (Article 73, para 81/15).
60. There is no proof when contradiction exists, but the judgment of a judge should not be withdrawn (Article 80, para 81/102).
61. Neither harm, nor reciprocating harm (Article 19, para 81/18).
62. No weight is given to suspicion if it is proven wrong (Article 72, para 81/16).
63. No weight is given to mere supposition (Article 74, para 81/14).
64. No attention shall be paid to inferences in the face of explicit statements (Article 13, para 81/12).
65. There is no room for *ijtihÉd* where the divine text is available (Article 14, para 81/55).
66. A gratuity is not complete except with delivery (Article 57, para 81/75).
67. It is not permissible for someone to take another's property without a legal reason (Article 97, para 81/87).
68. It is not permissible for someone to dispose another's property without the latter's permission (Article 96, para 81/86).
69. No statement is to be attributed to a person who is silent. However, silence in a situation where the statement is needed is a statement (Article 67, para 81/13).
70. It cannot be denied that changes in rulings follow changes in time (Article 39, para 81/46).
71. What has been established at any particular time, the ruling remains as it was before if there is no proof to the contrary (Article 10, para 81/8).
72. What is proven to be opposed to analogy cannot form the basis of further analogy (Article 15, para 81/57).

73. Whatever is permissible due to an excuse would annul with its removal (Article 23, para 81/59).
74. What is forbidden to take is forbidden to give (Article 34, para 81/60).
75. Whatever is forbidden to perform is also forbidden to request its performance (Article 35, para 81/61).
76. The direct perpetrator is liable even though not deliberate (Article 92, para 81/89).
77. The proximate causer is not liable unless he has acted deliberately (Article 93, para 81/90).
78. A person is bound by his owu admission (Article 79, para 81/97).
79. Hardship begets facility (Article 17, para 81/30).
80. The absolute is construed in its absolute sense, provided that there is no proof of a restricted meaning in the divine text or evidence (Article 64, para 81/50).
81. The well-known (practice) among traders is like a stipulation among them (Article 44, para 81/45).
82. The well-known customary practice is like a stipulated condition (Article 43, para 81/43).
83. If the validity of a condition is established, the validity of anything dependent thereon must also be established (Article 82, para 81/77).
84. What is customarily impossible is considered as impossible in reality (Article 38, para 81/17).
85. Whoever hastens the accomplishment of a thing before its time, is punished by being deprived of it (Article 99, para 81/62).
86. Whoever attempts to renounce anything that he had performed, his attempt will be disregarded (Article 100, para 81/63).
87. Whoever owns an object, owns whatever is indispensible to it (Article 49, para 81/67).
88. Any promise dependent upon a condition is mandatory upon fulfilment of such condition (Article 84, para 81/78).
89. The benefit is proportional to the burden and vice versa (Article 88, para 81/83).
90. The description of an item that is present is inconsequential, but in which it is absent is significant (Article 65, para 81/52).
91. The private gnardianship is stronger than the public guardianship (Article 59, para 81/93).
92. A specific harm is tolerated to ward off a general harm (Article 26, para 81/25).
93. Choose the lesser of two evils (Article 29, para 81/23).

94. The responsibility for an act falls upon the doer; it does not fall upon the person ordering the act, provided that it is not forced (Article 89, para 81/88).
95. The continuance is excused what is not excused in the commencement (Article 55, para 81/65).
96. The auxillary is excused what is not excused in other than it (Article 54, para 81/69).
97. The translator's statement is accepted at face value (Article 71, para 81/95).
98. Certainty is not overruled by doubt (Article 4, para 81/6).
99. The stated condition is adhered to as much as possible (Article 83, para 81/79).

SECTION 83

OTHER MAXIMS WHICH EXQUISITELY SUPPLEMENTS THE PREVIOUS MAXIMS

ARRANGED IN ALPHABETICAL ORDER

83/1 There exist other worthy general maxims to supplement the 99 maxims that were explained earlier. We have compiled them from various sources in the books of jurisprudence. Some are adages of great jurists with outstanding characters, which have been previously mentioned in this hook.

We saw fit to conclude the previous and mention their narration without explanation except for only a few comments sometimes, referring them to places which they can be found in this book or other.

We shall list them out in the following chronological order according to their initials, in order to ease their reference as follows:

83/2 **(1)** Subsequent ratification has the same effect as a previous authorisation to act as agent (see para 46/17, *Majallah* 1453).

83/3 **(2)** The default ruling in any matter is permissibility (*al-Ashbāh*, 1/97; *al-Qawāʿid al-Ḥamzāwī fī Masāʾil al-Khaṭr wal-Ibāḥah*, p. 284; *Radd al-Muḥtār*, 1/7 and 3/244 in the beginning of *Bāb Istīlāʾ al-Kaffār* and the beginning of *Kitāb al-Ribā*, 4/176).

83/4 **(3)** The norm in the contract is the consent of the two parties, and its consequence is what both of them agreed upon.

From the saying of Ibn Taymiyyah as it has been previously mentioned in the discussion of the authority regarding the legal force to dispose (*sulṭān al-irādah*) (see para 42/22).

A similar maxim in the foreign jurisprudence is article 1134 of the French civil code which states: Agreements lawfully entered into take the place of the law for those who have made them.

The Arab legislators express this with the phrase "legal contract of the contracting parties" and this text is mentioned in article 148 of the Syrian civil code.

83/5 **(4)** The trustee must make an oath over the trust. (see *Majallah* 1774).

83/6 **(5)** The disposition of a matter by the judge is like the disposition of a matter by the owner (see *Qawāʿid al-Ḥamzāwī, Masā'il al-Luqaṭah,* p. 282). It is like the disposition of a found item ordered by the judge, the person who found it has no choice but returns it to the owner when he is found. The case is the same for the joint property of partners if one of the partners disposes of it with the order of the judge.

83/7 **(6)** The statement of the trustee for which he is liable but for what others are compelled to (see Majallah 774; *Qawāʿid al-Ḥamzāwī, Masā'il al-Waṣāyā,* p. 335).

83/8 **(7)** The null does not confer the right (see para 53/10).

83/9 **(8)** Conditions over an object must be observed (see para 43/5 *Qawāʿid al-Ḥamzāwī, Masā'il al-Waqf,* p. 238).

83/10 **(8)** Ignorance of the rulings in an Islamic country is not an excuse.

Whoever carries out a civil or criminal action, and intends to escape the responsibility on the pretext of being ignorant of legal rulings that has been predetermined for the action, his ignorance will not at all discharge him from the civil consequences, that is, monetary consequences. However, regarding the penal consequences, the ignorance might be accepted, if the knowledge is lacking these instances as to the real penalties.

This maxim is also adopted by the modern law theories, where it is proven that, being ignorant with the law is not an excuse, because the citizens have been commissioned to know it after its announcement, if not, everyone will use ignorance as an excuse to escape liability under the law.

The exception of this maxim is that, if someone out of ignorance says something that makes one an infidel, he will not be judged as being an infidel (see the conclusion of *Majāmiʿ al-Ḥaqā'iq* by al-Khādimī and *Qawāʿid al-Ḥamzāwī, Masā'il al-Taʿzīr,* p. 322, and *Masā'il al-Siyar,* p. 346)

83/11 **(10)** The right does not cease with the effluxion of time (see *Majallah* 1674 and para 23/4).

83/12 **(11)** The rule is determined by its cause. It is valid when its cause is valid and invalid when its cause is invalid (see para 12/69, 4/73 and 9/73). This maxim is repeatedly said by the jurists and written by the pens for the purpose of justification (see *Risālah Taʿlīl al-Aḥkām al-Aḥkām* by Muḥammad Muṣṭafā Shalabī, p. 38, 42 & 310).[544]

83/13 **(12)** Error of the judge is responsibility of the treasury (*Qawāʿid al-Ḥamzāwī, Masā'il al-Ḥudūd,* p. 319). It is like when the judge passes a judgment of punishment which is completely executed, therefore, it becomes obvious that the killer (I think this is a mistake, the person supposed to be killed is not the one who as killed, the Muslim public treasury will guarantee the blood money (see *Durr al-Mukhtār wa-Radd al-Muḥtār*).

This maxim was adopted by the modern theories regarding the country civil responsibility about its employees' mistakes in their governmental function, if they do not intentionally commit the offense, if they do, they will be held responsible

83/14 **(13)** Treason is indivisible.

If the trustee on various legacies, or the person entrusted with various mortmain betrays one of these properties, it is compulsory to be removed from all (see *Tanqīḥ Fatāwā al-Ḥāmidiyyah*, chapter eight on *al-Waqf*, 204/1).

83/13 **(14)** The stipulation of *Waqf* creator is like the text of the lawmaker (*Majāmiʿ al-Ḥaqā'iq*, and *Qawāʿid al-Ḥamzāwī, Masā'il al-Waqf,* p. 214).

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[544] Because of this book, its author was conferred professorship in Islamic jurisprudence from Faculty of Sharīʿah, al-Azhar University. It was printed by al-Azhar in 1949 where we found it in the appendix of this chapter a valuable book as being the best of what was written in its topic.

This is likened to the lawmaker in two ways:

1. It is to be followed according to the understanding and interpretation of the waqf donor whose basic maxims are compulsory according to the text of the lawmaker.
2. It must be respected and executed as working with the lawmaker is compulsory, because it is passed from a respected will, it is like the bequest.

This is not general, as the waqf donors' stipulations are of three types:

The first type kind is void and cannot be executed; another type is respectably valid but it is permissible to be disagreed in case of need, and the last type must absolutely respected, it is impermissible to disagree with it in any circumstance. This type is what this maxim is applicable to.

We had explained these three types and their examples in our book, *Aḥkām al-Awqāf*, 1/151- 65/, it should be referred to.

83/16 (15) The obvious is a proof for defence not for claiming rights.

Likewise they say: The presumption of continuity is good for defense not for entitlement. This is because the presumption of continuity (*istiṣḥāb*) belongs to the category of obviousness (see para 82/12, and *al-Ashbāh* by Ibn Nujaym, 1/104).

83/17 (16) The hand is responsible for what it takes until it is returned. This maxim is a Prophetic tradition as mentioned before (see para 10/2 and 81/87).

83/18 (17) The purpose of *waqf* donor specifies the general text (*Qawāʿid al-Ḥamzāwī, Masā'il al-Waqf*, p. 227). We had talked about the aim of *waqf* donor in our book, *Aḥkām al-Awqāf*), para 192-195 (see the previous maxim para 83/15).

83/19 (18) The statement of the recipient is proportional to the amount received.

83/20 (19) Every stipulatiou contrary to the principles of the *Sharīʿah* is void. This is the meaning of the saying of the Prophet

(s.a.w.): "Every stipulation not in the book of Allāh is void" (see para 41/7).

83/21 (20) Every testimony containing gaining a benefit for the witness or avoiding a loss for him is rejected (*Qawāʿid al-Ḥamzāwī, Masā'il al-al-Shahādāt,* p. 120).

83/22 (21) Every thing whose spending or leaving is permissible without a stipulation is compulsory by stipulation (Ibn al-Qayyim, see para 42/21).

83/23 (22) Every owner is obliged to spend on what he owned (*Qawāʿid al-Ḥamzāwī, Masā'il al-Qismah,* p. 161).

83/24 (23) Whoever fulfills a right for other without a permission or guardianship is a volunteer, if he is not forced (see *Qawāʿid al-Ḥamzāwī, Masā'il al-Sharikah*, p. 356).

83/25 (24) Nothing shall be taken from someone's hand except by an established right. (Imām Abū Yūsuf in his *Kitāb al-Kharāj,* see para 80/1).

83/26 (25) No one has the right to make other person possess a thing without the latter's consent.

That is why, the discharge is reversed and the gift is invalid if the debtor and donee refused, as the *waqf* is invalid if it is meant for a specific person who refuses the waqf. Similarly for the will if it is returned after the death of the trustee (see para 46/27).

This is ruling of possessing property from other person: but possession through the rule of *Sharīʿah,* there is no stipulation of contentment in it, as in the inheritance and procreation from the bondswoman (see para 23/9).

83/27 (26) The unjust wrongdoer has no right.

This is a part of Prophetic saying, it goes thus: *"Whoever cultivates a barren land it belongs to him, the unjust wrongdoer has no right"*, reported by Abū Dāwūd, al-Nasā'ī, al-Tirmidhī, Yaḥyā ibn Adam in *Kitāb al-Kharāj*, and Abū 'Ubayd Qāsim ibn Sallām on *Ihyā' Mawāt al-Arḍ* in his *Kitāb al-Amwāl* (see *al-Amwāl*, para 702, p. 286).

Vein is one of the tree's veins, describing it with injustice is metaphorical, it means, the injustice of its owner as in *al-Nihāyah* by Ibn al-Athīr, root word of *'irq*.

This *ḥadīth* is a foundation that the wrongdoing will not let the wrongdoer to possess a right, whoever forcefully takes a land and plants on it or builds on it that does not deserve its possession with amount, or to remain in it by its same amount. Other properties forcefully withheld are related to the land in this sense.

83/28 **(27)** Several stipulations are made in something, it will be denied when one of these stipulations is absent.

The stipulated matter shall not be fixed if all its stipulations are not completed (see para 28/5).

83/29 **(28)** Whatever without it, the obligatory cannot be executed, is obligatory in itself (see para 24/2).

83/30 **(29)** What must be done is fulfilled regardless who it is done.

The form of this maxim is in *Ta'sīs al-Naẓar* by al-Dabbūsī, p. 6. It is thus: "The basis we have is that every action that is worthy doing itself, whatever way it is done is fulfilled, like returning the trust and anything taken forcibly". We had formulated and confirmed it.

If a usurper deposits a usurped item, the custodian is innocent. Also, if he sells it to him, the right of the owner is to get the refund from him. If the depositor usurps the deposit or the borrower usurps the borrowed item, then he mortgages it to its owner in return of a loan he must take it from him, if they both usurped the itemt.

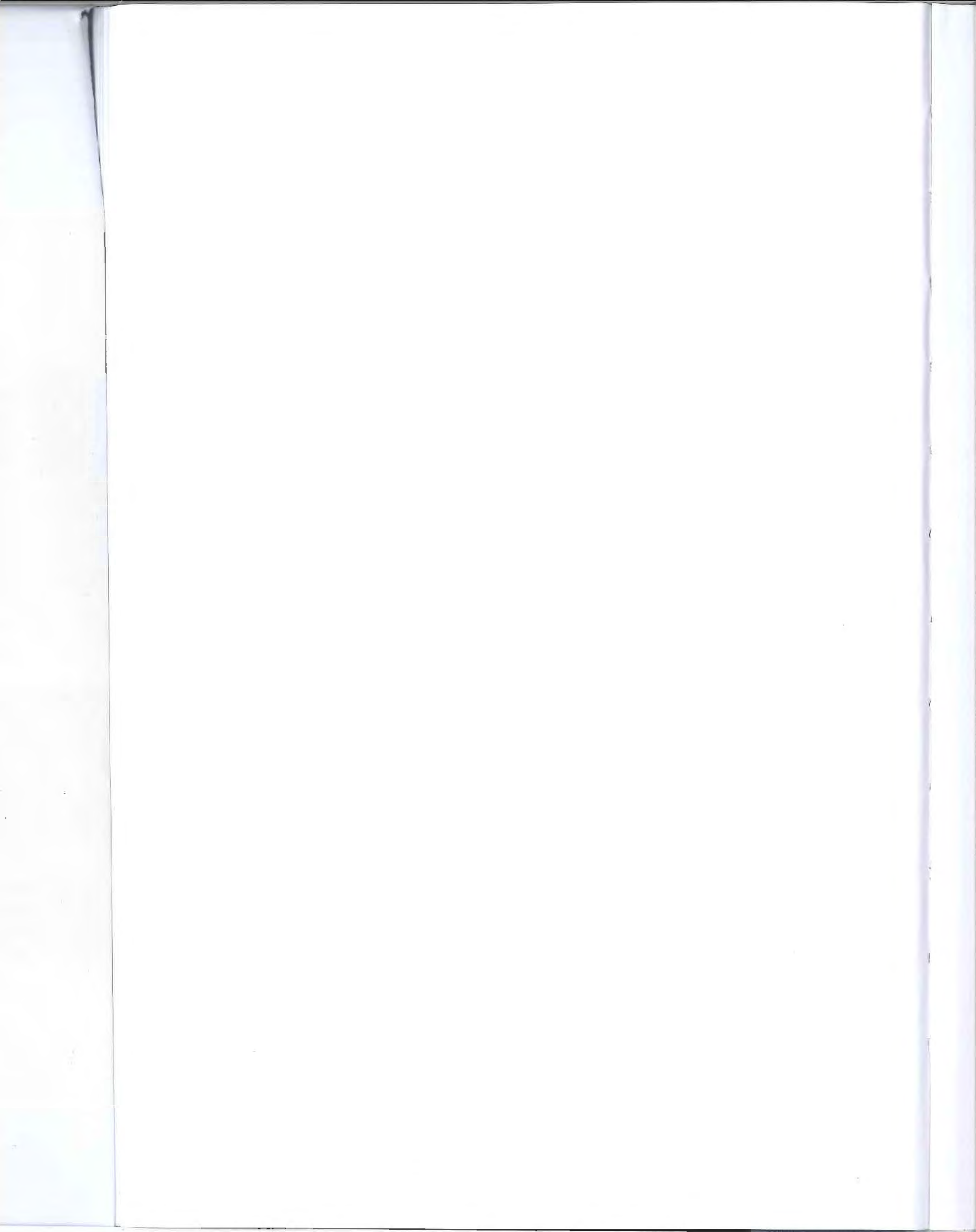
83/31 **(30)** The rights are removed with stipulations.

This maxim has been said earlier that 'Umar ibn al-Khaṭṭāb (may Allāh bless him) said it (see para 42/13).

83/32 **(31)** The agent with the principla is like one person (*Qawā'id al-Ḥamzāwī, Masā'il al-Da'wā*, p. 87).

83/33 This is the end of our aim to present this part which completes *al-Madkhal al-Fiqhī al-'Ām* consisting of two parts; one and two in the series of *al-Fiqh al-Islāmī fī Thawbihi al-Jadīd*. Iit is complete, praise be to Allāh by whose favor all good deeds are perfect. I hope

Allāh guides me to complete this series in the forth coming parts. He is the One of guides.



INDEX

'Abd Allāh ibn 'Abbās, *see* Ibn 'Abbās
'Abd Allāh ibn 'Ibād, 138
'Abd Allāh ibn Mas'ūd, *see* Ibn Mas'ūd
'Abd Allāh ibn 'Umar, *see* Ibn 'Umar
'Abd al-Qādir, 'Alī Ḥasan, 213
Abū al-Sa'ūd (the Mufti of Rome), 164, 166-7, 877
Abū al-Ḥasan al-Karkhī, *see* al-Karkhī
Abū Bakr al-Jaṣṣāṣ, *see* al-Jaṣṣāṣ
Abū Bakr al-Ṣiddīq, 24-5, 102, 124
Abū Bakr ibn al-'Arabī, *see* Ibn al-'Arabī
Abū Ḥafṣ 'Umar al-Nasafī, *see* al-Nasafī
Abū Ḥanīfah, 48, 138, 147-8, 152, 201, 212, 249, 606-7, 625, 653, 656, 661, 742, 751, 758-60, 789-90
Abū Hurayrah, 141, 866
Abū Mūsā al-Ash'arī, 41, 144, 452
Abū Sa'īd al-Ḥarawī, *see* al-Ḥarawī
Abū Sinnah, Aḥmad Fahmī, 87, 749, 773
Abū Ṭāhir al-Dabbās, *see* al-Dabbās
Abū 'Ubayd al-Qāsim ibn Sallām, 130, 901
Abū Yūsuf, 130, 147, 152, 249, 656, 668, 742, 797-8, 781, 789, 818, 901
Abū Zahrah, 47-8, 79, 81, 86, 88, 90, 121, 142, 147, 150, 154, 208, 216-7, 425, 449, 456
ādāb, 28, 115
'ādah, 19, 95, 99, 701, 704-8
'adl, 9
ahliyyat al-adā', 678, 692, 696
ahliyyat al-adā' al-madaniyyah, 651
ahliyyat al-ta'abbud, 651, 696
ahliyyat al-taṣarruf, 659, 696
ahliyyah al-wujūb, 638, 692
Aḥkām al-Awqāf, 900
aḥkām al-fusūkh, 437
Aḥkām al-Qur'ān, 130, 541, 747
Aḥkām al-Ṣibyān, 687
al-Aḥkām al-Sulṭāniyyah, 28, 255, 556, 559-60
Aḥmad Amīn, 212
Aḥmad ibn Ḥanbal, see Ibn Ḥanbal
'Āishah, 703
Algeria, 138
'Alī Bāshā, 181
'Alī Ḥaydar, 724, 729, 734, 804, 852-3, 861, 865
'Alī ibn Abī Ṭālib, 129-30, 132, 144, 154, 556, 560
amānah, 171, 499, 505-6
al-Āmidī, 82
Amman, 206
Ammār ibn Yasīr, 144
'Amr ibn al-'Āṣ, 130
Anas ibn Mālik, 144
'aqd, pl. *'uqūd*, 267, 299-301, 304, 333, 405, 448, 463, 514-5, 517, 519
  'aqd aṣliyyah, 527
  'aqd al-'ayniyyah, 333, 513, 517-8
  'aqd al-amānah, 522
  'aqd al-bay', 420-1
  'aqd al-ḍamān, 522
  'aqd al-fuḍūlī, 519
  'aqd al-ijāratayn, 514
  'aqd al-īṣā', 511
  'aqd al-istiṣnā', 426, 434
  'aqd al-lāzimah, 482, 508
  'aqd al-madīn, 406
  'aqd al-mu'āwaḍah, 458, 521

ʿ*aqd al-musammā*, 438, 440, 442-5, 491, 514
ʿ*aqd al-muwālāh*, 506-7
ʿ*aqd al-rahn*, 610
ʿ*aqd al-safīḥ*, 405
ʿ*aqd al-shakliyyah*, 518
ʿ*aqd al-sharikah*, 501
ʿ*aqd al-ṣulḥ*, 503
ʿ*aqd al-ṣūrī*, 453
ʿ*aqd al-tabʿiyyah*, 527
ʿ*aqd al-tawrīd*, 525
ʿ*aqd al-waṣiyyah*, 334
ʿ*aqd al-ziwāj*, 390
ʿ*aqd ghayr al-lāzimah*, 424, 427
ʿ*aqīdah*, 115, 218
ʿ*āriyah*, 444, 455, 499, 505-6, 524, 580
ʿ*aṣabah*, 57
al-Ashbāh wa'l-Naẓā'ir, 347, 349, 393, 415, 437, 469, 471, 482, 485, 545, 676, 687, 718, 732, 750, 785, 790, 792-4, 837, 852, 882, 897, 900
ʿAṭā' ibn Rabāḥ, 132
ʿAwdah, ʿAbd al-Qādīr, 255
ʿ*awrāt*, 63
al-Awzāʿī, 26, 193, 201, 244
al-ʿayn, 275
al-Badā'iʿ al-Ṣanā'iʿ, 278, 341, 345-6, 355-6, 435, 576, 583, 601, 613, 615, 631
al-Badā'iʿ fī al-Ijārah, 567
al-Bahr al-Rā'iq, 385, 387, 561, 773
bālighah, 439
Banū Qurayẓah, 140
Barīrah, 452
Bāshā, Anwar Ibrāhīm, 241
Baṣrah, 132, 248
bāṭil, 123, 567-70, 576, 591-2, 598-9
bayʿ, pl. *buyūʿ*, 165, 171, 181, 278, 346, 389, 402, 405, 437, 443, 448, 460-1, 491-2, 503, 505-6, 513-4, 520-7, 567, 603, 605
bayʿ al-amānah, 493
bayʿ al-fāsid, 444
bayʿ al-istijrār, 515
bayʿ al-maḍāmīn, 517
bayʿ al-malāqīh, 517
bayʿ al-muʿāmalah, 165, 229-30, 232
bayʿ al-muhaffalāt, 372
bayʿ al-wafā', 176, 491, 493, 495-8, 514-5, 599, 702
bayt al-māl, 124, 130, 168, 378, 557
al-Bazdawī, 48, 308, 553, 653, 675, 703
Bidāyat al-Mujtahid, 57, 58, 68, 130, 444, 449, 462, 548, 553, 649
al-Bīrī, 168, 545, 718
al-Bishtāwī, 888
buṭlān, 482, 537-8, 563-5, 571, 573-7, 580-1, 593-7, 599, 608, 615, 617-8, 627
Cairo, 191
ḍamān, 505, 513, 716, 854
al-Dabbās, Abū Ṭāhir, 790-1
al-Dabbūsī, 790, 792, 807, 902
Damascus, 191, 195
dar' al-mafāsid, 65
ḍarūriyyat, 61, 81
daʿwā, 171, 567, 597-8
Dawālibī, Maʿrūf, 62, 82, 86
dayn, 275-6
dayn al-mushtarak, 279
dilālah, 85
dirāyah, 139
diyānah, 371
diyah, 271
Ḍuḥā al-Islām, 212
Al-Durar Sharḥ al-Ghurar, 603, 609, 721, 740, 793
al-Durr al-Mukhtār, 51, 86, 164-6, 168, 271, 278, 287, 321, 336, 396, 405, 432, 437, 475, 506, 509, 511, 522, 527, 535, 558, 569, 571, 573-4, 584, 648, 824, 862, 871

Egypt, 132, 144, 189, 195, 197, 205-6, 671, 704, 792
farā'iḍ, 63, 506
al-Faraid al-Bahiyyah, 793
farḍ, *749*
fasād, 435-6, 517, 538, 563-4, 573, 589-97, 599-601, 605, 607-8, 612-5, 617-8, 627
fāsid, 598-600, 605-14
faskh, 482, 487
Fatāwā Ibn Taymiyyah, 453
Fatḥ al-Bārī, 130
Fatḥ al-Qadīr, 278, 284, 321, 325, 444, 557, 571, 606, 680, 753, 755, 757
fatwa, pl. *fatāwā*, 26, 30, 69, 75, 115, 122, 134, 136-7, 142, 150, 155, 160, 163-4, 166-8, 179, 196, 204, 232-3, 507, 753, 770, 772-3, 781
al-Fatāwā al-ʿĀlamkīriyyah, 179
al-Fatāwā al-Bazzāziyyah, 160
al-Fatāwā al-Ḥāmidiyyah, 160, 166, 887, 899
al-Fatāwā al-Hindiyyah, 160, 178-9
al-Fatāwā al-Khāniyyah, 160, 858
al-Fatāwā al-Tātar-khāniyyah, 160
al-Fawā'id al-Bahiyyah, 345
fay', 126, 128, 154
firaq al-abdān, 425
al-Furūq, 296, 309, 747, 781, 786-7, 794-5, 852
Futūḥ al-Buldān, 557
ghalaṭ, 353, 380
ghanīmah, 128
gharar, 90, 601, 604-6
gharḍ al-shāriʿ, 80
Gharīb al-Qur'ān, 785
ghasb, 171, 272, 415
al-Ghazālī, 61, 79, 85, 86, 309
ghishsh, 19
ḥaḍānah, 443
ḥadd al-sariqah, 125
Hague, the, 241
ḥājiyyāt, 61, 81
ḥajj, 342
hajr, 171
ḥalāl, 214, 463, 716
Ḥāmid al-ʿImādī, 166
al-Ḥamzāwī, 750, 793, 842, 848, 858-9, 863-4, 872, 887, 897, 898, 899, 901-2
al-Ḥānūtī, 166
ḥarām, 214, 446, 775
al-Ḥarawī, Abū Saʿīd, 790
Ḥārūn al-Rashīd, Caliph, 207-8, 247, 249, 789
al-Ḥasan al-Baṣrī, 132, 193, 201
Ḥāshiyah al-'Adawī, 371
Ḥāshiyah al-Ḥamawī, 393
al-Ḥaṭṭāb, *387*
ḥawālah, 171
hazl, 358
hibah, 75, 171, 284, 293, 321, 429-30, 491, 499, 506, 510, 514, 521, 524-5, 569, 579, 583, 714, 799
Ḥibbān ibn Munqidh, 45, 368
al-Hidāyah, 278, 321, 346-7, 526, 574, 580, 638, 742, 752-3, 755
Hijaz, 132-4, 143-4, 147
ḥisbah, 148
al-ḥiṣṣah al-shā'iʿah, 279
ḥiwālah, 491, 495
Hudhayfah ibn al-Yaman, 144
ḥudūd, 226, 253, 540, 543, 545, 550-1, 554-7, 561, 820
al-ḥuqūq al-khāṣṣah, 74
ḥurriyyah, 446
Ḥnsnī al-Zaʿīm, Sayyid, 187-8
iʿārah, 277, 283, 293, 295, 317, 333, 427-8, 474, 491, 499, 505, 508, 513, 520, 522, 524-5, 527, 579
ʿibādāt, 28, 133, 180, 183, 692
Ibn ʿAbbās, 132, 144
Ibn Abī Laylā, 193, 201, 244
Ibn ʿĀbidīn, 68-9, 166, 168, 230, 703, 714-5, 717-9, 726, 753-4, 766, 781, 888
Ibn al-'Arabī, 208, 747

Ibn al-Athīr, 902
Ibn al-Hammām, 325, 557, 680, 705, 757
Ibn al-Muqaffaʿ, 178, 184, 248
Ibn al-Qayyim, 58, 94, 123, 132, 154, 462, 464, 781, 901
Ibn ʿAwn, 462
Ibn Ḥanbal, 79, 81, 86, 88, 90, 92, 144, 152, 201, 455-6, 649
Ibn Masʿūd, 127, 132, 144
Ibn Nujaym, 166, 385, 393, 415, 437, 469, 471, 561, 676, 718, 773, 790-3, 837, 882, 900
Ibn Qudāmah, 455, 488, 553
Ibn Rajab al-Ḥanbalī, 681, 794-5
Ibn Rushd, 57-8, 130
Ibn Shihāb al-Zuhrī, 774
Ibn Shubrumah, 186, 193, 201, 212, 244, 451, 480, 619
Ibn Sīrīn, 462
Ibn Taymiyyah, 453, 464, 897
Ibn ʿUmar, 132
Ibn Wahb, 208
ibrā', 171, 299, 461, 508
Ibrāhīm al-Nakhaʿī, 132
ibṭāl al-istiḥsān, 78
ʿīd al-aḍḥā, 762, 773
ʿīd al-fiṭr, 135, 773
īdā', 333, 427, 491, 498, 513, 520, 522, 525, 527
ʿiddah, 15, 17, 66, 510, 577, 625, 744, 778-9
iflās, 674
iftā', 167, 760, 769
al-Iḥkām fī Fatāwā, 729, 760
iḥrāz, 568
iḥsān, 9, 226
ījāb wa-qabūl, 19, 165, 267, 302, 303, 306, 381, 400
ijārah, 171, 277, 283, 390, 420, 425, 431-2, 437, 443, 461, 474, 482, 486, 489, 491, 493, 499, 503, 509, 514, 521-5, 526-7, 580, 691, 720-1, 772, 858
ijmāʿ, 35, 38-40, 55, 101, 103, 124, 154, 192, 757, 760, 835
  ijmāʿ qawlī, 40
  ijmāʿ sukūtī, 40
ijtihād, 5, 9-10, 17, 28, 35, 41, 53, 57-8, 74, 77, 78, 79-83, 85, 87, 93, 102, 106, 113, 122-6, 128, 130, 132, 143-4, 146, 148, 150-5, 161-2, 166, 173, 178, 180, 185-7, 190, 192, 196, 201-2, 205, 207-9, 212-3, 223-6, 245-50, 264, 441, 443, 446-52, 455-7, 459-63, 498, 541-2, 544, 548, 552-3, 556, 608, 617, 622-3, 644, 649, 656-7, 745-7, 751, 757, 760, 769-70, 780, 791, 835-6, 853, 891
ikhlāṣ, 208
ikrāh, 171, 353, 360-1, 403, 436, 601, 606, 821, 862
  ikrāh tām, 363
  ikrāh nāqiṣ, 364
Iʿlām al-Muwaqqiʿīn, 58, 123, 132, 154, 458, 460-2, 464, 781
ʿillah, 40, 42-3, 47-8, 124, 310, 770
ilzām, 402, 417
iltizām, 420-3, 474-5
inḥilāl al-ʿaqd, 482
al-Inṣāf, 456
iqālah, 424, 461, 482, 491, 508-9, 520, 522, 597
  iqālat al-bayʿ, 508
ʿiqār, 498
iqrār, 171, 357
Iraq, 129, 132-4, 143, 144, 153, 182, 189, 197
ʿĪsā, Prophet, 7
īṣā', 491
al-Isʿāf, 680
ishārah, 327
isqāṭāt, 474
istiḥqāq, 396, 581, 842, 847
istiḥsān, 48, 52-6, 58, 70, 76-82, 89, 91, 98, 103, 123, 142, 190, 213, 281, 446

istiḥsān al-ḍarūrah, 49, 77
istiḥsān al-ijmāʿ, 55
istiḥsān al-sunnah, 55
istiḥsān qiyāsī, 49-50, 77
istimtāʿ, 454
istiṣḥāb, 884, 900
istiṣlāḥ, 48, 59, 64-6, 70-2, 76-7, 79-82, 85-6, 94, 99, 104, 106, 123, 131, 176, 190, 238, 446, 675, 737, 757, 765, 800
istiṣnāʿ, 39, 55, 176, 433, 515, 707
al-Iʿtiṣām, 71, 208
iʿtāq, 299
iʿtināq al-raqīq, 289
itlāf, 171
itlāqāt, 474-5
ʿIzz al-Dīn ibn ʿAbd al-Salām, 734, 794, 827
jahālah, 601
jāhiliyyah, 440, 703, 737, 749
Jalāl al-Dīn, Shaykh, 179
jalb al-maṣāliḥ, 64
Jaʿfar al-Ṣādiq, 138
al-Jaṣṣāṣ, 130
al-Jawāliqī, 750
jihād, 60, 106, 131, 162, 508, 511, 660, 732, 811, 821
jināyah, 271
jizyah, 128
Jordan, 197, 206, 238
al-Jurjānī, 308-9
kafālah, 171, 427, 429, 443, 461, 491, 493-4, 507, 509, 520-2, 524, 527, 799, 874
al-Karkhī, Abū Ḥasan, 48, 791, 793
al-Kāsānī, 631
Kashf al-Asrār, 48, 553, 653, 668, 678
Kashf al-Ẓunūn, 795
Kashshāf al-Qināʿ, 456-9
al-Khādimī, 793, 898
khalābah, 353
khalafiyyah, 269, 271, 273
Khallāf, ʿAbd al-Wahhāb, 62
kharāj, 127-8, 789, 818, 856, 901
Khawārij, 254
Khaybar, 129-30
khilābah, 391, 435
al-khiyānah, 369
khiyār, 19, 365, 425, 436-7, 449
khiyār al-ʿaqdiyyah, 435
khiyār al-ʿayb, 374, 397, 436-7
khiyār al-ghabn, 437
khiyār al-kammiyyah, 436
khiyār al-majis, 424, 425-6
khiyār al-naqd, 46, 435, 437, 449
khiyār al-ruʾyah, 388, 433, 437
khiyār al-sharṭ, 45, 385, 387, 395, 435-7, 449, 463
khiyār al-taʿyīn, 437, 449
khiyār al-waṣf, 384, 437
khiyār kashf al-ḥāl, 436
Khizānat al-Akmal, 168
Khuḍarī, Muḥammad, 134, 637
khulwah, 66
Kisrā, 122
Kitāb al-Amwāl, 130
Kitāb al-Kharāj, 130
kitābah, 326
Kūfah, 127, 132-3, 144, 248
Kuwait, 195
al-Kuzbarī, Maʾmūn, 240
lafẓiyyah, 335
Lāʾiḥat al-Asbāb al-Mūjibah, 171
al-Layth ibn Saʿd, 193, 244
liʿān, 36
Libya, 189, 191
Lisān al-ʿArab, 263, 371
luzūm, 402, 417, 424
Maʿan ibn Zāidah, 557
al-Mabsūṭ, 391, 718, 872
Madīnah, 40, 132-3, 143, 444
al-Madkhal ilā ʿIlm Uṣūl al-Fiqh, 62, 82, 86, 88
mafsadah, pl. *mafāsid*, 61, 80, 82, 133
mahl, 395
al-Maḥmaṣānī, Ṣubḥī, 220
Maḥmūd Ḥamzah, 345

mahr, 15, 95, 366, 421, 448, 457, 461, 509-10, 577, 597, 758, 770
al-Majallah al-Aḥkām al-ʿAdliyyah, 29, 96, 98-100, 113-4, 171-2, 174, 180-8, 190, 201, 234-9, 248, 266, 272-3, 278-82, 287, 292, 296, 301-2, 322, 324-6, 328-30, 332-3, 350, 357, 364, 378, 385, 389, 396-99, 403, 411, 428-9, 432-3, 435-7, 450, 469, 483, 491-5, 498-506, 508-9, 522, 581, 616, 618-9, 625, 657-9, 690, 716, 718, 720-1, 724-9, 734, 750, 762-4, 766, 770, 787, 793-4, 796-8, 801-9, 811-8, 820, 822-5, 827-35, 837-48, 850-1, 854-57, 859-62, 864-74, 876, 886-7, 891, 897-9
al-Majallah al-Aḥkām al-Sharʿiyyah, 170, 239, 259, 618
Majallat al-Qaḍā' al-ʿIrāqiyyah, 241
Majallat al-Naqābah al-Muḥāmīn, 241
majlis al-ʿaqd, 425-6
Makḥūl, 132, 201
Makkah, 129, 132, 191, 462
makrūh, 371, 457
māl, pl. *amwāl*, 264, 278, 425, 523-4
Mālik ibn Anas, 47, 81, 88, 92, 142, 144, 147-8, 201, 208, 387, 553, 557, 649, 774, 866, 876
Manāqib al-Imām Mālik, 207
mandūbāt, 63
manfaʿah, 275-6, 296
māniʿ, 313-4
manqūl, 498
mansūkh, 37
al-Manṣūr, Caliph Abū Jaʿfar, 178, 184, 248
maqāṣid al-sharīʿah, 190, 738
maqbūḍah, 210
maʿrifah, 95
marjūḥ, 463-4
Maṣādir al-Ḥaqq, 388
al-mas'alah al-mushtarikah, 57
al-maṣāliḥ al-mursalah, 16, 48, 52, 59, 63, 70-2, 76-9, 81, 82-3, 91, 106, 142, 161, 213, 219, 238, 778, 780
maṣlaḥah, pl. *maṣāliḥ*, 22, 36, 56-7, 61, 70, 76, 79-80, 82-90, 103, 121, 133, 153, 154, 161-2, 164-5, 175, 201, 204, 214, 218-9, 236, 244, 247, 249-50, 267, 281, 310, 657
al-Māwardī, 255, 556, 559
mawqūf, 403
al-Miṣbāḥ al-Munīr, 301, 308-9, 490, 545, 565, 785
Muʿādh ibn Jabal, 129-30, 132
muʿāmalah, pl. *muʿāmalāt*, 28, 165, 171, 179-80, 194, 214, 463
muʿāwaḍah, 505
muʿāwaḍāt al-māliyyah, 449, 473
muḍārabah, 172, 427-8, 484, 491, 501
muḍārib, 876
muḍāyafah, 515
Mufradāt al-Qur'ān, 309, 545, 565, 704
muftī, 30, 78, 205, 249
Mughal of India, 179
al-Mughīrah ibn Shuʿbah, 144
al-Mughnī Sharḥ al-Kabīr, 373, 376, 379, 454, 457, 553, 557
muḥakkamah, 99
Muḥammad Ḥasan, Shaykh, 179
muḥṣan, 225, 540
Muʿīn al-Ḥukkām, 763, 773, 811
al-Mūjiz fī al-Iltizāmāt, 565, 628-9
al-Mūjiz fī Naẓariyyat al-Iltizāmāt, 481
mujmal, 444
mujtahid, 41, 78, 79, 103, 126, 143-4, 148, 150-2, 166-7, 208, 246-7, 556, 706, 760, 781, 837
mukallaf, 7, 135, 167, 193, 245-7, 252, 461, 531, 738
mukhārajah, 491, 504, 509, 522

mulāmasah, 591
al-mulk al-mutamayyiz, 278
al-mulk al-shāʾiʿ, 278-9
al-Mulkiyyah wa-Naẓariyyat al-ʿAqd fī al-Sharīʿah al-Islāmiyyah, 121, 147, 154, 209, 217, 425
Mullā Ḥumayd Junūrī, 179
Mullā Niẓām al-Dīn Burhhān Bora, 179
multazim, 421
munābadhah, 591
al-Muntahā, 456
muqāyaḍah, 493
muqtaḍā al-ʿaqd, 448-50, 453, 456, 459, 463
murābaḥah, 165-6, 375, 493
Murshid al-Ḥayrān, 396
Mūsā, Prophet, 8
musāqāh, 484, 490-1, 502
al-Mustaṣfā, 61, 79, 86
muqāranah, 761
muqāṣarah, 716
muqāwalah, 515
murūr al-zamān, 765
mutawātir, 106
muwāḍaʿah, 354-5, 357-8
al-Muwāfaqāt, 64, 310, 311, 565, 665, 738, 749, 755, 768, 821
muwālāt, 491
al-Muwaṭṭaʾ, 147, 148, 207, 809, 877
al-Muzanī, 47
muzāraʿah, 431-2, 484, 491, 501, 524
al-Nāblusī, ʿAbd al-Ghaniy, 167-8
Nāfiʿ ibn Ḥārith, 462
al-Nasafī, Abū Hafṣ ʿUmar, 791
nāsikh, 37
nawāzil, 132
Naẓariyyat al-ʿAqad, 301, 305, 449, 479, 515, 525-6
al-Naẓariyyat al-ʿUqūd, 220
Naẓrah ʿĀmmah fī Tārīkh al-Fiqh al-Islāmī, 111, 213
nifādh, 402
nikāḥ, 126, 175, 183, 205, 359, 420, 457, 459, 473, 509, 574, 597, 694, 740, 770
  nikāḥ al-mutʿah, 453-4, 512
al-Nihāyah, 902
al-Niyābah, 684
Niẓām al-Dīn, Shaykh, 180
al-niẓām al-qaḍāʾī, 73
Pakistan, 189, 192
Palestine, 182
qabḍ, 236
qaḍāʾ, 166, 171, 179, 182, 271, 500
Qadrī Bāshā, 512, 647, 655-6, 664, 719, 890
al-Qarāfī, 296, 309, 729, 733, 747, 760, 786, 790, 794-5, 852
qarḍ, 165, 333, 491, 505, 513, 522-3, 525
al-Qārī, Aḥmad ibn ʿAbd Allah, 239
al-Qāsim ibn Muḥammad, 208
al-Qawāʿid al-Aḥkām, 734, 794, 827
al-Qawāʿid al-Karkhī, 790
al-qawāʿid al-kulliyyah, 171
al-qawāʿid al-uṣūliyyah, 105, 137
al-qawānīn al-siyāsiyyah, 94
Qayṣar, 122
qazf, 540, 543-4
qirāḍ, 501
qiṣāṣ, 93, 251-3, 255, 540, 545-52, 554, 849
qismah, 437, 491, 500, 513, 522
qiyās, 5, 35, 40-1, 43, 46, 47, 49-57, 70, 76-9, 82-3, 89, 98, 101-4, 123, 142, 143, 176, 178, 190, 209-12, 246, 248, 281, 284, 308, 366, 369, 425, 435, 446, 737, 757,-9, 766
  qiyās khafiy, 49
qudsiyyah, 107
al-Qurṭubī, 836
Rabat, 206
Radd al-Muḥtār, 31, 51, 54, 86, 130, 161, 164, 166, 168, 268, 271, 278, 284, 286, 323, 328-9, 331,

337, 344, 364, 370-1, 376, 385, 387, 395, 397, 405, 411, 415, 437, 450, 505, 507-9, 515, 526, 542-3, 545, 548, 558, 561, 573, 579-81, 597, 602, 616, 653-5, 658-9, 668, 675, 680, 687, 689, 715-6, 719-20, 727, 753, 755, 758, 760, 770, 789, 810, 849, 881, 897
al-Rāghib al-Iṣfahānī, 309, 545, 704
rahn, 171, 333, 344, 427-9, 432, 443, 449, 491, 495-7, 520, 522, 524-5, 527
  rahn al-madīn, 428
rājiḥ, 463-4
raqabah, 275
al-Rāzī, 541
ribā, 35, 221-2, 228-9, 231, 233
  ribā al-faḍl, 54, 450
riḍā'iyyah, 446, 500
Risālat al-Ahliyyah, 687
Risālat al-Iltizām, 853
Risālat al-Ṣaḥābah, 248
Risālat al-ʿUrf wal-ʿĀdah, 87, 749, 773
Risālat al-Uṣūl, 102, 148
riwāyah, 139
Riyāḍ, 191
sabab, 309, 311-4
Saʿd ibn Abī Waqqās, 144
ṣadaqah, 861
  ṣadaqat al-fiṭr, 135
sadd al-dharā'iʿ, 65, 446
safīh, 405
Ṣafwān ibn Umayyah, 462
Ṣafwat, Aḥmad Zakī, 248
ṣaḥābah, 39, 208
ṣaḥīḥ, 123
Saʿīd ibn Jubayr, 201
Saʿīd ibn al-Musayyib, 132
salaf, 493
salam, 493
ṣalāt, 308, 665, 692, 821
Samarkand, 26
al-Sanhūrī, ʿAbd al-Razzāq, 189, 241, 301, 305, 388, 479, 481, 515, 525-6, 565, 628-9
ṣarf, 493
Saudi Arabia, 206
al-Shāfiʿī, Muḥammad ibn Idrīs, 47, 78, 102, 130, 144, 147-8, 152, 201, 649, 649
al-Sarakhsī, 872
al-Sāyis, 733
Shaḥātah, Shafīq, 335, 613
Shām, 132
Shalabī, Muḥammad Muṣṭafā, 899
Sharḥ al-Ḥaṭṭāb al-Mukhtaṣar, 385
al-Sharḥ al-Kabīr, 371, 455, 462
Sharḥ al-Kharshī, 371
Sharḥ al-Manẓūmah al-Raḥbiyyah, 58
Sharḥ Mukhtaṣar al-Ḥaṭṭāb, 387
sharikah, pl. sharikāt, 171, 172, 278, 427, 428, 484, 486, 491, 499, 513-4, 522, 524
  sharikat al-ʿaqd, 280, 525
  sharikat al-mulk, 280-1
sharṭ, pl. *sharā'iṭ*, 310-2, 314-5, 456, 461
  al-sharṭ al-jazā'ī, 463
  al-sharṭ al-juʿlī, 313
al-Shāṭibī, 64, 71, 208, 311, 565, 665, 738, 749, 768, 821
al-Shaybānī, Muḥammad ibn al-Ḥasan, 147-8, 656
shirā', 492
shubhah, 219
shufʿah, 171, 268, 269, 391
Sufyān al-Thawrī, 193
shūrā, 22, 36, 40, 153, 154, 209
Shurayh al-Qāḍī, 186, 451, 463, 480, 619, 622
al-Sijistānī, 785
siyar, 28
al-siyāsah al-sharʿiyyah, 28, 92-4, 131, 175
al-Subkī, 111, 783, 794

ṣulḥ, 171, 420, 425, 452, 482, 491, 503, 505, 509, 513, 520-3, 525, 581
Sulṭān al-Irādah, 305, 438, 440-1, 447, 450-1, 455-6, 462-3, 465, 897
al-Suyūṭī, 207, 794
Syria, 182, 187, 189, 194-5, 197, 205-6, 241, 512, 623, 670-3, 704, 897
taʿāmul, 95
al-Ṭabarī, 559-60
tabarruʿ, 473, 517, 521
al-Tabṣirah, 764
tafwīḍ, 525
tadlīs, 19, 435
  tadlīs al-ʿayb, 373
taḍmīn, 271
tafarruq, 425
  tafarruq al-ṣafqah, 395
taghayyur al-zamān, 65
taghrīr, 19, 371, 391
  taghrīr fiʿlī, 371
  taghrīr qawlī, 371
tahārah, 692
Tahdhīb al-Furūq, 764
taḥkīm, 429-30, 491, 504
taḥkīr, 514
taḥlīf, 171
taḥrīr, 113
taḥsīniyyāt, 62, 63, 81
takāful, 224
takhāruj, 316, 504
takhrīj, 113, 155, 157, 176
takhṣīṣ al-naṣṣ, 85
takmīliyyāt, 62
ṭalāq, 15, 202, 205, 299, 359, 364, 510, 694, 749
  ṭalāq al-firār, 67, 765
  ṭalāq al-rajʿī, 779
Ṭalḥah, 129
taʿlīq, 259, 461-4, 468
  taʿlīq al-ʿaqd, 461
  taʿlīq al-bayʿ, 461
taljiʾah, 354-5
tamlīk al-intifāʿ, 296
tamlīk al-manfaʿah, 296
tanājush, 370
tanāquḍ, 874
tanāzul, 299
Tanqīḥ al-Fatāwā al-Ḥāmidiyyah, 355, 758
al-Ṭanṭāwī, 557
tanẓīm, 157
taqlīd, 152, 156
Taqnīn al-Fiqh al-Islāmī, 250
taqrīr, 37
taqwā, 166
taqyīd, 474-5
  al-taqyīd bil-sharṭ, 469
tarjīḥ, 116, 157
Tārīkh al-Balādhurī, 26
Tārīkh al-Fiqh al-Islāmī, 775, 840
Tārīkh al-Tashrīʿ al-Islāmī, 111, 134
Tārīkh al-Umam, 560
tarjīḥ, 37
al-Taʿrīfāt, 308-9
taṣsarruf, 300
  taṣsarruf al-marīḍ, 406
al-tashrīʿ al-ʿamalī, 115
al-Tashrīʿ al-Jināʾī, 255
taʾsīs al-naẓar, 790, 792, 807, 902
tawfīq, 37
taʿwīḍ, 271
tawliyah, 493
tawthīq, 525
Ṭāwūs, 132
taʿzīr, 20, 92, 125, 219, 227, 237, 251, 255, 545, 549, 553-64, 898
thābit, 85, 439
thiqah, 169
al-Ṭūfī, Sulaymān, 80, 81, 84
Tunisia, 138, 189
ulil-amr, 168
ʿUmar ibn ʿAbd al-ʿAzīz, 26, 208, 556, 776
ʿUmar ibn al-Khaṭṭāb, 21, 25, 40-1, 58, 73-4, 102, 124, 126-7, 129-30,

132, 153, 162-3, 452, 457-8, 462, 480, 553, 557, 653, 837, 840, 902
ʿumrā, 286, 491, 506
ʿumrah, 342
ʿUmrān ibn Ḥusayn, 144
United Arab Emirates, 238
ʿUthmān ibn ʿAffān, 93, 129, 132
al-Umm, 78, 148
ummah, 39, 132, 185, 203, 207-8, 825
ʿuqūbāt, 28
ʿurbūn, 462
ʿurf, 19, 48, 69, 88, 95-100, 104, 142, 177, 202, 259, 602, 605, 661, 699, 702, 704, 706-15, 717-20, 722-7, 731, 734, 737, 739, 742, 744-55, 757-66, 780-2, 825-9, 832-3, 859, 879
Usāmah, 25
Uṣūl al-Aḥkām, 82,
uṣūl al-fiqh, 55, 62, 66, 104, 113, 148, 155, 190, 247, 627, 665, 676, 787
uṣūl al-zawāhir, 875
ʿuyūb al-riḍā, 352-3
wadīʿ, 427-8
wadīʿah, 51, 493, 499
Wajīh al-Dīn, Shaykh, 179
wakālah, 171, 413, 429, 461, 491, 502, 508
waqf, pl. *awqāf*, 43, 69, 75, 130, 164, 177, 277, 284-5, 288, 294-6, 299, 311, 344, 391, 459, 474, 514, 597, 619, 681, 702, 715, 794, 804, 838, 845, 877, 898-901
wārith, 415
waṣiyyah, 43, 67, 205-6, 277-8, 284, 295, 334, 429-30, 474, 491, 510-2, 524-5, 597
wilāyah, 413, 474-5, 683-4, 686-90
wiṣāyah, 413, 511, 522
yamīn, 749
Yemen, 132, 144
zakāt, 35, 163-4, 191-2, 535, 649, 732
  zakat al-amwāl, 649
  zakat al-fiṭr, 135
Zanzibar, 138
Zubayr ibn al-ʿAwwām, 130
Zayd ibn ʿAlī ibn Zayn al-ʿĀbidīn, 138
Zayd ibn Thābit, 132
al-Zaylaʿī, 337, 555
zawājir, 533
zinā, 226
ziwāj, 491
Zufar ibn Hudhayl, 606-7
al-Zuhaylī, Wahbah, 250

This book is a simplified introduction that teaches the university student the basic jurisprudential concepts and a sound methodology of jurisprudential thought, and not jurisprudential details and rulings found in the classical books of *fiqh*. The jurisprudential rulings contained in this book are basically aimed at serving its teaching goal through examples, quotations, depiction of the abstract concepts and establishing the main issues in the mind of the student. I have added a number of clarifying examples that I have selected carefully so as to suit the beginner's need for clarification.

Dr. Muṣṭafā Aḥmad al-Zarqā

I have come across the book entitled *al-Madkhal al-Fiqhī al-'Âm* (Introduction to General Jurisprudence) and I have found it a new and noble work. It is, in my opinion, new because Islamic jurists were neither accustomed to the modern method of writing used by the author nor did they follow the author's contemporary classification. In this new methodology, the problems are consolidated, generalities are presented, theories are simplified, and terminologies are explained. Then the branches are extracted from their roots or the portions are related to their whole or the theories are applied to their relevant topics. Thus, the student eventually comes out from his study while he is well acquainted with the generalities and theories having strongly grasped the juristic problems, and understood the way of relating the branches (*furū'*) to the roots (*uṣūl*). He will also have gained the ability of solving problems and distinguishing between similar problematic cases.

Dr. 'Abd al-Qādir 'Awdah

This book is regarded, in our opinion, as the best book for the preparation of the study of *al-Majallah al-Aḥkām al-'Adliyyah*, the classical civil law of the Ottoman era. In addition, it is a glorious defence of the greatness of the *fiqh*. The author has conveyed to us three significant international texts that commend the merits of our *fiqh*: It was made by the Conference on Comparative Laws which was held in the Hague in August 1937; It was made by the International Conference of Lawyers in 1948; and It was made by the International Academy of Comparative Law held in Paris in 1952.

Dr. Munīr al-'Ajlānī

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