OUTLINES OF ISLAMIC JURISPRUDENCE

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ABOUT THIS BOOK

The purpose of this book was to present in a very concise way almost all the topics that are studied in Islamic law. The result was that some of the topics were reduced to mere definitions or explanations in a few lines. Surprisingly, many readers found this to be a good idea and the first edition of the book is now out of print. This book is the draft of the revised second edition. This means that it is still to be edited and some sections may be cut out. Suggestions for improving the book are welcome. It might be a good idea to use the index to jump to the required topic. In Adobe Acrobat Reader: Use F7 to access the menu, CTRL= to zoom in and CTRL- to zoom out.

Those who wish to study *Uṣūl al-Fiqh* in greater detail may refer to Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad: IIIT & IRI, 2000)
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Chapter 1

Islamic Law in the Modern World

1.1. The Future of Islamic Law

Islamic law has no parallel in history. It has, indeed, been the most successful legal system, a system that has been practised for more than fourteen hundred years by many peoples and nations with widely differing cultures and local conditions. If the current population projections are to be believed, Islamic law will, within another hundred years, be practised by more than half the population of the world.

One reason why Islamic law has been so successful is that it deals with every conceivable relationship that human beings can establish. It deals with relationships that are established between individuals, between individuals and the community, between different communities, between the individual and the Creator and even between the community and the Creator. The law provides detailed rules for each of these areas, but above all this law provides an identity to Muslims in a way that no other religion or system can. The law influences and creates a common culture, a culture that may reflect different shades in different geographical regions, but is essentially the same at its core. A Muslim can comfortably associate with another Muslim, whatever his race or nationality. He will always feel the strength of the bond that ties them together, a bond that cannot be provided by a common nationality or race.

There is no denying the fact that it is Islamic law and its requirements that strengthen this culture and the Muslim brotherhood. Without the law, the driving forces of this culture will be considerably diluted.
This has been witnessed in the last two hundred years when Islamic law was weakened by colonial powers almost to the extent of elimination, at least at the level of the state.

Islamic law is a living organism that cannot be eliminated. It has a central core that is indestructible. Even if the body of Islamic law or large parts of it are cut off or annihilated, the central life-giving core regenerates the body once again. This central core, as is obvious, is the Qur’an itself. As long as it lives in the hearts of the Muslims and is recited, Islamic law will continue to rise and serve its purpose. This it will do despite all rivalry and opposition.

The biggest rival that Islamic law, or Islam if you like, is expected to face in the future is “secular humanism” with its appeal for universal brotherhood and human rights. Yet, secular humanism cannot influence culture the way Islamic law can. It yields, almost always, to nationality, race and even discrimination. Islamic law, on the other hand, eliminates nationalism, racism and all forms of discrimination. It is, perhaps, the only system that has a solution for such evils and has been very successful against them in many regions of the world throughout history.

The main difference between the two, however, is that Islamic law believes that human reason and human desires are not always right; they are in need of divine guidance that may sometimes go against human desires and even the ideas of good based on human reason. For example, Islamic law upholds that true distributive justice cannot be established unless usury and interest are eliminated completely from society. Secular humanism, based upon human reason and ideas of fairness and supported by powerful economic interests and the capitalist lobby, is not prepared to accept such an idea.

One has to admit that in strengthening Islamic culture, the criminal law of Islam has a minimal role to play, but it is this law that draws the maximum criticism and objections from different parts of the world and from various groups. The most powerful influence on Islamic culture is exercised by its various forms of worship and personal law. These laws operate even when Muslims are living as minorities in non-Muslim states.

In the coming years, we feel, that the influence of Islamic commercial law will increase in the area of commerce and finance. To some extent this can be seen already in the shape of Islamic banking and financial transactions. This development is probably seen, in certain quarters, as an attempt by the developing Muslim world to gain greater control of their resources, both material and financial. We feel, however, that this part of the law provides the real test case. It is likely to become the battleground where
the systems of distributive justice offered by secular humanism and Islamic law will compete and try to achieve domination. Today, secular humanism is far ahead in this area, and Islamic law has a lot of ground to cover in terms of its implementation. Much will depend on how Muslims understand, interpret, organise and implement their law. The first thing to be done in this direction is to organise and restate Islamic law in a manner that it becomes easily accessible to readers. Indeed, we must do this for it is a duty that lies on the shoulders of every person who is part of the Muslim community.

1.2. The Study of Islamic Jurisprudence is an Obligation

The study of Islamic law and its jurisprudence is an obligation. It is, however, a communal obligation, which means that there must be some persons within the community who are skilled in the law and its jurisprudence. Āl-Rāzī (544–606 A.H./1149–1209 C.E.) explains the obligation by saying that “the acquisition of this knowledge is an obligation... It is not a universal, but a communal obligation (farḍ kifāyah)”\(^1\). Āl-Rāzī’s goes into details to show that acquiring a knowledge of the law, its jurisprudence, is obligatory. He deems it obvious, because without such a knowledge it is not possible to follow the injunctions of the Lawgiver. This knowledge cannot be acquired without a proper methodology, and the methodology is called \(\text{uṣūl al-fiqh}\).

We would like to widen this concept somewhat. In another work, we have stated that \(\text{uṣūl al-fiqh}\) is the queen of Islamic sciences.\(^2\) This means that the subject is essential for understanding the law, its jurisprudence, the discipline called \(\text{ahkām al-Qur’ān}\) (laws derived from the texts of the Qur’ān), \(\text{fiqh al-sunnah}\) (laws derived from the texts of the sunnah), the discipline of \(\text{tafsīr}\) (interpretation of the texts of the Qur’ān, both legal and other), \(\text{‘ulūm al-ḥadīth}\) (the science of traditions), and even subjects like \(\text{‘ilm al-kalām}\) (dialectics).

The number of disciplines that need this subject today has widened considerably in the modern age. The statistician needs a thorough grounding in this subject if he is to deal with issues of Islamic economics. The banker and the manager will need it too. The accountant will need this discipline if he has to devise accounting standards required by institutions giving or employing capital in accordance with Islamic


norms. It can be readily seen that the discipline will expand in the modern world to assume roles that have hitherto not been assigned to it. Its true significance has to be realised. While our focus in this book will be on Islamic law and its jurisprudence, we believe that the students of other fields can also benefit from the description of the discipline.

1.3. The Scope of this Book

The goal of this book remains essentially the same as that stated in the previous edition, although a number of new topics have been added and many of the existing topics have been rewritten. The aim of this book is to:

1. provide an introduction to the study of Islamic law and jurisprudence;
2. present in a concise and systematic form all the topics that have been discussed by the earlier jurists and to indicate some of those that they left to the ruler (imām) to determine according to his legal reasoning based on the sources of Islamic law;
3. provide, within the text, the meaning in English of the entire terminology used by the earlier jurists; and
4. set out the different topics of Islamic law in an improved and unique arrangement that meets not only the requirements of traditional Islamic law, but also takes into account the needs of modern law and many other disciples that will depend more and more on this subject.

References and bibliographic details have been kept to a bare minimum in this book to reduce its size. Some of the topics that are usually discussed in ṣūl al-fiqh, as well as the detailed issues, have not been included intentionally. The present book deals briefly with ṣūl al-fiqh as well as with fiqh. As such it covers the entire field of Islamic law and jurisprudence.
Chapter 2

The Scope of Islamic Law and Jurisprudence

In this chapter we will try to form a general picture of the gigantic output of the Muslim jurists over the last fourteen hundred years. Thereafter, we will attempt to answer a few questions that perturb the mind of someone new to the study of Islamic law.

It goes without saying that some of the best minds among the Muslims devoted themselves to this important field. It is difficult for us to record the details of the lives of these important personalities in a small book that has to cover the details of their work, but most of the great jurists had versatile talents. They were businessmen, soldiers, judges, financiers, educationists, medical practitioners, scientists, statesmen and philosophers. What is surprising is that we sometimes find a single person performing many of these roles. Abū Ḥanīfah was a businessman and the founder of the Ḥanafi school, Abū Yūsuf was the chief justice, Ibn Khaldūn, the father of the discipline of sociology, was a qāḍī. Ibn Rushd (Averrœes) was a philosopher and the personal doctor of the ruler, besides being a great jurist and the qāḍī of Cordoba. Imām Rāzī, the author of Kitāb al-Maḥsūl and Tafsīr Kabīr, is said to have financed, all by himself, a war waged by the sultan. Imām Ghazālī is well known for his versatile talents and needs no introduction. These are just a few of the great minds, and there are a large number of others whose powerful works will live till the end of time.
Most of these men, and some women too, will be remembered for as long as their works survive. Anyone who studies their works with some earnestness will realise that these works are as relevant today as they were in their own times. The reason is that these scholars were dealing with powerful and fundamental ideas, and ideas live forever; they only emerge in a new form or in a different language. A comparison of the work of these powerful minds with that of the modern legal philosophers shows that many ideas that are considered unique and new today were dealt with in depth by these scholars centuries ago.

These earlier jurists have left a vast treasure of knowledge as a gift for the Muslims in particular and for the world in general. We feel that if the Muslims wish to succeed, as Muslims, they must build on this knowledge. If they do, they can come up with the best, the most practical, and the most just system for solving the problems of the modern world. If, on the other hand, we start saying today that the work of the jurists was relevant for their own times and we have no need for their work today, the first impression is that we have soft minds and are not being able to match wits with the earlier jurists. Indeed, such an attitude on our part would only portray our shallow arrogance, and the loss will be ours entirely.

We should also not think of “re-inventing the wheel” so to say, by insisting that we can, in possession of all our modern knowledge, ignore the work of the jurists and go back to the Qur’ān and the sunnah to rediscover everything (perhaps, under the influence of the movement called “back to the Bible”). We can only do so when we have a new system of interpretation that is as good, or even better, than the systems developed and refined by the earlier jurists over the centuries. The truth is that we do not have a modern system for the interpretation of the texts of the Qur’ān and the sunnah. The systems of interpretation employed by the jurists evolved gradually over the centuries.

It is, therefore, easier to build on the existing systems, but to do so we have to understand the work of the earlier jurists. Insisting on going back to the Qur’ān and the sunnah without a stable system of interpretation will lead to the repetition of the process completed over a period of centuries. Santyana’s words will then ring true for us: “Those who forget the past are condemned to repeat it”. The problem is that even that may not be possible without the help of the earlier jurists.

Another reason for paying greater attention to the work of the jurists is the state of the legal system in Pakistan. It is gradually being realised by everyone that the legal structure erected by an alien power is now giving way. The system has nothing to do with the lives and culture of the people, with their “collective soul”. They still view it as one imposed from above through the use of force. They simply
cannot “internalise” the laws left by the colonial power. The only way to enforce such a system is through coercion and more coercion. As compared to this, a humane and just system based on the fundamental principles of Islamic law will be readily acceptable to the people. The few efforts that have been made to Islamise the system are looked at with suspicion, because each effort has been more in the shape of a political ploy rather than a genuine broad-based programme. What needs to be done, therefore, is to begin understanding the work of the jurists in earnest. This book is a very small step in that direction, while this chapter is an attempt to list some of the major areas of knowledge with which the jurists have been occupied.

2.1. The Subject-matter of Islamic Jurisprudence

2.1.1. ʿUsūl al-Fiqh

The discipline of ʿusūl al-fiqh is extremely powerful and deals with a host of issues that are concealed from our view when we try carve out a simple classification like the one given below. A detailed study reveals many issues that are deemed important today by legal philosophy. Nevertheless, Islamic jurisprudence, when viewed in the meaning of ʿusūl al-fiqh, covers three things:

1. The Formal Structure of Islamic law: The formal structure of Islamic law is studied by the Muslim jurists under the title “the ḥukm sharʿī.” This study of the conceptual structure of Islamic law attempts to answer the following questions: What is Islamic law? What is the nature of rules in this legal system? How many kinds of rules are there and how do they unite with each other to give rise to the Islamic legal system? What is legal capacity and how does it interact with the operation of the rules? What kind of rights underlie the various kinds of rules? How are these rights secured through the legal framework and machinery of Islamic law?

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1 The term formal pertains to the distinction made by Aristotle between “form” and “substance” as referred to above. If a carpenter is trying to make a chair, the picture of the chair in his mind is called the form, while the material, like wood, he will use is the substance. In prayer, bowing and prostrating pertain to form, while the verses recited are the content. In jurisprudence, the distinction between form and content is often used.
2. **The Sources of Islamic law**: Islamic law is derived from its sources. The primary sources are those that are unanimously accepted by all the schools and all the jurists as the fundamental sources of Islamic law. In addition to these there are the secondary sources of Islamic law, which are not unanimously accepted by all schools or all the jurists. The discipline of *usūl al-fiqh* does two things:

(a) It defines and describes the primary and secondary sources of Islamic law listing the various assumptions made by the schools of law.

(b) It instructs the would-be jurist about the methodology of interpretation, i.e., how to interpret these sources. The methodology involves some complexity and takes us to the third item below.

3. **Ijtihād and Taqlīd or the Methodology of the Mujtahid and the Methodology of the Faqīh**. Most writers discuss the methodology of the jurists as if *ijtihād* were the only methodology. This is not the whole truth. Most of the jurists in the schools of law were not *mujtahids*, yet they too had a methodology for interpreting and extending the law.

The *mujtahid* is an independent jurist who is qualified to derive the law directly from the sources of Islamic law, like the Qur’ān and the Sunnah. It may help to imagine the *mujtahid* as performing the legislative function within the Islamic legal system. In other words, he interprets the texts and lays down the law for the first time. His opinion, based on the texts, is treated as the law by the jurists of his school and also the laymen who follow that school.

The *faqīh* is not an independent jurist, as he is dependent upon the work of the *mujtahid*. The *faqīh* employs the law laid down by *mujtahid*, just like the judge decides cases with the help of statutes and precedents. The approach of the *faqīh* and the “sources” employed by him are, therefore, slightly different as compared to the approach of the *mujtahid*, who is unrestricted in his search for the law in the texts. The methodology of the *mujtahid* is called *ijtihād*, while that of the *faqīh* is called *taqlīd*, although we would prefer to call it *takhrīj* for reasons that will come later.
2.1.2. *Fiqh*

Islamic jurisprudence, when viewed in the meaning of *fiqh*, covers the substantive and procedural law determined by the jurists. When we say “determined by the jurists”, we mean that the jurists focused on those laws that could either be derived directly from the texts or were laws that were closely linked to the texts through strict and determined methods of interpretation. Some of the areas of the law were left to the *ijtihād* of the ruler. The rulers did legislate separately on certain areas of the law in accordance with their knowledge and interpretation of the texts. These areas are described briefly in the following section. Here we list the topics that are found in the manuals of *fiqh* compiled by the jurists.

1. **Ibādāt**: The rules of ritual purification, prayer, pilgrimage, fasting, *zakāt* (poor-due), war (*jihād*) and some other forms of worship are dealt with under this heading. Most of these rules deal with the rights owed to Allah by the individual alone or by the community as a whole.

2. **Mu‘āmalāt**: This is a very broad category. Some jurists include crimes and torts (listed below) in this category. This area deals with property, contracts, business organisation, security of debts and insolvency, preemption, marriage, divorce, gifts, bequests, *waqfs*, inheritance, and guardianship. We find some modern jurists using different terms to identify areas like marriage, divorce and related matters. They do this to equate these conceptions with what is called personal law.

3. **Hudūd and Jināyāt**: Major offences like unlawful sexual intercourse (*zinā*), theft (*sariqa*), robbery and brigandage (*hīrābah*), false accusation of unlawful sexual intercourse (*qadhf*), drinking of *khamr* (prohibition) and other matters fall under what are called the *hudūd* laws. Offences against the human body and torts are called *jināyāt*. The term *jināyāt* is also used for torts when the offence falls under *ghaṣb* (usurpation, misappropriation) and *itlāf* (destruction of property).

2.1.3. *The Siyāsah Shar‘īyyah: The Administration of Justice According to the Sharī‘ah*

Administration of justice is called *siyāsah shar‘īyyah* in Islamic law. In its wider meaning it includes the courts of the *qādī* as well, and would thus cover the work of the jurists. *Siyāsah shar‘īyyah* in the narrow sense means the area of the law that the jurists left to the ruler to develop and adapt according to the context.
changing times and circumstances. The distinctive feature of this part of the law is its flexible rules of procedure and evidence as compared to the laws derived by the jurists. Under this heading we discuss the maṣāliḥ courts and the offences falling under their jurisdiction. There were many other functions like the regulation of the markets and the maintenance of public morality that also came under this jurisdiction. Today, the laws of taxation, traffic, hijacking, terrorism, corruption, accountability and the like would all fall under the siyāsah sharʿīyyah of the ruler.

In some periods, the rulers did not follow the dictates of the sharīʿah very strictly in administering such laws. The jurists have termed these periods as those of siyāsah zālimah or administration based upon injustice.

2.1.4. Qawāʿid Fiqhiyyah: The Principles of Fiqh

The term qawāʿid fiqhiyyah or the principles of fiqh is a broad term that includes flexible general principles that give rise to rules and other sub-principles as well as to legislative presumptions. These principles and presumptions have to be “read-in” by the interpreter when settling the law or deciding cases. The titles used by the jurists for this discipline are usūl, like usūl al-karkhī, or al-Asbāb wa al-Nazāʿīr (analogous cases and precedents).

We have said that in Islamic law there are two broad methodologies of interpretation: ijtihād and takhrīj. The first is a legislative function, while the second corresponds more with the theories of adjudication in which the judge and lawyer are involved. The discipline of the qawāʿid fiqhiyyah provides the primary tool for the methodology of takhrīj.

2.1.5. Furūq: The Science of Distinguishing Cases

The term furūq derives its name from a book al-Furūq written by the famous Mālikī jurist al-Qarāfī. The discipline is related to the previous field of qawāʿid fiqhiyyah. The distinction is that while the discipline of al-Asbāb wa al-Nazāʿīr deals with cases falling under a common principle, the discipline of furūq distinguishes cases by showing that there might be cases that appear to fall under one principle, but they actually belong to different principles. Some outstanding and instructive opinions are to be found in al-Qarāfī’s book. Other jurists have dealt with the same subject too, but without using this name.
2.1.6. *Maqāṣid al-Sharī‘ah*: Islamic Justice Through the Purposes of the *Sharī‘ah*

This is the area of ultimate principles that highlight the spirit of the *shar‘i* rules. These purposes serve as values that regulate and govern discretionary justice in Islamic law. The study of the *maqāṣid al-sharī‘ah* is rightly considered by many as an independent field of study. The credit for developing the discipline goes to al-Ghazālī, but major contributions have been made by later jurists, especially the Spanish jurist al-Shāṭibī in his four volume work called *al-Muwāfaqāt*.

2.1.7. *Aḥkām al-Qur’ān* and *Tafsīr*

The discipline of *aḥkām al-Qur‘ān* is related directly to Islamic law and jurisprudence. In fact, it deals with what we may call the applied law. In *usūl al-fiqh*, we find the theoretical foundations of the science of interpretation and the assumptions made by the different schools about the different sources of Islamic law. In the discipline of *aḥkām al-Qur‘ān* the theoretical convictions of the schools are turned into a practical science. This is where the jurists show how their rules are used to actually derive the rules from the texts of the Qur‘ān dealing with the law. This discipline has been neglected in modern times. It needs to be explained in a more accessible form so that the readers learn how the law is derived from the texts. When we use the title *aḥkām al-Qur‘ān* it includes all those traditions as well that have a bearing on the rules in the Qur‘ān.

The best known books on the subject are by Imām al-Shāfi‘i himself and by Abu Bakr al-Ja‘ṣṣāṣ. When the interpretation is expanded to include not only the legal texts, but all the verses of the Qur‘ān, the title given to the subject is *tafsīr*. Most of the well known *tafsīrs* have been written by jurists. One example is the *Tafsīr Kabīr* by Imām al-Rāzī.

It may safely be stated that without a thorough grounding in *aḥkām al-Qur‘ān* it is difficult to see how a person can acquire skills in interpreting the legal texts.

2.1.8. The Discipline of *Khilāf*

The science of *khilāf* is another area of applied *usūl*. It is quite similar to the field of *aḥkām al-Qur‘ān* in its method. The major difference is that while the former starts with the texts and then derives the
rules from these texts, this subject starts with the derived rules and works backwards to show how the jurists derived these rules from the texts. While doing so the discipline takes into account the opinions and the detailed legal reasoning of different jurists and of different schools. The discipline was developed right from the start and the best known early book records the different legal reasoning of the early judges and jurists Abū Yūsuf and Ibn Abī Laylā.

Many of the earlier books can be called books of khilāf. The method followed in Imām Muḥammad al-Shaybānī’s works, in the works of Imām al-Shāfi’ī and in al-Mudawwanah al-Kubrā of the Mālikī school may be classified as the method of khilāf used by the earlier jurists. Among the later jurists, the works of al-Sarakhsi, al-Kāsānī, Ibn Rushd and many others can be classified as such.

The later manuals of fiqh started eliminating the detailed legal reasoning provided by the earlier works in the interest of brevity and memorisation by the judges. The science of khilāf needs to be documented properly in modern times under the title of applied usūl.

2.2. Has a Variety of Opinions Caused Disunity Among the Muslims?

The first question that arises in the mind of someone new to the study of Islamic law is: Why are there so many opinions in Islamic law on individual issues? Why could the Muslim jurists not agree on a uniform law for the sake of the unity of the ummah? Why do we have so many schools of thought in Islamic law? These questions have two answers. The first answer is somewhat technical, and deals with the reasons for the existence of so many schools of law within the Islamic legal system. The second answer deals with the ends that are served through multiple schools. We will try to focus, for the time being, on the second answer to explain the utility of a variety of opinions within schools.

A variety of opinions within the school does not represent disunity or weakness; it is, in fact, the real strength of the system. A multiplicity of opinions in no way indicates discord or tension within the Muslim community. On the other hand, it indicates an unparalleled richness and variety in a system of law that accommodates within its fold a large number of distinct races, cultures, and geographical regions. Let us explain this point by comparing Islamic law with the English common law.

As already stated in the previous chapter, the legal system of Islam has accommodated a large variety of races, peoples, and cultures for a long time. In modern times, English common law may be said to have
achieved something similar. One strength of the English common law is that it lends itself to adaption. Today it is applied in somewhat different forms in England, United States, Australia, Canada, and even in former colonies with widely differing cultures like India, Pakistan, Nigeria and Malaysia. The versions of common law that may be found in these areas differ from each other to some extent. For example, the provisions of the Penal Code of Sudan pertaining to murder and culpable homicide not amounting to murder were interpreted in a slightly different way than they were in Pakistan, even though the Indian Penal Code was borrowed by Sudan. Thus, the English law is able to adapt to changed circumstances and locations and that is the reason for its success.

This attribute of adaptability has been the strength of Islamic law from the start. It is reflected in its schools of law with their somewhat different methodologies. Each school has served a more or less contiguous geographical region, accommodating the cultural and local preferences. As Islamic law is a religious law, this flexibility based on a multiplicity of schools serves not only geographical areas and nations but individuals too, who may move to another school if they do not like the one they follow. It is for this reason, perhaps, that a difference of opinion within the ummah has been called the mercy of Allah.

In short, one of the fundamental reasons for the maturity, stability, and longevity exhibited by Islamic law, which is not exhibited by any other legal system, is the existence of a variety of opinions within the legal system. This feature has given Islamic law a built-in and indestructible feature of adaptability, a feature that is vital for the survival of every living organism.

2.3. The Schools of Law are not Sects but Systems of Interpretation

The above explanation about the multiplicity of opinions in Islamic law does not answer the question as to why the different schools appeared in the first place. The brief answer to this question is that the schools of law are not sects. They are systems of interpretation based on a methodological foundation. It

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2 These provisions of the Pakistan Penal Code have now been repealed by the Qisāṣ and diyat Act.

3 See, e.g., Krishna Vasdev, The Law of Homicide in The Sudan (London: Butterworths, 1978). It appears that this law has been, or is about to be, replaced by a new code based upon the provisions of Islamic law.
is natural for such systems to exist within any legal system. This will become clear when we study the
schools of law and Islamic legal history in the last part of this book.

Another very important point with respect to the schools, which is their vital function, is to bring
uniformity into the law. We have indicated above that Muslims sometimes complain about there being a
large number of opinions on a single issue, even within a single school. The truth is that this problem is
resolved within the schools by the schools themselves. One function of the schools is to bring uniformity
into this variety. Thus, each school in a given period will issue a ruling that out of several opinions within
a school on an issue one of the opinions is preferred by the school. The words usually used for such a
statement are: “The fatwā today is on such and such opinion”. This, indeed, is the vital function of the
institution of iftā’.

2.4. Islam has a Fully Developed and Mature Legal System

Islam is a universal religion and covers many things that are not, and cannot be, dealt with by a system of
law. The religious norms provide the general morality on which the laws are based. In fact, these laws are
sometimes deeply intertwined with the moral norms. Nevertheless, the Islamic legal system is a mature
and developed system of law. It is also a unique system and no other religion has been able to offer a legal
system like it. Jewish law has a developed system too, but that system has never been practised. Many
of its rules were developed in isolation outside the Jewish homeland during the Diaspora. The Islamic
system, on the other hand, has been in practice for more than fourteen centuries and has been developed
down to the smallest detail.

It has been observed that those who take up the study of Islamic law sometimes fail to maintain the
distinction between Islam as an all encompassing religion and Islamic law as an efficient legal system. As a
result of this, many question start emerging like the one listed above about there being too many differing
opinions. Islamic law as a legal system must be compared with other legal systems and not with other
religions. The conceptual distinction must be maintained. It is only then that one can understand its true
significance.
Chapter 3

The Meaning of *Uṣūl al-Fiqh* and Basic Terms

Islamic law is a religious law based on the texts of the Qur’ān and the Sunnah. The discipline that tells us how this law is derived from these texts, and how it is classified, understood and applied, is called *uṣūl al-fiqh*. A study of Islamic law, therefore, begins with the definition of *uṣūl al-fiqh*. The term is broken up into its two components: *uṣūl* and *fiqh*. These two components are defined separately and then combined. This separation of the components and relinking establishes the separate meanings of the two terms and their relationship. It, thus, becomes a useful device for elaborating the meaning of this discipline.

Defining these terms, however, is not intended to tell us what we mean by Islamic law, even if that knowledge is acquired as a by-product.¹ The definitions of these two terms help us identify the role and function of the specialists within the Islamic legal system. The terms also elaborate the relationship that exists between the truly independent jurist and the person who is a pure layman. In other words, the definitions indicate the levels at which different experts operate within the Islamic legal system.

The definitions of the two components also inform us about the nature of the rules of Islamic law, and the nature of the sources from which the laws are derived. Understanding these definitions is, therefore,

¹ The meaning of Islamic law is understood through an examination of the *ḥukm sharʿī*. See page 48
very important. The reader who does not comprehend their exact implications is likely to miss much
during the rest of the study.

According to the method of study preferred by the jurists, a reader embarking upon the study of
Islamic law must first understand the meaning of essential terms like fiqh, sharī‘ah, ijtihād, mujtahid,
faqīh, taqlīd, and muqallid. These terms have to be understood in the precise meanings that the jurists
assigned them, that is, their legal or technical meanings. An understanding of Islamic law will otherwise
be considerably hampered. What, for example, is the meaning of fiqh as distinguished from the meaning
of sharī‘ah? If the reader cannot define these two terms with precision or identify a difference between
them, then he needs to read this chapter. By the end of this chapter, he will be able to define each of the
terms listed above and a few more that will come up during the discussion. This chapter is, therefore, of
crucial importance for those who do not already have a knowledge of Islamic law.

Usūl al-fiqh then is composed of two terms: fiqh and usūl. Once these constituent parts are defined, the
jurists combine the two parts to arrive at the final definition. The jurists define the term fiqh first.

3.1. The Literal Meaning of Fiqh

The term fiqh is used in the literal sense to mean “understanding” and “discernment.” In this sense the
words fiqh and fahm are synonymous. It implies an understanding of Islam in a general way. It may also
mean what a prudent person is likely to conclude from obvious evidences. The word has been used in the
Qur’ān, in this sense, on several occasions:

What hath come to these people that they fail to understand a simple statement. [Qur’ān 4 : 78];

They have hearts wherewith they understand not. [Qur’ān 7 : 179]

The same meaning is reflected in the words of the Prophet:
He for whom Allah wills His blessings is granted the understanding of din.

3.2. Earlier General Meaning of Fiqh

The term ‘ilm (knowledge) also has the same literal meaning as fiqh. During the time of the Prophet there appears to be no difference in the two terms. Later, as sophistication crept in, the term ‘ilm came to be applied in a narrow sense to mean knowledge that comes through reports, that is, traditions: ahadith and athar.2

The term fiqh, on the other hand, came to be used exclusively for a knowledge of the law. Abū Ḥanīfah (d. 150 A.H.), the founder of the Ḥanafi school, defined fiqh as:

معرفة النفس ما لها وما عليها

A person’s knowledge of his rights and duties.3

The definition is very wide and includes elements that are part of the subject of kalām, like the tenets of faith (‘aqā’id). This definition was formulated to mean al-fiqh al-akbar or fiqh in its wider sense. When the subject of kalām was introduced by the Mu’tazilah during the time of al-Ma’mūn, the term fiqh came to be restricted to the corpus of Islamic law alone. Fiqh in this restricted meaning is sometimes called al-fiqh al-aṣghar in order to distinguish it from the wider definition given by Imām Abū Ḥanīfah. It is in this restricted sense that we use the term fiqh today, as will be obvious from the definition given below.

2 Ahadith is the plural of hadith. The term hadith is used for reports from the Prophet, while athar is a report about a precedent laid down by a Companion. The detailed meanings will be provided later in this book. It is to be noted, however, that some of the earlier writers have used the term hadith in a much wider sense, that is, as a report from the Prophet, the Companions, or even their Followers. See, e.g., Abū ‘Ubayd ibn al-Sallām, Kitāb al-Amwāl (Cairo, 1968).

3 See Ṣadr al-Sharī‘ah (d. 747 A.H.), al-Tuwdiḥ fi Hall Jawāmīḍ al-Tanqīḥ (Karachi, 1979), 22. He adds the word ‘amalan (for conduct) to this definition to make it conform to the narrower meaning.
3.3. Later Shāfi‘īte Definition of *Fiqh*

The term *fiqh* was defined later by the Shāfi‘ī jurists in a very narrow technical sense. The definition is attributed by some to al-Shāfi‘ī, the founder of the Shāfi‘ī school, himself.⁴ The Shāfi‘īs define *fiqh* in its technical sense as follows:

> العلم بالأحكام الشرعية العملية المكنية من أدلةها التفصيلية
> It is the knowledge of the *sharī‘ah* (legal rules), pertaining to conduct, that have been derived from their specific evidences.

The definition of *fiqh* explained above begins by first encompassing all knowledge within it, and then systematically excludes those types of knowledge that do not form part of *fiqh*, to give us a precise definition of *fiqh*. The final form of the definition declares *fiqh* to be the knowledge of the rules of conduct that have been derived by the jurist from specific evidences found in the Qur‘ān and the *Sunnah* as well as other specific evidences in *ijmā‘* and *qiyyās*. In other words, *fiqh* **is a knowledge or understanding of Islamic law; it is not the law itself.** These points may be understood as follows:

1. **It is knowledge of the rules of conduct:** That *fiqh* is a knowledge of the legal rules pertaining to conduct and does not include a knowledge of the tenets of faith (*‘aqā‘id*). Thus, it is a knowledge of the law, the *sharī‘ah*. In this sense, the meaning of *fiqh* is similar to that of Western jurisprudence, which is a knowledge of, or skill in, the law.

2. **It is knowledge that has been derived from individual texts or evidences:** That this knowledge has been derived from the specific evidences or the detailed proofs. The specific evidences

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are the individual texts of the Qur‘ān or the Sunnah, like those telling us to pray, not to kill, not to steal, not to charge interest (ribā). These specific evidences are to be found in the general evidences, which are the sources of Islamic law; namely, the Qur‘ān, the Sunnah, ijmā‘ and so on.

3. **It is knowledge that has been derived from the texts by the specialist:** That some effort has been spent to derive this knowledge of legal rules. The knowledge has not been given by someone. This meaning implies the existence of an expert, a jurist, who derives this knowledge directly and may then give it to his follower. It is similar to the effort made by a lawyer or a judge who derives the knowledge of the law from the statute or case law and may then give it to his client.

3.4. **Distinctions Based on the Definition**

The definition leads to the following distinctions:

3.4.1. **Distinction between sharī‘ah and fiqh**

There is a difference between the meaning of the terms sharī‘ah and fiqh. Yet, these two terms are used interchangeably. The definition, however, indicates that the term sharī‘ah has a wider meaning than fiqh. The term sharī‘ah includes both law and the tenets of faith, that is, the ‘aqā‘id. The real distinction between sharī‘ah and fiqh, however, is that sharī‘ah is the law itself, while fiqh is a knowledge of that law—its jurisprudence.

3.4.2. **Distinction between mujtahid and faqīh**

The definition implies that there is someone deriving the law from the texts by expending some effort. This person was termed the faqīh in earlier times. In later times a distinction was drawn between the terms mujtahid and faqīh. The term faqīh came to be applied later to the jurist who derived his knowledge from the manuals of fiqh. These manuals contained the opinions of the mujtahids. The laws derived by the mujtahid become a source of law for the faqīh. Although the faqīh is a qualified jurist, he is still classified
as a *muqallid* (follower). He follows some *mujtahid*, who has derived the law directly from the specific evidences. To make the matter even more simple, we may say that the *mujtahid* derives the law for the first time, while the *faqih* uses this derived law.

In reality, the term *faqih* cannot be applied to a single type of specialist. There are various grades of the jurists according to their skills and level of ability. This may be compared with the legal profession as it exists today. Some lawyers practice in the lower courts dealing mostly with questions of fact, while others appear before higher courts where the questions facing the court are usually those of the law. These grades have been explained later in this book. Today, judges, lawyers and law teachers should be classified as *faqih*, if they acquire the requisite skills.

3.4.3. Distinction between *ijtihad* and *taqlid*

*Ijtihad* and *taqlid* are somewhat complex concepts. It would, therefore, not be possible for us to go into details at the preliminary stage of our study, yet we may indicate the basic distinction. *Ijtihad* is the name for the activity of the *mujtahid* that makes use of all the sources to derive the law. This activity is indicated in the definition above. The output of the *mujtahid* is the substantive as well as procedural law, a knowledge of which is called *fiqh*. In addition to this, the absolute *mujtahid* (a term used for the founders of the schools) lays down the principles of interpretation as well as the general principles of the substantive and procedural law.

*Taqlid*, on the other hand, is the activity of the layman (which term includes the modern day *faqih* as explained above). *Taqlid* in the legal sense means following the opinion of another. When a legal justification is found, *taqlid* is permitted. Permitted *taqlid* is similar in its logic to following the opinion of a doctor prescribing medicine, a lawyer pointing out the law, or the opinion of any other specialist, or even the following of precedents. *Taqlid* as a judicial method is permitted in Islamic law.

The topics of *ijtihad* and *taqlid* are dealt with in detail later in this book. Here, the purpose is to show their relationship with the concept of *fiqh* in Islamic law.
3.4.4. Distinction between a *muqallid* and a *faqīh*

As stated above, the term *faqīh* came to be applied to a person who was not able to undertake independent *ijtihād*, because he lacked the requisite qualifications or skills. Technically, then, he was a *muqallid*, that is, the person who was following the opinion of the *mujtahid*. As compared to him, the ordinary person who does not have any knowledge of *fiqh* also follows the opinion of the *mujtahid* in the daily performance of his duties or in other matters of the law. This person too is a *muqallid*. What, then, is the difference between an ordinary *muqallid* and a *muqallid* who is a *faqīh*? The difference lies in understanding the texts in which the opinions of the *mujtahids* are recorded and the sources from which these opinions have been derived. If an ordinary person reads these books he will find himself facing a number of opinions on a single issue and he will not be able to determine what the law is on the issue. He will have to go to the *faqīh*, who will be able to state which opinion is upheld by the school at a certain time or which one is preferred. Thus, the position of an ordinary *muqallid* is the same as that of a client with respect to his lawyer. The lawyer follows the law too; the law itself has been laid down by the legislature.

The *faqīh*, besides having a knowledge of Islamic law, is sometimes able to extend the law through reasoning from principles, on the basis of a methodology called *takhrīj*. A *faqīh*, who has the ability to perform *takhrīj*, may be compared with a judge of the superior court dealing with questions of law; he lays down the law, but is not legislating (according to the accepted theory).

3.5. The Meaning of *Aṣl* and *Uṣūl al-Fiqh*

The second component of the title *uṣūl al-fiqh* is *uṣūl*, which is the plural of *aṣl*. The literal meaning of the term *aṣl* is “something from which another thing originates” or “something upon which another thing is built”. The former may mean source, while the latter may mean foundation. Thus, the origin of a thing is its *aṣl*. Technically, the term *uṣūl* here means principles. These may also be referred to as *qawā‘id*. There are several types of principles, but here it means principles used for the interpretation of the texts of the Qur’ān and the Sunnah. Thus, the term *uṣūl al-fiqh* means the principles of interpretation used to derive the knowledge of the legal rules of conduct from the specific evidences. After establishing the meaning of the term *aṣl*, Muslim jurists define the term as follows:
They are the principles by the use of which the mujtahid derives the legal rules of conduct from the specific evidences.

This definition states that the usūl al-fiqh are a body of principles of interpretation by the help of which the mujtahid is able to derive the law from the detailed evidences in the Qur’ān, the Sunnah, ījmāʿ, and qiyās. Thus, it is this body of rules or principles is known as usūl. A large number of such principles are derived from the rules of literal interpretation that are also part of usūl. A few examples of such usūl are given below:

1. Each time a ḥukm is discovered in the Qur’ān it is said to be proved. [Unanimous] In other words: The Qur’ān is a source of Islamic law.
2. Each time a ḥukm is discovered in the Sunnah it is said to be proved. [Unanimous] In other words: The Sunnah is a source of Islamic law.
3. Each time a ḥukm is discovered though ījmāʿ it is said to be proved. [Unanimous, though al-Shāfi‘ī had some reservations]
4. Each time a ḥukm is discovered through qiyās it is said to be proved. [Unanimous for the existing Sunnī schools]
5. Each time a ḥukm is discovered through the opinion of a Companion it is said to be proved. [Not unanimous; the Ḥanafīs consider it binding, but the Shāfi‘īs do not]
6. Each time a command (amr) is found in the texts it conveys an obligation, unless another evidence indicates the contrary. [Not unanimous]
7. Each time a proscription (nahy) is found in the texts it conveys a prohibition, unless another evidence indicates the contrary. [Not unanimous]
8. Each time a ḥukm is expressed in general terms it applies to all its categories with a certainty, unless restricted by an equally strong evidence. [Not unanimous]
9. The ḥukm is proved through the persuasive power of the dalīl and not through the number of evidences. [Not unanimous]

Each school of Islamic law has its own set of rules, like the ones stated above. The set of rules chosen by one school is somewhat different from that chosen by another school, although there is agreement on certain basic rules, for example, the rules that say “unanimous” above. Choosing a different set does affect the legal opinion derived from the texts. A school of law is established when it has an independent and analytically consistent set of the rules of interpretation. Today, a new school can come into existence only if it develops its own set of such analytically consistent rules.

3.6. Widening the Definitions

3.6.1. A Wider Definition of Fiqh

The definition of fiqh given above is very compact and concise and serves to illustrate many subtle points. Yet, it is too narrow and confines the activity of the jurist to a very strict method of interpretation. The definition is built around the Shāfi‘ī methodology of interpretation and does not conform completely with the methodology of the other schools. It focuses on the specific evidences (adillah tafsīliyah) and, therefore, prevents the use of the purposes of Islamic law (maqāsid al-sharī‘ah), which are general evidences (kulliyāt). If the above definition is used to determine the meaning of fiqh, the principle of maṣlaḥah (reasoning through general evidences or the purposes of law) cannot be used to derive the rules (aḥkām). The only general principles that can be used for the derivation of the rules according to the narrow definition are those that are explicitly stated in the texts.

The earlier Ḥanafī jurists, who were not employing comparative methods of the later jurists, do not define fiqh in the way the later Shāfi‘īs have defined it. Al-Sarakhsī, for example, quotes Ibn ‘Abbās (R), who equates fiqh with hikmah (wisdom), to define fiqh as follows: “Wisdom (hikmah) is the knowledge of the aḥkām with the ḥalāl distinguished from the ḥarām.”6 A similar meaning is given in the books of other Ḥanafī jurists as well.7

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7 See, e.g., al-Kāsānī, Badā‘i’ al-Ṣanā‘i‘i’, vol. 1, 2.
Later Shāfi’ī jurists, who advocated the use of *maslahah* do not accept the Shāfi’ī definition stated here. The definitions of *fiqh* preferred by two famous Shāfi’ī jurists, al-Ghazālī and al-Rāzī are much wider, and we would prefer these definitions. Al-Ghazālī states the definition of *fiqh* as follows:

*عبارة عن العلم بالاحكام الشرعية الثابتة لأفعال المكلفين خاصة*

An expression for the knowledge of legal rules established specifically for human conduct.⁸

This, indeed, is a very general and wide definition. Imām al-Rāzī gives a more precise and somewhat narrower definition. He states it as follows:

العلم بالاحكام الشرعية العملية، المستدلّ على أعيانها، بحيث لا يعلم كونها من الدين ضرورة.

The knowledge of the legal rules, pertaining to conduct with reference to their sources, when this knowledge is not obtained by way of necessity (in religion).⁹

It is to be noted that in the modern age, with many writers promoting the principle of *maslahah* as well as the use of general principles, there is a need to widen the meaning of *fiqh*. To make matters simple, a broad and general definition of *fiqh* may be employed and is formulated as follows here as an example:

*Fiqh* is the knowledge of the shari’ah *aḥkām* derived directly from the specific evidences in the texts or extended through reasoning from general propositions of the shari’ah in the light of its maqāṣid.

By “general propositions” here we mean all those general principles that are laid down or supported by the shari’ah whether directly or indirectly.

What difference, one may ask, will a narrow or wider definition of *fiqh* make? The response is that the wider definition of *fiqh* takes into account the methodology of *ijtihād* followed by the Ḥanafī and the Mālikī schools as well. This enables reasoning from general principles and the use of principles like *istiḥsān* and *maslahah mursalah*. The narrow definition accommodates the Shāfi’ī and Ḥanbali methodologies alone. As the Ḥanafī methodology is based on the use of general principles, the wider definition will accommodate these principles when the narrow definition does not.

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⁸ See al-Ghazālī, *al-Mustaṣfā min Ḭlm al-ʿUsūl*, vol. 1, 3.
3.6.2. A Wider Definition of Usūl al-Fiqh

If the definition of fiqh is adopted in its wider sense, the meaning of usūl al-fiqh will be widened automatically. Accordingly, we may define usūl al-fiqh to be the discipline imparting a knowledge of “the sources and principles of interpretation and of legal reasoning that helps the jurist arrive at the legal rules of conduct.” This definition includes, indirectly, the use of the purposes of Islamic law (maqāṣid al-sharī‘ah). Perhaps, it is for this reason that al-Ghazālī and al-Rāzī defined usūl al-fiqh as follows:

"عبارة عن مجموع طرق الفقه على سبيل الإجلاس وكيفية استدلال بها و كيفية حل المستدل بها"

It is an expression that includes all the paths (evidences) leading to fiqh when these are considered in a broad sense, and for the legal reasoning proceeding from these paths, as well as the status (skill) of the person undertaking such reasoning. ¹⁰

The word paths (turūq) is employed in the sense of all the “evidences” (adillah) and signs (‘amārāt).¹¹ The words “considered in a broad sense” mean that the discipline talks about the legal validity and strength of the general evidences, for example, the legal validity of ijma‘ as a source of Islamic law.¹² The words “legal reasoning proceeding from these paths” are intended to cover the boundary conditions under which such reasoning is to proceed and in this sense broad general principles like istiḥsān and maṣlaḥah would be included in the meaning.

Al-Ghazālī defines usūl al-fiqh as follows:

"أصول الفقه عبارة عن أدلة هذه الأحكام، وعن معرفة وجه دلائلها على الأحكام من حيث الحجلة لا من حيث التفصيل"

Usūl al-fiqh is an expression employed for the evidences of these legal rules and for a knowledge of the broad ways in which they reveal such rules, and not by way of a specific indication (for a specific rule).¹³

¹¹ Ibid.
¹² Ibid.
He goes on to explain that it is not the task of the discipline of *uşūl al-fiqh* to indicate what the specific arguments and sources are for a specific rule. That, he says, is the task of *ʿilm al-khilāf* where the specific arguments of jurists for a specific rule are compared and analysed for a deeper understanding. Perhaps, it was this explanation that led some to focus more on the specific evidences.
Part I

The Ḥukm Sharʿī
Chapter 4

The Ḥukm: What is Islamic Law?

The purpose of studying the Ḥukm sharʿī is to understand the conceptual part of Islamic law. This study provides the framework within which the meaning of Islamic law is understood, the nature of its rules is grasped, and the operation of the legal system is seen.

4.1. The Elements of the Ḥukm Sharʿī

The Ḥukm sharʿī in its literal sense conveys the meaning of a rule of Islamic law.¹ It comes into being through the operation of its three elements (arkān).² These elements are:

1. The Ḥākim (Lawgiver). The true source from which the Ḥukm originates. The original source for Islamic law is the Ḥākim or the Lawgiver, that is, Allah Almighty;

2. The maḥkūm fiḥ or the act on which the Ḥukm operates—also called the maḥkūm biḥ; and

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¹ The term Ḥukm (plural abkām) has been translated into English in different ways: injunction, command, prescription, and sharī‘ah-value. None of these terms conveys completely the comprehensive meaning of the term, as will be obvious in the discussions to follow. It is preferable to retain such terms in their untranslated forms.

² Arkān is the plural of rukn. A rukn may be conceived as a pillar on which a thing is erected. If we pull out the pillar the structure on top of it will collapse. A rukn, therefore, is an essential element of a thing without which it cannot stand.

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3. The *mahkūm ʿalayh* or the subject (legal person) for whose conduct the *ḥukm* is stipulated.

A discussion of the meaning of the *ḥukm sharʿī* in Islamic law amounts to asking the question: what is Islamic law? The response deals with Islamic law as a system as well as with individual rules. The study of the *ḥukm sharʿī*, when it deals with the nature of rules, reveals the types of legal obligation created by the rule. It tells us that all the rules may not create an obligation and that some rules are laid down by the Lawgiver to facilitate the operation of other rules. A classification of the various types of rules or *ahkām* becomes necessary to grasp these meanings.

In the study of the first element, it is shown by the jurists that Allah is the True Source of all laws in Islam. Further, the implication of this statement is examined, that is, what do we mean by saying that Allah is the source of all laws? The second element deals with the act on which the *ḥukm* operates and the legal rights that are affected. The third element deals with the types of subjects who are affected by a *ḥukm*, that is, those who possess full legal capacity and those who do not. It also deals with cases in which the legal capacity of the subject is restricted or becomes defective.

4.2. The Meaning of the *Ḥukm* Sharʿī or the Meaning of Islamic Law

The Arabic word *ḥukm* (pl. *ahkām*) in its literal sense means a command. In its technical sense it means a “rule” This may be a rule of any kind. Thus, it may be a rational rule, like $2 + 2 = 4$, or the rule that the whole is greater than its parts. It may be a rule perceived by the senses, like fire burns. Again, it may be based upon experience or experiment, like aspirin is good for headache. Here, however, we are concerned with the legal rule, which is called the *ḥukm sharʿī*.

The Muslim jurists give us a definition of the *ḥukm sharʿī* when they attempt to answer the question: What is Islamic law? They define it as:

خطاب الله تعالى المتعلق بأفعال المكلفين بالقضاء أو التخلي أو الوضع

A communication from Allah, the Exalted, related to the acts of the subjects through a demand or option or through a declaration.\(^3\)

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\(^3\) Šadr al-Shariʿah, *al-Tawdih*, vol. 1, 28.
This definition highlights the following important points:

1. The *hukm* or a rule of law (to be referred to as *hukm* from now on) is a *communication from Allah*. This means that it is not treated merely as a command. It also means that a communication from anyone else cannot be considered as a *hukm*, be he a ruler or someone else in authority.

2. *The communication is related to the acts of the subjects.* The communication invariably gives rise to a rule of some kind and enables the jurist to understand whether the requirement is for the commission of an act or its omission, or whether a choice has been granted for the commission or omission of such act. Thus, the words of Allah, “Do not go near unlawful sexual intercourse (zinā),” [Qur’ān 17 : 32] contain a *hukm* that requires omission and affects conduct. Some jurists divide the communication (*kıṭāb*) into two types: *kıṭāb jinā’ī* and the *kıṭāb* of *mū’āmalāt* (criminal and civil liability).

3. *The hukm may be expressed through a demand.* The demand in this case may be for the commission of an act or its omission. In each case, the demand may be expressed in binding terms or otherwise. When the demand is expressed in binding terms and requires the commission of an act, the *hukm* creates an obligation (*ʿijāb*). When the terms used are not binding or absolute, the *hukm* gives rise to a recommendation (*nadīb*) for the commission of the act. The jurists use various rules to decide when a demand has been expressed in binding terms.

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4 For an analysis see ibid., 28–32.
5 The method is, therefore, different from the one adopted by John Austin for law in his well known imperative theory or the command theory of law.
6 While every *hukm* is related, directly or indirectly, to the act of the subject, the declaratory *hukm* may address situations or sets of facts. For example, the *hukm* may tell us that the time for the evening prayer is related to the setting of the sun. Now, this is not an act of the subject, but an act (the evening prayer) is indirectly addressed.
When the demand in the *hukm* is for abstention from or omission of an act and is expressed in binding or absolute terms, the *hukm* conveys a prohibition (*tahrīm*). If the demand, for omission, is not expressed in binding terms the act is looked down upon and conveys abomination (*karāhah*).

Al-Ghazālī describing the division of commission and omission and the resulting *rules*, says: When there is a demand for the commission of an act, we conclude that there is a command (*amr*), but when this command is accompanied by additional evidence about a consequential penalty for omission the act is obligatory (*wājib*). In case we do not find such evidence, the act is recommended. In the case of a demand for the omission of an act, if there is accompanying evidence entailing punishment for the omission, the act is *ḥarām*, if not the act is *makrūh*.\(^7\)

In any case, we have four categories of obligations arising from a demand: obligation, recommendation, disapproval, and prohibition. These obligations are mostly associated with sanctions. When the obligations relate to ritual or worship the sanctions pertain to the hereafter or to censure through public opinion, and when the obligations relate to mundane affairs they invoke sanctions in the form of punishment in this world.

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7 Al-Ghazālī, *al-Mustaṣfā min ʿilm al-Uṣūl*, vol. 1, 42. See also al-Rāzi, *al-Mahṣūl*, vol. 1, 93–104.
4. *The ḥukm may grant a choice or option to the subject* for the commission or omission of an act. If a text tells the subject to “eat and drink,” a choice is offered to him that he may exercise when he likes. In other words, the subject is free to perform the act at his discretion. The bulk of the Islamic laws fall under this category and include all kinds of contracts and transactions. The Lawgiver, it is sometimes said, is indifferent to the performance of such acts.\(^8\)

5. *The communication may be expressed through a declaration.* In this case, the communication declares or determines the relationship of an act, or set of facts, with the ḥukm. The communication, therefore, declares that an act or set of facts is the cause (*sabab*), condition (*shart*), or an impediment (*māniʿ*) for the application of the ḥukm. For example, in the ḥukm of the payment of *zakāt* (obligatory religious contribution), the possession of a minimum amount of wealth (*niṣāb*) is the cause for the application of the ḥukm, having retained this wealth for a year (*ḥawl*) is a condition for the ḥukm, and the existence of debts against the subject may be the impediment or obstacle in the way of fixing liability for *zakāt*. The declaratory communication explains the relationship of all these categories.

\(^8\) In the discussion of the *mubah*, see page 71, we will see that this indifference is not absolute. For example, eating and drinking is permissible, but a person cannot give up eating altogether. If he does so, the rule will convert itself from indifference to one of obligation.
If we separate demands and choices from declaratory communications, we have two main categories for the *hukm*. The first is called the *hukm taklīfî* or the obligation-creating *hukm*. The second category is called the *hukm waddî‘î* or the declaratory *hukm*. We shall first take up the discussion of the obligation creating rule or the *hukm taklīfî*.

4.3. **The *Hukm Taklīfî* (Obligation Creating Rules)**

The *hukm taklīfî* is classified as follows:

1. Obligatory (*Wājib* — واجب)
2. Recommended (*Mandūb* — مندوب)
3. Abominable, Disapproved (*Makrūh* — مكروه)
4. Prohibited (*Harām* — حرام)
5. Permissible (*Mubah* — مباح)

This classification is provided by the majority of the Sunnî schools. The Ḥanafîs derive seven categories from the same definition as follows:

1. *Fard*: Obligatory. This duty arises from an evidence or source that is definitive with respect to its implication.
2. *Wājib*: Obligatory. This duty is slightly weaker than the first in its demand for commission. It arises from a source that is probable with respect to its implication and authenticity. The demand, however, has been expressed in binding terms.

3. *Mandūb*: Recommended. The difference between recommendation and the two kinds of obligation above is based on the binding nature of the command. The source is probable, but the demand is expressed in non-binding terms.

4. *Makrūh karāhat al-tanzīḥ*: Disapproved. It is an act whose omission is demanded by the Lawgiver through a probable evidence *expressed in non-binding terms*.

5. *Makrūh karāhat al-taḥrīm*: Abominable. This category arises from a probable evidence *expressed in binding terms*. It is close to prohibition.

6. *Ḥarām*: Prohibited or duty not to commit an act. This arises from a definitive evidence.

7. *Mubah*: Permissible. No duty is created and the subject is given a choice to perform the act or not to perform it. We may also say here that the subject is sometimes given the power to create obligations and duties with respect to other individuals. This may occur, for example, in the case of a person appointing another his agent or concluding a contract with him.

The figure below explains these categories:
4.4. The Ḥukm Wadʾī—Declaratory Rules

The definition of the Ḥukm sharʾī provided above stated that the communication from Allah may be related to the acts of the subjects in a manner that is declaratory. This is stated in order to accommodate rules that cannot be classified under the obligation creating rules. The following classifications are made:

1. Classification of secondary rules into sabab, sharṭ and māniʿ. The ʿushūlī is concerned more with this classification.

2. Classification into šīḥḥah, butlān, and fasād (validity, nullity and vitiation). This classification is more important for the faqīh, because it pertains to the performance of acts.\(^9\)

3. Classification into ʿāzīmah and rukhsāh (general rules and exemptions). This classification helps the jurists identify the general principles of the law and the exceptions to these general principles. It is used as a tool for achieving analytical consistency.\(^{10}\)

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\(^{10}\) It is sometimes stated that all the injunction of the sharʾī ah are of two types: broad general principles and exceptions to these principles. See, e.g., Amīn al-Iḥsān Mujaddadī, Qawāʿid al-Fiqh (Karachi: al-Ṣadaf Publishers, 1986), 5. In terms
4.5. The Distinction Between the Ḥukm Taklīfī and the Ḥukm Wad‘ī

1. The aim of the Ḥukm Taklīfī is to create an obligation for the commission or omission of an act or to grant a choice between the commission or omission of the act. The Ḥukm Wad‘ī has no such aim. Its purpose is to either inform the subject that a certain thing is a cause of, condition for or obstacle to a Ḥukm or it is to explain the relationship that exist between two rules or to provide the criterion for judging whether an act performed is valid or void.

2. The act or event that is affected by the Ḥukm Taklīfī is within the ability of the subject with respect to its commission or omission. The act affected by the Ḥukm Wad‘ī may or may not be within the ability of the subject with respect to commission or omission. In other words, it is always possible for the subject to commit or omit an act affected by the Ḥukm Taklīfī, but it may not be possible for him to commit or omit all acts that fall within the domain of the Ḥukm Wad‘ī. Thus, theft is an act the omission of which is required and it is possible for the subject to avoid it, but the setting of the sun is the legal cause for the evening prayer, and it is not possible for the subject to bring it about. Rushd (discretion) is a necessary condition for contracts, but it is a condition that is beyond the power of the subject to create. Insanity is a defence against criminal liability, that is, it is an obstacle (māni‘) preventing the Ḥukm from taking effect, but it is beyond the power of the subject (he can only feign it for some time).

It is not to be assumed that the Ḥukm Taklīfī and the Ḥukm Wad‘ī are always stated in separate texts. It is possible for them to exist in the same text. For example, the verse about theft states: “The thief, male and female, cut off their hands.” Here the Ḥukm is the obligation to cut off the hand, the cause for it is sariqah (theft), thus, both occur in the same text.
Chapter 5

Classification of Islamic Law

The main categories of rules emerging from the definition of the ḥukm sharʿī have been identified in the previous chapter. The details of these categories will be taken up in this chapter. The discussion of wājib, mandūb, mubāh, makrūh and ḥarām will be taken up first. This will be followed by the discussion of the types of ḥukm wadʿī.

5.1. The Meaning of Wājib (Obligatory Act) and its Different Types

The term wājib means an act the performance of which is obligatory for the subject. In its technical sense, it is an act whose commission is demanded by the Lawgiver in certain and binding terms. The binding and certain nature of the demand may be inferred from the syntax of the statement in which the demand is expressed. It may also be inferred from an evidence external to the syntax, for example, the existence of a consequential punishment for omission. Examples of these are: the performance of ṣalāt, the payment of zakāt, the fulfilling of promises and many other acts that are required by the Lawgiver from His subjects. The Lawgiver has determined penalties for the omission of such acts.
5.1.1. The ḥukm or rule for the wājib

The rule for the wājib is that it must be brought about by the subject and for doing so there is reward (thawāb) for him, while omitting it, without a legal excuse, entails a penalty. The rule further says that a person who denies the legality of a wājib when it is based upon a definitive (qat‘ī) evidence is to be imputed with kufr (infidelity).\(^1\) This is the rule according to the Sunni majority. The rules according to the Ḥanafīs for the fard and for the wājib are as follows:

- The wājib according to the Ḥanafīs is what has been made binding for the subject by the Lawgiver, but which has been established through a probable (zannī) evidence, whose strength is not that of a definitive evidence. The examples are: ṣadaqat al-fitr, witr prayers, prayers of the two ‘Īds and reciting sūrat al-Fātihah in prayers. These cases have been established, according to the Ḥanafīs, through a khabar wahid, which is a probable evidence.\(^2\)
- The fard, on the other hand, has been made binding for the subject and is established through a definitive (qat‘ī) evidence. The evidence may be a verse of the Qur’ān or a mutawatir or mashhur tradition. Examples of the fard are: the five daily prayers, zakāt, ḥajj, recitation of the Qur’ān in prayer and so on.\(^3\)
- The rules for fard and wājib are different in their view. The rule for fard is the obligation of performance and liability for punishment on omission as well as imputation of kufr for denying its legal validity. The rule for the wājib is the obligation of performance and liability for punishment for omission, but of a lesser gravity as compared to the fard. They also do not impute with kufr the person who denies the wājib.\(^4\)
- This distinction drawn by the Ḥanafīs has an effect on the opinions derived in fiqh. For example, they say, if one forgets to recite the Qur’ān in prayer, the prayer is a nullity (bāṭil), because this is noncompliance with a definitive evidence in the Qur’ān requiring such recitation: “Then recite what

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\(^1\) Ṣadr al-Sharī‘ah, Tawdīh, vol. 2, 681.
\(^2\) Ibid., 680, 682.
\(^3\) Ibid., 681.
\(^4\) Ibid., 681.
is easy from the Qur’ān.” On the other hand, if one forgets to recite sūrat al-Óāthāh, but does recite something else, it does not invalidate the prayer, although this is noncompliance with a tradition that says: “There is no prayer for one who does not recite the Óāthāh of the Book.” This, however, is a khabar wāḥīd.5

5.2. The Classifications of the Wājib (Obligatory Act)

There are several classifications for the wājib (obligatory act) based upon different criteria. These are described below:

5.2.1. Classification based on the time available for performance: wājib muṭlaq and wājib muqayyad

On the basis of the time of its performance the wājib is divided into wājib muṭlaq, which is absolute or unrestricted by time, and into wājib muqayyad or wājib with a time limitation.

5.2.1.1. Wājib muṭlaq (obligatory act independent of time)

Wājib muṭlaq is an act whose performance has been demanded by the Lawgiver, but He has not fixed a definite time for its performance. An example is the payment of expiation (kaffārah) and the nadhr for fasting sometime in the future.

The rule for wājib muṭlaq is that the subject may perform the act whenever he likes. For example, if he took an oath to do something and then broke his oath, he may pay the kaffārah, for which he is liable, anytime he wishes to do so.

5.2.1.2. Wājib muqayyad also called wājib mu’aqqat (obligatory act limited by time)

It is an obligatory act demanded by the Lawgiver from the subject for which a time period is also determined having a beginning and an end. Examples are: the five daily prayers, fasting during Ramadān, and Ḥajj.

5 See al-Sarakhsī, Kitāb al-Usūl, vol. 1, 133.
The \textit{wājib muqayyad} or \textit{mu’aqqat} gives rise to two further subdivisions depending on the performance of the act within time and depending on the time available for the performance of the act, that is, whether the time is just enough for the act or exceeds the time required. Let us look at both divisions.

5.2.1.2.1. First subdivision of the \textit{wājib mu’aqqat}: early, timely and delayed performance or \textit{ta’jīl, adā’} and \textit{qaḍā’}. The three types are as follows:

1. \textit{Ta’jīl} or early performance of an obligatory act, if permitted by the Lawgiver, amounts to performance in time, like the early payment of the \textit{ṣadaqat al-fiṭr}.

2. \textit{Adā’} is the timely performance of the act, that is, the time that the Lawgiver has fixed for it, without there being any shortfall in such performance. In case the act has not been properly performed and is repeated within time and is performed properly, it is called \textit{iʿādah} (repetition), like a person praying with \textit{tayammum} finds water, performs ablution and prays again within time. There are some fine distinctions about the term \textit{iʿādah} among the majority and the Ḥanafīs, that is, when a repetition is called \textit{iʿādah} and when \textit{adā’}.

3. \textit{Qaḍā’} is the performance of an obligatory act after the time fixed for it by the Lawgiver, like offering the morning prayer after the sun has risen or like offering \textit{zuhr} in the time of \textit{aṣr}. The jurists agree that one who misses the determined time is obliged to offer the act as \textit{qaḍā’} and if the delay was without a valid excuse, he is liable for blame. The Zāhirī jurists confine the excuse to one who forgot or one who missed the act while he was asleep, thus, it is obligatory only for these two cases in their view and not for one who misses it intentionally.
5.2.1.2.2. Second subdivision of the \textit{wājib mu’aqqaṭ}: wide, narrow and dual duration for the performance of the act or \textit{muwassa’}, \textit{muḍayyaq} and \textit{dhū shibhayn}. The three types are as follows:

1. \textit{Wājib muwassa’} (Obligatory act with extra time) is an act for which the time given by the Lawgiver is enough for this act and others like it. The time for the act is called \textit{żarf} according to the Hanafis. An example is the time for the \textit{zuhr} prayer. The subject is permitted to perform the required act in any part of this time period. After agreeing on this, the jurists disagreed as to which part is the \textit{wujūb} (obligation) connected to: the beginning or the end of the period. Supposing a woman starts menstruating in the middle of the period for the \textit{zuhr} prayer, when she has not offered the prayer. Is she liable for \textit{qadā’}? This problem is actually related to the issue in \textit{uṣūl} whether a command necessitates immediate or delayed compliance. It is somewhat complex and lengthy to discuss here.\footnote{For the details see al-Sarakhsi, \textit{Kitāb al-Uṣūl}, vol. 1, 26–59. He discusses these details under the topic of \textit{amr} (command) and all these categories are dealt with as types of commands.}

2. \textit{Wājib muḍayyaq} (Obligatory act with time sufficient for a single performance) is an act for which the time granted by the Lawgiver is just enough for its performance and for no other, like the fasts
of Ramaḍān or like the evening prayer. The time granted itself becomes the standard (mi’yār) for the validity of this act.

3. Wājib dhū shibhayn (Obligatory act with extra time from one aspect and sufficient time from another) or the act that can be performed once in a time period, yet it permits other acts. An example is ẖajj. It can be performed once in a year in known months, but it permits the subject to perform acts like ʿawāf a number of times during this period.

A major reason for this distinction is that the wājib muwassa‘ is not valid if the subject does not form a niyyah required for it, because the time available may include other acts and the act has to be identified. As compared to this the wājib muḍayyaq is valid with a general niyyah or even a niyyah for another act of the same kind. The niyyah will be redirected, so to say, toward the act for which the time is just sufficient.

5.2.2. Classification based on the extent of the required act

The wājib is classified according to the extent or amount of the act required into wājib muḥaddad and wājib ghayr muḥaddad.

5.2.2.1. Wājib muḥaddad (determinate obligatory act)

It is an act whose amount or extent has been determined by the Lawgiver, like the five daily prayers and the amount of zakāt. The rule for this type of wājib is that it becomes due as a liability as soon as its cause is found. A demand for its performance or payment is valid without waiting for a judicial verdict or on the willingness of the subject to perform the act. The subject is not absolved from the liability to perform or pay unless he does so in the way determined by the Lawgiver and in the amount fixed by Him.

5.2.2.2. Wājib ghayr muḥaddad (indeterminate obligatory act)

It is an act whose amount or extent has not been fixed by the Lawgiver, like spending in the way of Allāh, feeding the needy or hospitality for guests. These things depend upon the need and capacity of the individual and thus vary. The rule for this kind of wājib is that it does not become a liability, unless it is imposed by a judicial decision or through willingness and acceptance.
The jurists have differed as to which act is to be attached to which type of wājib. For example, maintenance of wife and children, or support for the next of kin: are these to be linked to wājib muḥaddad or wājib ghayr muḥaddad? According to some Hanafi scholars these are to be linked to the ghayr muḥaddad, because there is no fixed amount for them. A court decision would, therefore, be required or it will become obligatory through an agreement between the parties. The majority link these to the muḥaddad and no court decision is required in their view for a claim.

5.2.3. Classification based on the subjects who are required to perform

Depending on who is required to perform the act, the wājib is divided into the universal obligation and the communal obligation or the wājib ‘aynī and the wājib kifāʾī.

5.2.3.1. Wājib ‘aynī (the universal obligatory act)

Wājib ‘aynī or the universal obligation is a demand by the Lawgiver from each subject, or each subject with legal capacity for the act, to perform the act, like prayers, fasting, hajj and zakāt. The rule for this type of obligation is that it is to be performed by each person from whom it is demanded. The individual is not absolved of the liability even if some other persons have performed the act.

5.2.3.2. Wājib kifāʾī (the communal obligatory act)

The wājib kifāyah is an act whose performance is required from the whole community and not from each individual, like jihād, answering the salām, and rendering testimony.

The rule for the wājib kifāyah is that if it is performed by some individuals in the community, the rest are no longer liable for it, as the required act stands performed. The communal obligation may turn into a universal obligation, however, in certain cases. For example, if there is only one doctor in the community, it will be his personal obligation to look after a patient.
5.2.4. Classification based on the identification of the object of the required act

The obligatory act is divided into two types on the basis of the determination of the object of the act. The types are *wājib mu‘ayyan* and *wājib mukhayyar*.

5.2.4.1. *Wājib mu‘ayyan* (the specified obligatory act)

The *wājib mu‘ayyan* is an act that is required by the Lawgiver specifically; there is no choice in it with respect to the act to be performed. The examples are prayer, fasting, payment of due wages and so on. The rule is that the subject is not free of the liability without specific performance.

5.2.4.2. *Wājib mukhayyar* (the unspecified obligatory act or obligatory act with an option as to its performance)

This type of act is required by the Lawgiver not as a specific act, but as one out of several determined acts, like the *kaффārah* (expiation) for breaking the oath: feeding ten needy persons, or clothing them, or the freeing of a slave. If the subject is not able to perform one act, he may perform the other. Each of these three acts, however, are required by way of a choice. When one is performed, the subject is absolved of liability.

5.3. The Meaning of *Mandūb* (Recommended Act) and its Different Types

*Mandūb* or the *mandūb ilayh* is defined as “a demand by the Lawgiver for the commission of an act without making it binding and without assigning any blame for its omission.” The non-binding nature of the demand can be inferred from the syntax. Sometimes the syntax may indicate that the demand is binding, but there may be related evidence showing that the demand is non-binding. The related evidence may be a text or a general principle of the *sharī‘ah* or some other indication, like the absence of a penalty for non-performance.

For example, in the verse,
O ye who believe, when you enter into a transaction involving a *dayn* (debt), write it down

[Qur'ān 2 : 282]

the demand for the recording of the debt is a recommendation and is non-binding, because of an associated evidence that indicates this. The evidence is found in the following verse:

And if one of you deposits a thing on trust with another, let the trustee faithfully discharge his trust [Qur'ān 2 : 283]

This indicates to the creditor that he may trust the debtor without the writing down of the debt. Likewise in the verse

And if any of your slaves ask for a deed in writing (to enable them to earn their freedom for a certain sum) give them such a deed, if ye know any good in them. [Qur'ān 24 : 33]

The command requires the agreement of *mukātabah* with the slave (in which the slave pays for his freedom in installments). It is, however, not binding on the owner. This is inferred from the established principle of the *shari'ah* that an owner of property is free to dispose of it as he likes. It is not permitted to coerce him into a specific transaction, unless there is a legal necessity for doing so.

5.3.1. Types of *Mandūb*

The recommended act (*mandūb*) sometimes has some additional legal emphasis behind it for persistent or continued performance. On this criterion, it has been divided into two broad types:
5.3.1.1. **Sunnah mu’akkadah** (the emphatic recommended act)

*Sunnah mu’akkadah* is a recommended act that was persistently performed by the Prophet (p.b.u.h.). He did not give up its persistent performance, except on some occasions. This again is of two types:

- **Sunnah mu’akkadah that complements and completes a wājib**, like ḍhān and congregational prayers. The rule for this category is that the person who gives up such acts is liable to some blame, though this does not reach the level of punishment. The person who performs them is entitled to reward in the hereafter. If an individual gives up such acts totally, he is liable to lose his ‘adālah (moral probity), which may in turn result in the rejection of his testimony. If a township collectively decides to give up these recommended acts, it exposes itself to legal and military action. The reason is that these acts are part of the fundamental practice (*sha’ā’ir*) of Islam. (ما لا يتم الواجب الا به —An act essential for completing an obligatory act becomes an obligation in itself).

- **Sunnah mu’akkadah that does not complement or complete a wājib**, though it is generally supportive of it, like praying two *rak`as* before the *fajr* prayer, or after *zuhr*, *maghrib* and ‘*ishā’. There is reward for the performance of such an act and blame for giving it up, however, the person giving it up totally does not lose his ‘adālah. If a township gives them up, it does not become liable for civil or military action, because these acts are not considered part of the *sha’ā’ir* of Islam.

5.3.1.2. **Sunnah ghayr mu’akkadah** (non-emphatic recommended act)—*nafl, mustahabb*

The recommended act that is not emphatic is called *sunnah ghayr mu’akkadah* or *nafl* or *mustahabb*. It is an act that was not performed persistently by the Prophet, that is, he performed it several times and did not do so at other times. Examples of this type are the four *rak`as* before *āsr* and ‘*ishā’ and giving
ṣadaqah to the poor. The rule for this type of act is that one who performs it is entitled to thawāb, but one who does not, is not subject to blame.

5.3.1.3. Sunnat zawā‘id

This term is used by some jurists for the acts of the Prophet pertaining to ordinary daily tasks as a human being, like his dress, food and drink, as well as his dealings with his family members. The rule for such acts is that one who adopts them seeking to follow the Prophet’s example, out of love for him, is to be rewarded. The person who does not adopt them is not blameworthy in any way.

5.4. The Meaning of Ḥarām (Prohibited Act) and its Different Types

The prohibited act (ḥarām) is one whose omission is required by the Lawgiver in binding and certain terms. According to the majority of the jurists (jumhūr), it does not matter whether the evidence informing us of this omission is definitive or probable. According to the Hanafis, however, the act that is Ḥarām is based upon a definitive evidence. The prohibited act that is based on a probable evidence expressed in binding terms, falls within the category of the abominable act that is closer to prohibition (makrūh karāhat al-tahriq). The rule for the prohibited act in their view is the imputation of kufr for the person who denies its legal validity. The rule according to the majority is also the same, that is, the imputation of kufr is applicable when the prohibition arises from a definitive evidence.

The binding and certain terms in which the demand is expressed are understood either from the syntax of the text alone or from other supporting evidence. Some examples of the prohibited act (ḥarām) are: 1) Eating of carrion; 2) infanticide; 3) marriage with mothers or step mothers; 4) false evidence; 5) the misappropriation of another’s wealth; 6) murder and 7) unlawful sexual intercourse.

The texts on which these are based are:

1. Forbidden to you (for food) is dead meat. [Qurʾān 5 : 3]

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9 That is, with respect to its transmission.
2. Do not kill your children on plea of want. [Qur’ān 6:151]
3. Prohibited to you (for marriage) are your mothers. [Qur’ān 4:23]
4. And marry not women whom your fathers married. [Qur’ān 4:22]
5. And shun the word that is false (perjury) [Qur’ān 22:30]
6. And do not eat up your property among yourselves for vanities. [Qur’ān 2:188]
7. If a man kills a believer intentionally, his recompense is Hell, to abide therein (for ever). [Qur’ān 4:93]
8. Nor come nigh to unlawful sexual intercourse, for it is a shameful deed. [Qur’ān 17:32]

The communication in all the above texts is expressed in binding terms, and this is obvious either from the word prohibition or from the negation of permissibility or from the demand for the avoidance of the act.

5.4.1. **The types of ḥarām**

The prohibited act is divided into two types: prohibited for itself and prohibited due to an external factor.\(^\text{10}\)

\[
\begin{align*}
\text{Ḥarām} & \quad \begin{cases} 
\text{Ḥarām li-dhātihi} \\
\text{Ḥarām li-ghayrihi}
\end{cases} \\
(\text{Prohibited Act}) & \quad (\text{prohibited for itself}) \\
& \quad (\text{prohibited for an external factor})
\end{align*}
\]

5.4.1.1. **Ḥarām li-dhātihi** (prohibited for itself)

The act that is prohibited for itself is one that was declared prohibited for itself *ab initio* and right from the start, and not for an external category. Examples of this type are: unlawful sexual intercourse, theft, and selling of carrion.

\(^{10}\)Ṣadr al-Sharī‘ah, *al-Tawdīh*, vol. 2, 683.

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The rule for this category is that it is not permissible *ab initio* and if the subject commits such an act, there will be no beneficial legal effects or the gains desired. Thus, unlawful sexual intercourse cannot lead to the establishing of paternity or claims of inheritance, \(^{11}\) while theft cannot be a reason for the claim of ownership, nor can the selling of carrion lead to ownership.

5.4.1.2. *Harām li-ghayrihī* (prohibited for an external factor)

The act that is prohibited due to an external factor was not prohibited initially, and was legal in itself, but an external factor intervened and led to its prohibition, like fasting on ‘Īd day. Fasting is legal otherwise, but the Lawgiver prohibited it on the day of ‘Īd, because the subjects that day are the guests of Allāh, and fasting becomes a hurdle for this hospitality. Another example is the sale that involves *ribā*. Sale is legal in itself, but a condition imposed in it that requires the charging and giving of interest leads to its prohibition.

The rule for this type is that as the act is valid in itself, if it is possible to remove the obstructing factor the act may be declared valid. Thus, according to the Hanafis, if the condition of *ribā* is removed from the *ribā* based sale, the sale may be declared valid. It is for this reason that they place this type of contract in the category of *fāsid* (vitiated; unenforceable) and not *bāţil* (void).

5.4.1.3. Distinction between the two types

There are two basic distinctions between acts that are prohibited for themselves and those that are prohibited due to an external factor:

1. When an act prohibited for itself becomes the subject-matter of a contract, the contract is void, that is, it will have no legal effects. As compared to this, when the act prohibited for an external factor becomes the subject of a contract, it is not void, but is valid or is vitiated with partial or suspended legal effects, according to the varying opinions of jurists on this. Thus, if the sale pertains to carrion

\(^{11}\) Some people argue that the unlawful act here has been committed by the parents, while the denial of benefits is for the illegitimate offspring, who is innocent.
or to wine, the contract is void having no legal effects. Likewise, a contract of marriage within the prohibited degree. As for the contract of ribâ mentioned above, it is vitiated.

The reader will come across many examples that are said to fall in the category prohibited for an external factor, however, in most examples one finds that they fall in this category according to the majority of the jurists; the Ḥanafīs would place them in the category of makhir that is closer to prohibition. Thus, some care is to be exercised in studying the examples.

2. The act prohibited for itself cannot be permitted, except in the case of duress (idṭirâr). For example, wine is prohibited for itself and cannot be permitted, unless the person affected is dying of thirst and there is nothing else available. The reason is that preservation of life is a vital interest secured by the ḥarî. As compared to this, an act prohibited for an external factor may be permitted in case of dire need to the extent of the need. Thus, the covering of private body parts is prohibited not for itself, but for what it leads to. It is, therefore, permitted to uncover these parts in case of need, as when it is necessary for medical treatment.

5.5. The Meaning of Makhir (Disapproved Act) and its Different Types

The makhir (disapproved act) is divided by the Ḥanafīs into two types: makhir tahriman and makhir tanzihan.12 The first is what has been called abominable or reprehensible as it is closer to the category of ḥarî. This type of act is the opposite of wâjîb, according to the Ḥanafīs. It is an act whose omission has been demanded by the Lawgiver in certain terms through a probable evidence, like making a proposal for marriage where the proposal of another is awaiting response or even making an offer for sale where the offer of another is pending. Each of these has been established through a khabar wâhid. The ḥukm or rule for this type of makhir is punishment for the person denying it, though he is not imputed with kufr.

The simple makhir (disapproved) act is one whose omission is demanded by the Lawgiver in non-binding terms whatever the type of evidence from which it arises. It is one for which omission is better than commission. For example, a verse of the Qur′ān proscribes sale at the time of the Friday congregational prayer, and asks the believers to avoid it at that time. This, however, may be interpreted as makhir rather

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than prohibited; and even if it is interpreted as prohibited due to an external factor, the result is the same. This division of *makrūh* into two types is based on the Ḥanafi opinion. The majority of the jurists place *makrūh tahrīman* into the category of *ḥarām* insofar as it is a demand for omission expressed in binding terms.

Al-Shāṭibī, the Mālikī jurist, explains that something that is considered disapproved in an individual case may be deemed prohibited as a whole. This means that a person should not make a habit of indulging in disapproved acts.

5.6. The Meaning of *Mubāḥ* (Permitted Act) and its Different Types

The *mubāḥ* or permissible act is one in which the Lawgiver has granted a choice of commission or omission, without blame or praise for omission or commission. It is also called ḥalāl.

The *mubāḥ* that is mentioned in the texts is usually expressed in words like “There is no harm for you...” or “It is no sin for you” and so on. The *mubāḥ* is also understood through the principle of *istiṣḥāb*, which states that anything that is not expressly prohibited or considered abominable by the *shari‘ah* is permissible. According to the above rule, all contracts and transactions are permissible, unless there is an evidence indicating that they are not. This principle emphasises the fact that underlying rule for all things is permissibility, however, it will be explained in detail in the sources of Islamic law.

There is an interesting discussion in *usūl al-fiqh* about the *ḥukm* of *mubāḥ*. It is generally maintained by the jurists that once an act is established as *mubāḥ*, the Lawgiver cannot be assumed to have an intention of omission or commission related to it, and the performance or non-performance cannot be deemed an act of worship or required obedience. On the other hand, there are certain groups, like the Šūfīs, who are attributed with the statement that the omission of *mubāḥ* is a required act. They rely for this on certain verses and texts of the traditions in which the temporal world and its pleasures have been looked down upon by the Lawgiver. They also argue that indulging in the permitted pleasures of this world leads to the commission of the disapproved and the forbidden. The jurists, however, reject such opinions and maintain that omission of the *mubāḥ* is not a required act. There have been other jurists who insist that as the commission of a *mubāḥ* act amounts to the non-performance of a prohibited act, the commission of *mubāḥ* becomes *wājib*. Al-Shāṭibī, thinking in different terms, has explained in great detail how the *mubāḥ*...
may be permitted for individual cases, but taken as a whole may be considered obligatory or permitted. For example, eating and drinking is permitted and the subject has a choice in eating or not eating, but overeating may destroy his health and not eating at all may kill him too; a balance, therefore, has to be maintained. This means that at the level of a specific evidence it is permitted, but when it attacks a purpose of the law it becomes obligatory or prohibited, as the case may be.

We may raise the question here as to whether the mubah is permitted by itself or whether it becomes permitted with the approval of the shari‘ah? For example, whether eating and drinking was permitted anyway or only when the texts said “eat and drink”. This question is directly concerned with the principle of istiṣḥāb. The answer will, therefore, be provided there (see page 152).

5.7. The Ḥukm Wad‘ī or the Declaratory Rule

The declaratory rule or the ḥukm wad‘ī does not create an obligation; it is a rule that facilitates the operation of the obligation-creating rule or it explains the relationship between different obligation-creating rules. The major classifications are: 1) sabab, sharṭ and māni‘; 2) šiḥḥah, fasād and ṣuṭlān; and 3) ‘azīmah and rukhsah.

5.7.1. Sabab, sharṭ and māni‘

The secondary or declaratory rules primarily include the causes of, conditions for, and obstacles to the ḥukm. These may be described very briefly.13

5.7.1.1. Sabab (Cause).

Sabab is the cause on the basis of which a primary rule or ḥukm taklīfī is invoked or is established. The literal meaning of sabab is the means to a thing. In its technical meaning it is what the Lawgiver has determined to be the identifier of a legal rule so that its existence means the presence of the rule, while its

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absence means the absence of the rule. Thus, it is each entity or incident whose existence the Lawgiver has determined to be the prerequisite for the existence of the *hukm*, and its absence an indication of the absence of the *hukm*. Unlawful sexual intercourse, for example, is a cause for the obligation of implementing *hadd*, while *safah* and insanity are the causes for interdiction, but when these causes are missing there is no obligation to impose *hadd* or interdiction.

The cause (*sabab*) is divided with respect to the act of the subject into two types. The first is not dependent on the act of the subject, nor is it within his power to bring it about. Yet, when such a cause is found the *hukm* exists, like the setting of the sun as a cause for the obligation of the evening prayer, and the beginning of the month of Ramaḍān as a cause for the obligation of fasting, and like *safah* for the obligation of interdiction.

The second type is an act of the subject and is within his power to bring about, like journey for the permissibility of not fasting, or murder (*qatl ‘amd*) for the obligation of *qisās*, or the formation of contracts as a cause for enforcing their performance. Such an act may itself be the subject of a *taklīf* rule, that is, it would be required or prohibited or recommended, and it may fall under the category of declaratory rules. Thus, marriage is a cause for the permissibility of marital relations, but it becomes obligatory when there is fear of falling prey to unlawful sexual intercourse.

The distinction between a *sabab*, that is, a *sabab* alone and a *sabab* that amounts to an ‘*illah* for a *hukm* is important and must be understood. The simplest way to understand this distinction is to say that when a cause can be rationally perceived to be the reason for the existence of the *hukm* it is an ‘*illah*, but when the cause is obscure for human reason and it is not possible to understand why the cause has been associated with a *hukm*, the cause is simply a cause and not an ‘*illah*. For example, human reason can comprehend why journey has been determined to be the cause for the permissibility of not fasting, but it may not understand why the month of Ramaḍān has been fixed for fasting.

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15 See al-Shāṭibī, *al-Muwafaqāt*, vol. 1, 188.
16 For further details see al-Sarakhsī, *Kitāb al-Uṣūl*, vol. 2, 301.
5.7.1.2.  *Shart* (Condition).

The Lawgiver may declare that a set of facts must exist or an act must take place before the cause can take effect and invoke the related *hukm*. The existence of such a set of facts is called a *shart* or condition for the *hukm*. A *shart* or condition then is a sign or an indication on which the existence of another thing depends, but the existence of this sign does not necessarily mean the existence of that thing, however, its absence does mean the non-existence of the other thing. By existence and non-existence of the *hukm* here is meant something of which the *shari'a* will take cognisance and will also assign legal effects to it.

In its technical sense, however, it implies a necessary condition for a *hukm*. Ablution is a condition for prayer and the presence of witnesses a condition for the marriage contract. The existence of witnesses, however, does not necessarily mean that a marriage has taken place, yet without witnesses a marriage would not be valid.

The meaning of *shart* is understood clearly by distinguishing its meaning from those of other attributes. There are similarities and differences between a *shart* and a *rukn*. The similarity is that the legal existence of a thing depends on both; if either is missing the act is not valid or the *hukm* does not exist. The difference between the two is that a *rukn* (element) is always part of the act, while a *shart* is external to it. For example, bowing is a *rukn* or prayer and is a part of it, while ablution is a condition and is external to prayer.

There are similar distinctions between *sabab* and *shart*. The similarity is that both are external to the act and on both depends the existence of the *hukm*. The difference is that the existence of the cause necessarily leads to the existence of the *hukm*, but the existence of a *shart* does not necessarily mean the existence of the *hukm*, as in the case of witnesses to a marriage contract.

A *shart* is divided into two types by the jurists: *shart* *shari'i* and *shart* *ja'ali*. These are conditions imposed by the Lawgiver and conditions imposed by the subjects, as in contracts that accept them.

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17 Ibid., vol. 2, 320.
5.7.1.3.  *Māni‘* (Obstacle).

A condition or set of facts may exist that prevent the *hukm* from being applied even if the cause is found and the condition is met. The obstacle or *māni‘* is a factor whose existence indicates the negation of a *hukm* or its *sabab*. This implies that an obstacle is of two types. The first type negates the *hukm* or prevents it from coming into operation, like the negation of the *hukm* of retaliation when the accused is the father of the victim. The other type is the obstacle that affects the cause and prevents it from coming into being. The majority of the obstacles are of this type. Those who will study Islamic criminal law should understand that the first kind of *māni‘* constitutes the doctrines of criminal law also called general defences. The principle is the same as in Western criminal law where the definition of the crime is not constituted unless the doctrines are read in with them, that is, the general defences are implied in the definition. We shall be discussing some of these general defences under the heading of legal capacity of the *mukallaf* (subject) as well as in contracts and criminal law.

5.7.2.  *Sīhah, fasād and buṭlān* (validity, vititation and nullity)

An act that is obligatory, recommended, or permissible may be required to be performed in a certain manner by the Lawgiver.\(^\text{18}\) When the act is performed properly it is deemed as valid (*ṣahih*) otherwise it is null and void (*bātīl*). Here too the Ḥanafites add another category called irregular or vitiated (*fāsid*). Such an act can become valid if the cause of the irregularity is removed, otherwise it stays suspended. It may, however, have some legal effects. An example is a contract involving *ribā*. Under Ḥanafi law such a contract is considered vitiated (*fāsid*). This means that it can become a valid contract if the offending condition is removed. Such a contract is to be distinguished from the voidable contract under law. A voidable contract is dependent upon the option of the parties, while in a *fāsid* contract the offending condition must be removed; the parties have no option in this.

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\(^{18}\) Şadr al-Sharī‘ah, al-Tawḍīḥ, vol. 1, 30.
5.7.3. ‘Azīmah and rukhṣah (initial rules and exemptions)

The Lawgiver may indicate that one hukm is to be considered as an obligation imposed initially as a general rule (‘azīmah).19 This may be followed by another rule that is an exemption (rukhṣah) from the general rule. Drinking of wine is prohibited as a general rule. In cases of duress (iḍṭirār), however, one is allowed to consume it, if it saves one from dying of thirst. This is a rukhṣah. According to some jurists, the entire law may be classified into general rules and related exemptions. This division has important methodological consequences and helps the jurist achieve analytical consistency. One important significance is that analogy (qiyās) cannot proceed from an exemption, it must be based on a general rule. This provision, considered with other strict conditions, further narrows down the operation of qiyās.

19 Ibid., vol. 2, 686.
Chapter 6

The Lawgiver (ḥākim)

6.1. Allah is the True Source of all Laws

The source of all laws in Islam is Allah and Allah alone. The verse of the Qur’ān, “The ḥukm belongs to Allah alone,” [Qur’ān 6:57] is often cited in support of this. This basic rule determines the character of Islamic law and gives direction to all interpretation and ijtihād. The rule says that it is Allah’s laws alone that are acceptable to the Muslim. No temporal authority can command a Muslim’s obedience, unless the authority is based on the commands of Allah. This is the essence of social contract within a Muslim community.

Each Muslim is a Muslim not only because he believes in the existence of one God and the truth of the mission of His Messenger, but also because the laws are prescribed by the Wise and Just Lord. It is these laws that grant him security from oppression and ensure justice and fair play in all dealings. A Muslim surrenders his will to Islam so that his life may be regulated in accordance with the ḥukm of Allah.

What, then, do we mean when we say that Allah is the True and Ultimate Sovereign? What is the general nature of the laws laid down by Allah? In other words, can we see a broad intention of the Lawgiver?

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1By social contract we mean the basis upon which Muslims, acting upon the commands of Allah, have agreed to cooperate with each other and to live together in the form of an organized Muslim society.
when we look at all the laws? We, therefore, ask the question: Are these laws laid down in the interest of Man? Thus, if we make a law that serves the interest of humanity (say based upon utilitarian principles), can this law be assumed to be valid and in accordance with the dictates of the sharī'ah?

Further, an extension of the above inquiry pertains to the independent use of reason. If the assumption is that Allah’s laws are always in conformity with human reason, then, can we also assume that all laws that appear reasonable to humans must be in conformity with the sharī'ah?

There are a number of other questions that pertain to the methodology to be adopted to ensure that laws conform with the injunctions of the Qurʾān and the Sunnah, but these require exhaustive analysis and will not be taken up in this chapter.

6.2. The Fundamental Norm of the Legal System

The fact that Allah alone is the source of all laws indicates to us the fundamental rule or norm of the Islamic legal system. The other rules of the legal system are all referred to, or checked against, this norm for their validity. The fundamental norm is repeated several times each day by every Muslim. It is contained in the declaration: “There is no god, but Allah, and Muhammad is the Messenger of Allah.” As the Muslim is ready to accept the laws of Allah, he will accept only those laws that were revealed through His Messenger. The revelation granted to the Messenger is in the form of the Qurʾān. Once this is accepted, we find that the Qurʾān itself declares the Sunnah of the Apostle of Allah to be a source of laws. Some say that the Sunnah is itself a form of revelation, that is, revelation in meaning alone as compared

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2 The idea of the fundamental norm or grundnorm was introduced into legal philosophy by Hans Kelsen, the German legal philosopher. He tried to present a concept of law that was different from the one presented by John Austin. Austin had stated that law is the command of the sovereign enforced under threat of sanctions. In other words, a valid law is a command of the sovereign. Kelsen, on the other hand, stated that each law in a state, in order to be valid, must conform with a basic rule or norm, and in a modern state, he said, such a a norm is provided by the constitution. Thus, the fundamental norm is that each law must conform with the constitution in order to be valid. Kelsen’s theory was employed in Pakistan in cases related to the imposition of martial law as well as other matters related to the Objectives Resolution. The idea of the grundnorm has, therefore, figured prominently in case law. The Objectives Resolution is now part of the Constitution of Pakistan as article 2A. The impact of this article is that all laws must conform with the injunctions of the Qurʾān and the Sunnah.
to the Qur’ān, which is revelation in both word and meaning. Starting from the other end, the Muslim may say:

- I am ready to obey such and such law as it has been communicated to me by a qualified jurist.
- I follow the opinion of the jurist as it is in conformity with the sources of Islamic law.
- I obey a law based on the sources as they are the sources revealed to Muḥammad. I obey Muḥammad for he is the Messenger of Allah, and
- I believe in Allah.

In this way the validity of all laws is traced to Allah. This basic norm or rule does two things. First, it provides a standard or criterion with which we can judge whether or not a law is valid law. Second, it creates for each Muslim an obligation or duty to obey the law. A subject of an Islamic state does not have to look for some external rule of morality or justice for his duty to obey the law.

6.3. The Law and the Interest of Man

Has the Lawgiver laid down laws in the interest (maṣlaḥah) of Man? If this is true, can the interest of Man be an independent source of laws? Is Man free to determine his own interest, or is it predetermined by the Lawgiver? These questions have always been at the forefront of Islamic legal theory. The answers form the basis of the principle of istislah that seeks to secure the interests (maṣāḥih) preserved and protected by the Islamic legal system. This issue is extremely important for ijtihād and the framing of new laws in the present times. The reason is that in the absence of a direct and express evidence in the Qur’ān and the Sunnah, laws are to be framed in the light of the interest (maṣlaḥah) of Man as determined by the Lawgiver.

The majority of the Muslim jurists agreed that the Lawgiver lays down laws in the interest of Man. There have been some voices against it too, notable among them being the objections of the illustrious Imām al-Rāzī (d. 606). He gave extremely powerful arguments against this idea.3 Al-Rāzī did concede

though that whenever we consider the laws and the interests of Man, we find them lying side by side, or
existing together, yet we cannot establish a causal relationship between them, that is, the laws are laid
down because they serve the interest of Man. The problem may be explained in a simple way.

6.3.1. Is Man the sole purpose of creation?

Take the case of a factory producing something. The sole purpose of the existence of this factory is the
creation of a product. Every directive that is issued to the workers is intended to enhance the quality of
this product or to create it on time, or to create a product that is more useful. The factory does not exist
for the workers, but for the creation of that product. The effective production of goods, however, requires
that the interest and welfare of the workers be kept in view, for that will lead to a better product. If the
worker performs well he is rewarded or promoted, because he is in harmony with the process leading to
the ultimate product. If he does not perform well, he will not be rewarded and may also be penalised for
a breach of discipline. The factory does have laws to regulate the activity of the workers. These laws are
laid down primarily to ensure an effective production of goods, though the laws may indirectly serve the
interest of the worker.

Is Man the final product of this universe created by Allah, or is the purpose of this universe something
larger, larger than Man?

أَ أَنْشُمْ أَشْدُ حَلَقًا أَمْ السَّمَاةْ أَبْنَاؤُهَا

What! Are ye the more difficult to create or the heaven (above); (Allah) hath constructed it.
[Qur'ān 79 : 27]

If Man is the sole purpose, then, all laws must have been made to serve his interest. On the other hand,
if the purpose of the creation of the universe is something other than Man as may be understood from
the above verse, then, is Man in the position of the worker, a servant of Allah (‘abd Allah), who is to be
rewarded if he performs well and punished if he misbehaves? The laws in this case would appear to be
lying side by side with the interest of Man, as al-Rāzī maintains, because they are actually serving some
larger purpose. Again, if Man is the sole purpose of the universe, the laws would be laid down to serve his interest alone. Thus, there would be a causal relationship between the laws and the interest of Man. In such a case, would he be called the vicegerent of Allah (khalifat Allah)? Some jurists have conceded that it is proper to assign this title to Man, for the Qur’ān mentions it too, while others consider it as heresy and maintain that the reference in the Qur’ān is to some previous creation to which Man is a successor (khalīfah). The latter jurists prefer to use the title “vicegerent of the Messenger” or khalīfat al-Rasūl. The answers to these questions are known to Allah alone. That is where the jurists leave the discussion, and we should do the same.

6.3.2. Can we employ maṣlaḥah (interest) for new laws?

Whichever approach we take on this issue it does not alter the decision on the interest of Man. There is some relationship between the interest of Man and the hukm of Allah. It does not matter if this is a causal relationship. The majority of the jurists, therefore, agree that maṣlaḥah or the interest of Man may be employed for the derivation of new laws. This in no case means that the Muslims are free to make laws in accordance with whatever they deem to be their interest. The interest of Man is determined by the Lawgiver Himself, and there is a determined methodology for identifying this. The jurists have taken great pains to lay down this methodology in a way that the laws derived through it may still be termed as the aḥkām of Allah. It would not be an exaggeration to say that the key to the future development of Islamic law is through the doctrine of maṣlaḥah, as will be shown later in this book.

6.4. Are the Sharī‘ah and Natural Law Compatible?

Can the aḥkām (legal rules) be discovered by human reason independent of the sources of Islamic law? This is a question that pertains to natural law or to the use of reason independent of the sharī‘ah. There

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4 See e.g., Qamaruddin Khan The Political Thought of Ibn Taymiyah (Islamabad, 1973) 78 for a discussion of Ibn Taymiyah’s views on the subject.

5 The intention behind the use of the word “doctrine” is to distinguish it from the narrower principle of maṣlaḥah, which is a form of extended analogy.
have been heated debates among the early Muslim jurists over this issue, though the terminology used by them was different. The terms they used were *hasan* (good) and *qabiḥ* (bad or evil).\(^6\)

Natural law has a very long history beginning in ancient thought and continuing right up to our times. The classical theory of natural law, as Hart puts it is that “there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid.”\(^7\) It should be made clear that natural law has not always been associated with God, and even when it has been its basic assumptions have not been dependent upon a belief in God. Our discussion, however, pertains to a much restricted version of natural law in which belief in Allah as the Lawgiver and Master of the Universe is essential. Even in the West, the real developments in natural law came through the writings of Thomas Aquinas. Some of his views, it is acknowledged in the West, were based on the works of Ibn Sinā and the Spanish jurist-philosopher Ibn Rushd (Averrōes), especially his commentaries on Aristotle. To describe what we mean by natural law in this context, let us borrow a definition provided by John Austin. He says:

> Of the Divine laws, or the laws of God, some are *revealed* or promulgated, and others are *unrevealed*. Such of the laws of God as are unrevealed are not unfrequently denoted by following names or phrases: ‘the law of nature;’ ‘natural law;’ ‘the law manifested to man by the light of nature or reason.’

> . . . Paley and other divines have proved beyond a doubt, that it was not the purpose of Revelation to disclose the *whole* of those duties. Some we could not know, without the help of Revelation; and these the revealed law has stated distinctly and precisely. The rest we may know, if we will, by the light of nature or reason; and these the revealed law supposes or assumes. It passes them over in silence, or with a brief and incidental notice.\(^8\)

Austin also says that these “unrevealed” laws are the only laws which God makes for that portion of mankind who are excluded from the light of revelation.\(^9\) We may qualify Austin’s description of natural

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\(^6\) Sadr al-Sharīʿah, *al-Tawdīḥ*, vol. 1, 32–33.


\(^8\) John Austin, *Lectures on Jurisprudence* (London, 1911) vol 1, 104. (Emphasis in the original).

\(^9\) Austin, *Lectures*, vol. 1, 104.
law by saying that these are laws that are to be discovered by mankind through reason prior to revelation, that is, before the arrival of the light of revelation amidst a particular community. Once revelation has come, such laws may only be discovered in the light of revelation, because revelation does not pass them over in silence; it indicates them through general principles. We are now ready to look briefly at some of the discussions of Muslim jurists.

There was complete agreement among Muslim jurists about the meaning of the words of the Exalted, “The hukm belongs to Allah alone.” [Qur’an 6:57] The Mu’tazilah agreed with the majority that the source of all laws is Allah, but they disagreed with them about the identification and discovery of these laws prior to revelation. They maintained that reason can discover the laws of Allah, that is, the shar‘i ahkām, in the absence of revelation. The Mu’tazilah were not alone in holding these views and there were other sects who held the same or similar views, especially the Māturīdīs, some of whom were Ḥanafīs, though their views were slightly different. Sadr al-Sharī‘ah has the following to say:

The term shar‘iyah (legal according to Islamic law) includes all that would not have been known had the communication from the Law not been issued. This is irrespective of whether this communication pertained directly to a particular hukm or was issued in a manner that the hukm was dependent upon it, as in the issues based on analogical deduction. The rules for these too would be legal for had the communication not been issued for the original case, the rule extended for analogy would not have been known either. This stipulation (of the term shar‘iyah), therefore, includes the goodness (husn) and badness (qubh) of all acts according to those who deny that this can be discovered through reason.

Know that, in our view (Ḥanafi), and that of the majority of the Mu’tazilah, the goodness of some acts as well as their badness can be discovered through reason, but in certain acts they cannot be discovered and are dependent upon the communication from the Lawgiver. The first type of acts are not part of fiqh; they belong to the domain of ethics. The second type are part of fiqh and the definition of fiqh remains sound, comprehensive and precise (with the stipulation of the term shar‘iyah) according to this view.

According to al-Ash‘arī and his followers, on the other hand, the goodness and badness of every act is known through the shar‘ah (even those of purely moral acts) and all these acts would, therefore, be part of fiqh (according to the definition under discussion).¹⁰

¹⁰ Sadr al-Sharī‘ah, al-Tawdih, vol. 1, 32–33.
The Ash’arites held the view that the laws of Allah can be discovered through revelation alone and there is no way in which reason can discover these laws. The basis of this disagreement is the debate over h*usn and qubh or good and evil or right and wrong.

The basic question was whether an act recognised by reason as good or right in itself became binding on the subject? Was he to act upon it even in the absence of revelation or prior to it? The Ash’arites maintained that even if reason could identify such an act there was no obligation to obey it or act according to it, the sole criterion for right and wrong being revelation. An extreme view of the Mu’tazilah appears to be that the laws of Allah must conform with reason, in fact, some of them appear to have gone so far as to say that it is binding upon Allah to lay down laws that conformed with reason. This was objected to by many as it amounted to restricting the attributes of Allah.\(^\text{11}\)

The essential point in all this is whether reason can be used as a source of law for those things on which the shari’ah is silent? In other words, if something is not expressly prohibited or commanded by the Qur’an and the Sunnah, can the law for such a thing be discovered through reason? The answer of the majority appears to be a clear “No!”

This, however, does not mean that reason has no part to play in the discovery of laws in Islam. The requirement is that all reason and reasoning must proceed from the principles in the Qur’an and the Sunnah. The process is the same in many other legal systems and judges are required to apply the general principles of law rather than those of natural law. The fundamental position of Muslim jurists is that there is no such thing as natural law outside the realm of the shari’ah on which we can rely as soon as we discover that a rule of law is not directly discoverable from the texts. Such a rule, they insist, needs to be discovered directly or indirectly from the principles of Islamic law, and not from some “ominous brooding in the sky.”\(^\text{12}\)

In the few issues discussed above, we have tried to examine some factors that can intrude upon the concept that the hukm belongs to Allah alone. This is a very important, interesting, and fertile area. Many conceptions of, and misconceptions about, Islamic law can be cleared up if they are discussed in the light of this concept. The conclusion we may draw is that a hukm or a rule of law in an Islamic state is only that injunction that has either been directly stated in the texts of the Qur’an or the Sunnah or in

\(^{11}\) See Şadr al-Shari’ah, al-Tawdīh, vol. 1, 345-47.

\(^{12}\) A phrase used by Oliver Wendell Holmes for natural law.
which the intention of the Lawgiver has been ascertained and verified through methods accepted as valid in Islamic law.
Chapter 7

The Act (Maḥkūm Fīh)

The ḥukm sharʿī, as stated earlier, has three elements, which interact with each other to give rise to liability and to the obligation to obey the law. The three elements of the ḥukm or a rule of law in the Islamic legal system are: the Lawgiver (Ḥākim); the act to which the ḥukm is related (maḥkūm fīh, also referred to as maḥkūm bih); and the subject who performs the act (maḥkūm ‘alayh), that is, the person who is under an obligation to obey the law. The first element has already been discussed. In this chapter, the second element will be examined briefly.

The maḥkūm fīh is the act to which the ḥukm is related. The act is always the act of the subject if the communication from Allāh is related to this act by way of taklīf, that is, when it creates an obligation. If the communication (khitāb) is related to an act by way of declaration, that is, through a secondary rule, the act may or may not be the act of the subject.1 For example, when there is a command to pay the zakāt, the obligation it creates is linked to the act of the subject. On the other hand, when there is a command to fix the minimum niṣāb for zakāt, there is an obligation to obey a secondary rule (ḥukm waḍ’ī), which is in the nature of a declaration supporting the imposition of zakāt.

Muslim jurists discuss the maḥkūm fīh from two aspects: the conditions of taklīf and the nature of the act.

7.1. The Conditions for the Creation of Obligation (Taklīf)

The jurists mention a number of conditions for the existence of obligation (taklīf). A person acquires an obligation, and is placed under some kind of duty, when all these conditions are met. A few of the important conditions are noted here.²

7.1.1. The act to be performed or avoided must be known

The first condition for the creation of an obligation is that the subject must be asked to perform a known act. There is no obligation to perform an unknown or uncertain act. The reason is that the subject has to conceive the act in his mind and usually formulate an intention for its performance. There is a tradition to the effect that the performance of acts is determined by the nature of the intention (Verily! The (nature) of acts is determined by intentions). The knowledge of the subject about the act here implies either actual knowledge or at least potential knowledge, that is, he should either be aware of the nature of the act or be in a position to find out about it either directly or indirectly. For knowledge about the nature of the act, the existence of the subject within the Islamic territory (dār al-Islām) is considered sufficient. Thus, the rule within the dār al-Islām is the same as that in law: “ignorance of law is no excuse even in a layman.” Islamic law, however, makes an exception in the cases of shubhah fī al-dalīl (doubt in the case of conflicting evidences).³ These are equivalent to mistake of law and mistake of fact in the positive law.

There is a disagreement among the Hanafīs and the Shāfīʿīs about the presence of the subject within the dār al-Islām for acquiring a legal obligation. It rests on whether the world is one with respect to the ahkām of Allah or is divided into two worlds, that is, obligation exists where the Islamic state has jurisdiction.⁴

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² For a systematic exposition of the conditions of obligation, see AlGhazālī, al-Mustaṣfā, vol. 1, 53-54.
⁴ See al-Dabūsī, Taṣīs al-Naẓar, 67.
7.1.2. The subject should be able to perform the act

The second condition is that the act should be such that it can be performed by the subject; it should not be an impossible act. The purpose of creating an obligation is to command the obedience of the subject. If the subject is not able to perform the act, the creation of the obligation becomes futile. This condition is split up into two sub-conditions: 1) there is no obligation to perform an impossible act; and 2) the performance of the act should be dependent on the will of the subject.

The former case is obvious. The latter includes such acts that involve the subject’s inner emotions over which he may have little control. Thus, the tradition that requires the subject not to feel angry is not in the nature of an absolute command creating a binding obligation. It is more in the nature of a recommendation or an advice. The same would apply to a father loving some of his children more than the others, though he is not permitted to let this love interfere with his other legal obligations towards his children whom he is supposed to treat equally.

Further, the ability to perform the act may be relative to the nature of the act. What, then, about acts in which hardship is excessive? The answer depends upon the act itself. For example, hardship involved during a journey while fasting is more than normal, and here the Lawgiver has provided relief. In other cases, where the act relates to a communal or collective obligation and has to be met by some persons and not everyone, the act must be performed even with the accompanying hardship, as in the case of jihad. There are cases where the subject invokes the hardship himself, because of his eagerness to please the Lawgiver or for some other reason. Consider the case of the person who used to stand constantly under the sun while fasting. He was ordered to stay in the shade and to sit down to complete his fast. There were several other incidents like this during the period of the Prophet (p.b.u.h.).

7.2. The Nature of the Act (Maḥkūm Fīḥ)

The structure of Islamic law, its classification, and the consequential obligations and duties, revolve around a set of rights. The classification of laws in Islam can generally be gleaned from the writings of Ḥanafi jurists.

5 AlGhazālī, al-Mustasfā, vol. 1, 53-54.
Each act affected by an obligation creating rule (ḥukm taklīfī) is based on a right. There are three kinds of basic rights in Islamic law: the right of Allah, the right of the individual, and the rights of the individuals collectively or the right of the state. The third category of rights is mentioned rarely by jurists, because it relates to the area of law with which they did not deal directly. This is the area left to the ruler (imām). This kind of right is sometimes designated as the right of the ruler (ḥaqq al-sultān)\(^6\) or as the right of the state (ḥaqq al-saltanah).\(^7\) Modern writers consider the right of Allah and the right of the state or that of the saltanah to be the same thing, because both are related to social interests. A thorough analysis of the Islamic legal system shows, however, that the right of Allah is distinct and independent of the right of the state. This is of crucial significance in understanding the structure of Islamic law. In fact, when we use the term ḥuqūq al-‘ibād in the plural we may mean the rights of individuals generally, or we may mean the collective rights of the individuals, that is, the rights of the community as a whole. In this latter sense, that is, the rights of the community, the implication should be the same as the rights of the state or saltanah. Again, the rights of the state should not be merged with the rights of Allah.

Once this has been understood, we may say that sometimes the right of Allah may coexist with the right of the individual. In these cases, it is either the right of Allah that is predominant or it is the right of the individual that is at the forefront. This gives rise, in all, to the following kinds of rights:

1. The right of Allah (ḥaqq Allah—حَقّ الله).
2. The right of the individual (ḥaqq al-‘abd—حَقّ العبد).
3. The right of Allah lying side by side with the right of the individual. These are of two types:
   (a) Those in which the right of Allah is predominant.
   (b) Those in which the right of the individual is predominant.
4. The collective rights of the individuals or of the community, also referred to as ḥaqq al-saltanah or ḥaqq al-sultān.

\(^7\) See al-Mawardi, al-Aḥkām al-Saltaniyah, 237–38.
The classification of rights is of great significance in understanding the structure and operation of Islamic law. There are many practical consequences attached to these rights. It is said that where there is a right there is a corresponding duty. The Muslim jurists also deal with duties with reference to rights. The classification of laws on the basis of rights is explained below.

7.3. **Classification of the Ḥukm Taklīfī on the Basis of Rights**

The proper classification of laws was first provided by the Ḥanafi jurists including al-Sarakhsī. The majority of the jurists classified laws under the heading of mahkūm fih or the act to which the ḥukm is related. Under the heading of the ḥukm sharīʿi, they give an account of the obligations arising from the operation of the act in relation to the ḥukm. Al-Sarakhsī combined the two. It is in this combined form that the subject is approached here.

Al-Sarakhsī says that all aḥkām are divided into four kinds of rights. These are further subdivided as follows:

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8 Al-Sarakhsī, *Kitāb al-Uṣūl*. See the last chapter in vol. 2. The classification of the rules within the category of the right of the state is left by the jurists for the imām, who is theoretically a full mujtahid. The ruler may decide how the rights of the state are to be classified in accordance with his ijtihād and his times. The classification of the right of state may, therefore, vary in different ages.


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1. Rules that relate to the right of Allah alone. These are of eight kinds:

- **Pure Worship.** The first of these is belief in Allah or īmān. The second is prayer. The third is zakāh. The fourth is fasting (ṣawm). The fifth is hajj. The sixth is ḥajj. There are other acts of worship associated with the above like ‘umrā and i’tikāf (seclusion in a mosque for worship).
- **Pure punishments.** These are the ḥudūd penalties that have been instituted as deterrents, as a pure right of Allah.
- **Imperfect punishments.** The example of this type is prevention from inheritance in case of murder, that is, the murderer cannot inherit from the victim.
- **Those vacillating between a worship and a penalty.** These are the kaffārāt, that is, expiation made for different reasons.
- **Worship in which there is an element of a financial liability.** The example for this is ṣadaqat al-fitr, which is a payment made before the ‘Īd following Ramadān.
- **Financial liability in which there is an element of worship.** This is like ‘ushr, the ten percent charge levied on the produce of land.
- **Financial liability in which there is an element of a punishment.** The example given by al-Sarakhsi is that of the kharāj tax.
- **Those that exist independently.** These are three: those laid down initially as a rule; those that are imposed as an addition to a rule; and those that are associated with the initial rule. The examples of these are the khums levied on cattle, minerals, and treasure-troves.

2. Rules in which the right of Allah and the right of the individual lie side by side, but the right of Allah is predominant. These are like the the ḥadd of qadhf. It is to be noted that for the Shāfī’i jurists this is a pure right of the individual.

3. Rules in which the right of Allah and the right of the individual lie side by side, but it is the right of the individual that is predominant. For this category the example is qisās or retaliation for bodily injuries or culpable homicide amounting to murder.

4. The last category is that of rules affecting the right of the individual. This category includes almost everything that is not included in the above categories and is beyond reckoning. The important point to consider is that al-Sarakhsī does not mention ta’zīr or discretionary penalties. The reason is that
the discretionary penalties fall within the category of the right of the individuals, when these are considered collectively, that is, they are the right of the state. The Ḥanafī jurist al-Kāsānī clearly states that all taʿzīr relates to the right of the individual. The Shāfiʿī jurist al-Māwardī has caused some confusion by stating that some taʿzīr penalties fall under the right of Allah. Al-Māwardī’s statement leads to analytical inconsistencies. Some later Ḥanafi jurists have also given confusing opinions on the issue. For our purposes, we adopt the more reliable Ḥanafi view.

The classification given above pertains to obligation-creating rules and shows how each type of law is linked with a right, which is either a right of Allah, or the right of the individual, or the right of both. The most important thing to remember, however, is that each act to which a ḥukm is related must be assigned a specific right or combination of rights. Each act, therefore, must be a right of Allāh, or the right of the individual, or a combination of the two. In the classification provided by jurists, the right of the saltānah is not mentioned, because the further sub-classification of this right is left to the ruler. It should be obvious, however, that all acts related to taʿzīr offences, to taxes other than zakāt, and a host of other areas will all be affected by the right of the state, as distinct from the right of Allāh. Acts affecting the right of Allāh involve duties owed to Allāh alone, while the right of the state relates to obligations created by the state. Even the ruler or the state owes some rights to Allāh. As the causes, consequences, and conditions affecting the right of state vary with the passage of time, the fuqahā’ saw no need to issue permanent rulings for them.

7.4. Classification of Duties: Original and Substitutory

Each right has a corresponding duty. A right is secured when the subject who owes the duty brings about the required act, that is, performs the duty owed by him. Muslim jurists say that each duty has an original form (aṣl) and a substitutory form (khalaf). For example, performance of prayer is a duty that flows out

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10 Al-Kāsānī, Badā’i’ al-Ṣanā’i’, vol. 7, 65. He makes this statement while explaining how taʿzīr is proved.

11 Al-Māwardī, al-Aḥkām al-Sultāniyah, 236. This is not to say that his statement is incorrect. In fact, in the Shāfiʿī school to which he belongs, even the ḥadd of qadhf is a right of the individual. He includes other penalties within the ḥudūd, like the refusal to pay debts, and considers them the right of the individual. Ibid. 223.
of a right of Allah requiring it. The condition for its performance is ablution (wudū’') with water, which also becomes a duty as it completes a wājib. If the subject fails to perform this duty, because he cannot find water, the Lawgiver provides a substitute in the form of clean soil. In the case of qisāṣ (retaliation), it is the duty of the ruler or the state to subject the offender to qisāṣ. If this is not possible for some reason, the state has to ensure the recovery of compensation in money as a substitute (badal sulh or diyah).

Some writers, following Abdur Rahim, have called this a classification of rights: original and substitutary rights. This is possible, because where there is a right there is a duty. It is suggested, however, that it is better to focus on performance and duties, otherwise some confusion may be created. This can be seen from the example of retaliation above. Qisāṣ is claimed by the state as a mixed right of Allah and the individual (the heirs of the victim). When qisāṣ is not possible monetary compensation is substituted. Is the right of Allah replaced by the right of the individual here during substitution? The question is answered when we think in terms of duties. Thus, when we speak of original and substitutary rights, we may not be speaking of the original claimants of these rights.

The rule for substitutary duties is that they cannot be performed unless the original duty has been created and cannot possibly be performed.

7.5. Human Rights and Other Classifications

It is possible to classify rights in other ways in Islamic law. One such classification can be seen in the public and private interests into which the maqāṣid al-sharī‘ah or the purposes of Islamic law are divided. It is from this classification that human rights recognised by Islamic law are also derived. The division into public and private interests is discussed briefly under the topic of maṣlaḥah in the next part of this book.

The question has to be answered is whether Islamic law recognises certain natural rights or whether it looks at rights granted by the sharī‘ah alone. These two types of rights would be different from the rights granted and taken away by the state. In fact, the state it appears has a limited role to play in the granting of rights. This means that if the rights are given by the sharī‘ah, they can only be taken away by the sharī‘ah. In such a case, the rights will exist whether or not they are stated in the constitution of a Muslim state. The courts will have to enforce these rights under all circumstances and no emergency can
justify the suspension of such rights. Yet, more research is needed to develop the theory of these rights.
Chapter 8

The Subject (Maḥkūm ʿAlayh)

The subject or the maḥkūm ʿalayh forms the third element of the ḥukm sharʿī. He is the person whose act invokes a ḥukm, or a ḥukm requires him to act in a prescribed manner. In legal parlance, he is known as the mukallaf (subject). A mukallaf is a person who possesses legal capacity, whether he acts directly or through delegation of authority.

The first requirement for legal capacity is the ability to understand the communication that creates the obligation.¹ In addition to this, there are a number of other conditions that must be fulfilled before the law can operate against or for a person. These conditions are all related to legal capacity, known as ahliyāh in juristic terminology. This topic is important for understanding Islamic law generally, but it has special significance for criminal law and the law of contract. All the general defences, for example, under criminal law are covered under this topic. Further, possession of contractual capacity is an essential element of each contract.

¹ This does not mean understanding the texts directly.
8.1. *Ahlīyah* or Legal Capacity

The literal meaning of the word *ahlīyah* (أهلية) is absolute fitness or ability.\(^2\) *Ahlīyah* is “the ability or fitness to acquire rights and exercise them and to accept duties and perform them.”\(^3\) This meaning indicates two types of capacity: one based on the acceptance or acquisition of rights and the other on the performance of duties. These are called *ahlīyat al-wujūb* and *ahlīyat al-ādā’* or the capacity for acquisition (of rights) and the capacity for execution or performance of duties.\(^4\) Capacity for acquisition enables a person to acquire both rights and obligations, while capacity for execution gives him the ability to exercise such rights and perform his duties.

In the opinion of some jurists, the term *dhimmah* also means the ability to acquire rights and obligations. The majority of the jurists consider *dhimmah* to be an imaginary container or receptacle that holds both the capacity for acquisition and the capacity for execution. It is the location or place of residence for the two kinds of capacity. In short, *dhimmah* is the balance-sheet of a person showing his assets and liabilities, in terms of his rights and obligations.

In Islamic law, *dhimmah* is deemed a requisite condition for the existence of *ahlīyah*. According to al-Sarakhsī, *dhimmah* is the “trust” that was offered to the mountains, but they refused; Man accepted it.\(^5\) Thus, *dhimmah* is an attribute conferred by the Lawgiver. It is a trust resulting from a covenant (*ahd*).\(^6\) The fact that *dhimmah* is a covenant between the Lawgiver and the ‘*abd* (subject) means that *dhimmah* can be assigned to a natural person alone. In Western law, the term *dhimmah* conforms with “personality,” which is an attribute conferred on a natural person.\(^7\)

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\(^7\) For a detailed discussion of this issue, see Imran Ahsan Khan Nyazee, *Islamic Law of Business Organization: Corporations* (Islamabad: International Institute of Islamic Thought and Islamic Research Institute, 1997). ‘Abd al-‘Azīz al-Bukhārī
8.2. The Underlying Bases of Legal Capacity

Legal capacity, as stated, is of two types: ahlīyat al-wujūb and ahlīyat al-adā’. Aḥlīyat al-wujūb is defined as the ability of a human being to acquire rights and obligations.\(^8\) It may, therefore, be referred to as the capacity for acquisition.

Manāṭ is a thing from which another thing is suspended. The manāṭ or basis for the existence of the capacity for acquisition is the attribute of being a human or natural person (insānīyah).\(^9\) There is complete agreement among jurists that this form of capacity is possessed by each human being irrespective of his being a mukallaf.

Capacity for execution, on the other hand, is defined as the “capability of a human being to issue statements and perform acts to which the Lawgiver has assigned certain legal effects.”\(^10\) The manāṭ or basis of the capacity for execution is ʿaqīl (intellect) and (rushd) discretion. ʿAql here implies the full development of the mental faculty. As there is no definitive method for checking whether this faculty is fully developed, the Lawgiver has associated it with bulūgh or puberty. Thus, the presumption is that a pubescent person is assumed to possess ʿaqīl necessary for the existence of the capacity for execution. This presumption, however, is rebuttable, and if it is proved that though a person has attained puberty, he does not yet possess ʿaqīl, capacity for execution cannot be assigned to such a person. This is the view of the majority of the jurists.

The Ḥanafīs acknowledge a deficient capacity for execution for purposes of some transactions for a person who has attained a degree of discretion, even if his mental faculties are not yet fully developed. Thus, a minor (ṣabī) who possesses discretion may be assigned such a capacity, for the khitāb of muʿāmalāt.\(^11\) Again, there is no way here of determining whether the minor has attained discretion. The Ḥanafī jurists have, therefore, fixed the minimum age of seven years for assigning such a capacity; anyone over seven

\(^8\) “It is the capacity to follow the obligation (wujūb) in a hukm.” ‘Abd al-ʿAzīz al-Bukhārī, Kashf al-Asrār, vol. 4, 336. It follows that dhimmah is a restricted form of legal personality granted to the dhimmī.


\(^11\) See the next paragraph for its meaning.
years of age who has not yet attained puberty may be assigned such a capacity.

Accordingly, this type of capacity is divided into three kinds on the basis of the type of liability associated with an act:

1. **Capacity for the khitāb jināʾī** or legal capacity for criminal liability. It is based on the ability to comprehend the khitāb jināʾī, ie, the communication pertaining to criminal acts.

2. **Capacity for the khitāb of ‘ibādāt** or legal capacity for ‘ibādāt. It is based on the ability to understand the khitāb of ‘ibādāt, ie, the communication from the Lawgiver pertaining to acts of worship.

3. **Capacity for the khitāb of muʿāmalāt** or legal capacity for transactions. It is based on the ability to understand the khitāb of muʿāmalāt, ie, the communication from the Lawgiver pertaining to the muʿāmalāt.

Two of these are civil and criminal liability, while the third is an addition because of religious law. The reason for separating the capacity for execution into these three types is to indicate that a person may, for example, be in possession of the capacity for transactions, but not the capacity for punishments. To put it differently, all three kinds of capacity may be found in the person who is sane and a major, but one or more of these may be lacking in other persons.

### 8.3. Complete Capacity

Muslim jurists divide legal capacity into three types: complete, deficient and imperfect. The terms kāmilah, nāqisah and qāṣirah are used to distinguish between such capacities.\(^{12}\)

**Complete capacity** for acquisition is found in a human being after his birth. This makes him eligible for the acquisition of all kinds of rights and obligations. Complete capacity for execution is established for a human being when he or she attains full mental development, and acquires the ability to discriminate. This stage is associated with the external standard of puberty. The physical signs indicating the attainment of


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puberty are the commencement of ejaculation in a male and menstruation in a female. In the absence of these signs, puberty is presumed at the age of fifteen in both males and females according to the majority of the jurists, and at the age of eighteen for males and seventeen for females according to Abū Ḥanīfah.

Attaining bulūgh (puberty) alone is not sufficient, however. For a person to acquire complete capacity for execution, in addition to puberty, the possession of rushd (discrimination; maturity of actions) is stipulated as well. The dalīl, or legal evidence, for this is the verse of the Qur’ān:

Make trial of orphans until they reach the age of marriage; then if ye find sound judgement in them, release their property to them; but consume it not wastefully, nor in haste against their growing up.

[Qur’ān 4:6]

This verse lays down clearly that there are two conditions that must be fulfilled before the wealth of orphans can be handed over to them. These are bulūgh al-nikāḥ and rushd.

The term rushd, according to the majority, signifies the handling of financial matters in accordance with the dictates of reason. The rashīd is a person who can identify avenues of profit as well as loss, and act accordingly to preserve his wealth. Rushd is the opposite of safah (foolishness), which implies waste and prodigality. Shāfi’ī jurists define rushd as maturity of actions in matters of finance as well as of dīn. In their view, a person who has attained puberty and is adept in dealing with financial matters cannot be called rashīd, unless he obeys the aḥkām of the sharī‘ah in matters of ‘ibādāt as well.

A person, then, is eligible for taking over his wealth if he is both a balīgh and a rashīd. This is the general view. Abū Ḥanīfah, however, maintains that a person who attains the age of twenty-five years, must be delivered his property irrespective of his attaining rushd. In addition to this, he maintains that if a person attains bulūgh and rushd and is given his property, but subsequently loses his rushd, while yet under twenty-five, he cannot be subjected to interdiction (ḥajr). Abū Ḥanīfah appears to be giving preference to life and freedom of the individual over his wealth in these cases.13 The majority of the jurists (jumhūr) subject a person to interdiction if he has not attained rushd or even when he loses it subsequently, irrespective of his age.

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13 This view appears to be in line with the priorities determined within the maqāsid al-sharī‘ah.
On attaining complete capacity, an individual comes within the purview of the different kinds of *khiṭāb*. He, therefore, becomes liable to punishments because of the *khiṭāb jina’ī* being directed towards him, just as he becomes liable because of the *khiṭāb* of transactions and *ibādāt*.

8.3.1. The stages leading to complete legal capacity

The conditions laid down by the Ḥanafī jurists indicate that there are three stages through which an individual passes with respect to his capacity for execution.

1. The first stage is from birth till the attainment of partial discretion, which is considered to be the age of seven years. During this period, the child is assumed to lack ‘*aql* and discretion completely, and is ineligible for the assignment of a capacity for execution.
2. The second stage commences from the age of seven and continues up to actual puberty or the legal age of puberty, whichever is earlier. Deficient capacity for execution is normally assigned during this stage, as the individual possesses a certain amount of ‘*aql* and discretion.
3. The final stage commences from actual physical puberty or the legal age determined for it, whichever is earlier. On reaching this age the individual is assigned complete capacity for execution, and becomes eligible for each kind of *khiṭāb*. An exception arises in the case of *safah* and the individual may be placed under interdiction for some time. *Rushd* (discretion) is a condition for attaining this stage, in addition to puberty.

8.4. Deficient and Imperfect Capacity

Deficient capacity is assigned in cases where the *manāt* or basis of legal capacity is not fully developed. Thus, a person may not have been born as yet or he may not have reached full mental development. In other cases, the attribute of being a human may be missing altogether.

 Imperfect capacity is assigned in cases where the bases of capacity, being a human and possession of discretion, are present, but an external attribute has been introduced that does not permit the recognition of the legal validity of certain acts.
Deficient and imperfect capacity is understood through the study of different cases falling under each. A brief look at these cases follows.

8.4.1. Cases of deficient legal capacity

8.4.1.1. The unborn child (janīn)

Deficient or incomplete capacity is established for an unborn child or the foetus (janīn). Deficient capacity implies that only some rights are established for the janīn and no obligations are imposed on it. The reason is that the janīn is considered part of the mother in some respects. Thus, it is set free with the mother and is also sold as a part of her (in the case of the umm al-walad). An independent personality is, therefore, not assigned to it.

In other respects, the janīn enjoys a separate life and is preparing for separation from the womb. Its personality is, therefore, considered deficient or incomplete. By virtue of this deficient capacity, the janīn acquires certain rights: freedom from slavery, inheritance, bequest, and parentage. On the other hand, the janīn cannot be made liable for the satisfaction of rights owed to others. A purchase made by the would-be wali (guardian) on behalf of the janīn cannot make the janīn liable for the payment of the price. Likewise, the maintenance of close relatives and the membership of the ‘āqilah cannot be enforced against the janīn. Once the child is born, these rights can be enforced against it, but not when the obligations were acquired during the gestation period.

8.4.1.2. Capacity of a dead person

A deficient capacity for acquisition is also assigned to a dead man or to a corpse. Thus, amounts due on account of debts, bequest, and funeral expenses are taken from the wealth of the dead man. For example, if a person had thrown a net into the water immediately before his death, the fish caught in the net after the person’s death belong to him. Likewise, if he had dug a pit before his death with the intention of trapping someone in it, then the diyah due as a result of someone falling in it is to be recovered from such a person’s wealth. Further, any compensation due for property destroyed by acts commencing before his

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death shall be recovered from his property. As in English law, the estate of the deceased is not assigned legal personality. The Roman law and the French law do assign a personality to the estate.\textsuperscript{15}

8.4.1.3. Capacity of a fictitious person.

Modern Muslim writers being faced with the need to acknowledge the existence of a fictitious personality, as it forms the basis of the present socio-legal structure, have claimed that such a concept does exist in Islamic law. They rely for this on instances like \textit{waqf}, \textit{bayt al-māl}, and the estate of the deceased. These assertions seem to be misplaced. Islamic law as expounded by the jurists does not acknowledge the concept of a fictitious person.\textsuperscript{16} It will be found to clash with the provisions of this law, whether the area is that of contracts, \textit{hudūd}, or constitutional law. In other words, the idea of a fictitious person is incompatible with Islamic law as expounded by the jurists.

This does not mean that the jurists were not aware of the concept. They were aware of it, but did not acknowledge it for Islamic law. The main reason appears to be that \textit{dhimmah} is an \textit{ahd} (covenant) with the Lawgiver, and a fictitious person cannot be expected to enter into such a covenant \textbf{primarily because it cannot perform religious duties}. In other words, the law derived by the jurists does not need this concept and will reject it. Nevertheless, the modern world is organised around the concept of the corporation or the fictitious personality. Modern scholars will, therefore, have to work hard to accommodate this concept into the fold of Islamic law. This means that adjustments will have to be made in the law wherever this concept clashes with it. The fictitious person may be deemed to have deficient capacity that is not fit for the performance of religious duties, like the payment of zakāt.

It is important to note that justifying the legal validity of a fictitious legal personality under Islamic law may not be very difficult if the general principles of this law are applied. It is what comes after such justification that is important. Take the case of the state. When we admit the state as a person within Islamic law a number of traditional concepts prevalent within Islamic constitutional law appear to need alteration. For instance, the state owns all the land within its territory. The stipulations regarding revival

\textsuperscript{15}See Salmond, \textit{Jurisprudence}, 351.

\textsuperscript{16}This issue has been discussed at great length in the author’s \textit{Islamic Law of Business Organization: Corporations}. We, therefore, do not feel the need to go into the details here.
of barren land (ṣlb ḥyā’ al-mawāt) become meaningless, because the primary condition is that only that land can be revived that is not owned by anyone. Here all the land is owned by the state as a person, and this excludes the possibility of any revival. Yes, the state may grant land to landless peasants, but that is not the issue here; here we are talking about the clash of concepts. Further, Islamic law contemplates a personal relationship between the head of the state or the chief executive and between the members of the community, that is, the relationship is governed by contract of wakālah (agency) where the head of state is an agent of the citizens. When the state intervenes, these relationships are altered. In the case of corporations, when the juristic person steps in, the traditional concepts of sharīkah lose their significance. In short, what we mean is that accepting this concept is not a question of saying “yes” or “no,” a number of changes will have to be made to the existing Islamic law of contract, changes that may wreck its whole structure and violate the fundamental principles upon which it is based.

8.4.1.4. Capacity of the minor (ṣabī)

A child possesses a complete capacity for acquisition of rights and obligations, but until he attains the age of actual or legal puberty, he lacks the capacity for execution. To facilitate matters, this child is made liable by the sharī’ah only for those obligations that he can meet.

Deficient capacity for execution is assigned to a non-pubescent who possesses some discretion, or to a ma’tūḥ who has attained puberty yet lacks complete mental development.

The person who possesses deficient capacity is not subject to the khīṭāb jīnā’ī; he cannot, therefore, be held criminally liable. The minor, however, is subjected to ta’dīb (discipline)—the reason being that the khīṭāb jīnā’ī is applicable to that person alone who comprehends the khīṭāb fully. This is based on the principle of legality in Islamic law.

With respect to the ‘ibādāt, there are detailed discussions whether the khīṭāb is addressed to the ṣabī and ma’tūḥ by way of nadīb (recommendation) or khīyūr (choice), or whether it is addressed to them at all. There is no dispute that there is reward (thawāb) for such a person for the performance of the ‘ibādāt.

The Ḥanafīs treat the issue of legal capacity of the minor in a somewhat different way. Our major concern here is for the capacity of such a person for the purpose of transactions.

1. Financial transactions are established against the dhimmah of the ṣabī. Though he cannot meet them
personally due to the absence of the capacity for execution, the Lawgiver allows his \textit{wali} (guardian) to stand in his place and represent him through a substitutory duty. The \textit{sabī} is also liable for any damage caused to another’s property, and for the maintenance of his wives and near relatives. He is also liable, except in the opinion of the Hānāfī school, for the payment of \textit{zakāt}. All financial transactions are divided into three types for determining the liability of the discriminating minor.\footnote{Al-Sarakhsī, \textit{Uṣūl}, vol. 2, 335; Şadr al-Sharī‘ah, \textit{al-Tawdīh}, vol. 2, 762.}

(a) **Purely beneficial transactions.** The transactions falling under this category are the acceptance of a gift or of \textit{sadaqah}. These are allowed to the person who has not attained puberty, but who can discriminate and has been permitted by his \textit{wali} (guardian) to exercise such acceptance.

(b) **Purely harmful transactions.** The granting of divorce, manumission (‘\textit{itq}’), charity (\textit{sadaqah}), loan (\textit{qard}),\footnote{Şadr al-Sharī‘ah states that a \textit{qard} may be given to a \textit{qādi} in his official capacity. Şadr al-Sharī‘ah, \textit{al-Tawdīh}, vol. 2, 757. This may be interpreted to mean that a minor’s wealth may be invested in government securities. The reason why a \textit{qard} is considered a financial loss is because the minor will be deprived of the benefit of its use during the loan period. In \textit{qard} \textit{hasan} this use is gifted to the beneficiary, and gift by a minor is not valid.} and gift (\textit{hibah}), as well as the making of a trust (\textit{waqf}) and bequest (\textit{waṣīyah}) are considered transactions resulting in pure financial loss. These are not permitted to the \textit{sabī mumayyīz} (discriminating minor).

(c) **Transactions vacillating between profit and loss.** Sale, hire, partnership, and other such transactions are considered valid if ratified by the \textit{wali}.

2. Criminal liability does not exist in the case of a person who has not attained puberty, because he is not a \textit{mukallaf}, and the \textit{wali} cannot stand in his place for criminal offences: punishments being deterrents for the offender himself and not for those who represent them. This, however, holds true as far as \textit{ḥudūd} and \textit{qiṣāṣ} penalties are concerned; a child over seven may be liable to some suitable form of \textit{ta’dīb}. Yet, this may not be interpreted to mean that a minor can be awarded penalties other than the \textit{ḥudūd} if he is over seven, as is done in the law.

3. The \textit{‘ibaḍāt} are not obligatory on the \textit{sabī}, as he does not possess the capacity for execution.
The deficient capacity granted to the discriminating minor by the Ḥanafīs is also granted to the maʿṭūḥ. The majority of the jurists (jumhūr) oppose the Ḥanafīs and refuse to acknowledge any kind of capacity for the discriminating minor. They maintain that the communication (khiṭāb) is not directed toward such a minor at all, and it is of no consequence whether the transactions are beneficial or harmful. In practice, however, we find young boys minding stores on behalf of their fathers, and often handling the transactions exceptionally well.

8.4.2. Cases of Imperfect Capacity

Capacity for acquisition may be perfect or imperfect. Imperfect capacity is attributed to women and slaves.

8.4.2.1. Legal Capacity of a Woman

A woman is said to possess imperfect legal capacity. Those who hold this view deny her the right to be the head of state, the right to be a qāḍī (judge), and the right to testify in cases being tried under hudūd and ḥudūd provisions. In addition to this, she does not have the right to divorce, like the right given to a man, she is given a share in inheritance that is equal to half the share of male heirs, and the diyaḥ paid in compensation of her death is half that of a man. These provisions have led certain Orientalists, like Joseph Schacht, to observe that in Islamic law “a woman is half a man.” Women who are struggling for the emancipation of women and the acceptance of their rights in Muslim countries have objected seriously to such a status granted to them. Demanding equality with men, they maintain that the status of women should be the same as that of men, by which they mean that their legal capacity should not be considered imperfect or deficient in any way. The purpose here is not to argue from one side or the other, but to identify the legal issues involved. Reasons or solutions will become obvious once these issues are grasped.

8.4.2.1.1. Evidence of women. The most important issue appears to be that of the evidence of women. This is split into two sub-issues. The first is whether the evidence of women is excluded by the texts of the Qurʾān and Sunnah in cases of hudūd? The usual answer given in reply is that the evidence of women is excluded in such cases on the basis of the Sunnah, which is also a source of law. These are cases involving the right of Allāh. The approach to this issue is that somehow women have been deprived of a right.

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This is incorrect. Evidence in these cases, and in others too, is a duty and not a right. Women have been spared the burden of this duty. The purpose is to waive the penalty of hadd, which is usually an extreme punishment, and to show mercy to the accused in an indirect way. This, perhaps, is the intention of the Lawgiver. Related to this is a misconception that the offence of rape cannot be proved and punished with the evidence of one woman. It is true that hadd cannot be awarded upon the testimony of one woman, but that does not mean that no other penalty can be awarded to the rapist on the basis of such testimony. The ruler or the state has wide powers under the doctrine of siyāsah to award an equally stiff penalty. The Federal Shariat Court of Pakistan has ruled that this will be possible.\footnote{Rashida Patel v Federation of Pakistan, PLD 1989 FSC 89.}

The second sub-issue is about the evidence of two women being equal to that of one man. This requirement is derived from a verse of the Qur’ān, and is supported by the Sunnah. The details of this problem cannot be discussed here. It is suggested, however, that the scholars of this age may try to interpret the relevant verse of the Qur’ān as implying a recommendation rather than an obligation. It should be remembered again that rendering testimony is primarily a duty and not a right, though it leads to the protection of rights.

8.4.2.1.2. A woman’s share in inheritance. The next issue is whether it is justified in the present times to give a woman half the share of a man. The answer is that the Qur’ān has laid down the law on this in explicit terms. The justification provided by scholars is that the Islamic legal system places a much greater financial burden on the male in terms of maintenance of his family and near ones. Such a burden has not been placed on a woman. Further, a woman is paid dower upon her marriage by the husband. This increases the financial liability for males. The argument from the other side may be that Islamic law, like any comprehensive legal system, especially one that is a complete code of life, is to be applied as a whole, in toto, not in pieces. In such a situation, is it possible for a woman who is left all alone to go to a court of law and enforcing her rights ask her brother, uncle, or cousin to support her? It is obvious that many such rights that the law provides her may not be enforceable today.
8.4.2.1.3. **Right to divorce.** As to the question of a woman not having a right to divorce the husband, the jurists unanimously agree that such a right has not been granted to her directly. There are, however, provisions in the law like *tafwîd*, *takhyîr* and *ta'mîlîk* through which she may be granted such a right at the time of the marriage contract, if she so desires. Perhaps, the rulers exercising their *siyâsah* jurisdiction may make this provision mandatory.

8.4.2.1.4. **Diyah.** In the case of *diyâh*, the majority of the jurists hold that the *diyāh* of a woman is half that of a man. This view is based on some traditions and a number of reports from the Companions. Taking into account the number of reports from the Companions, some of the jurists consider it to be a case of *ijmâ‘* (consensus of opinion). There are a few jurists, however, like Ibn ‘Ullayyah and Abū Bakr al-Asamm who maintain that the *diyāh* of a male is equal to that of a female. They base their opinion upon the generality of a tradition from the Prophet reported by ʿAmr ibn Ḥâzm: “For a believing person (نفس مؤمنة) a hundred camels.” The generality of this tradition treats men and women equally. Few will disagree with the statement that women are working today and are equally efficient working members of the society. In fact, some of them may be earning more than men. In this issue, it is not the right of a woman that is involved, because the right to *diyāh* belongs to the heirs, but it is a question of her status. The new law of *qiṣâṣ* and *diyāh* in Pakistan, therefore, makes no distinction between a male and female for purposes of *diyāh*.

8.4.2.1.5. **Judicial office and being head of state.** According to the jurists, the reason why a woman cannot become a *qâdî* or judge is linked to the question of evidence. A *qâdî* can only hear cases in which he or she can also be an eligible witness. This is a qualification for the *qâdî*. As a woman cannot be a witness in cases of *ḥadd*, she cannot be a *qâdî* for hearing the cases and passing sentence. The question of being a head of state depends on the same reasoning. The primary duty of a head of state is the implementation of *ḥudûd* (*iqāmat al-ḥudûd*), which again requires the qualification of a witness for such cases. A woman is, therefore, considered ineligible for the job. In Pakistan, women judges today are deciding cases under the *ḥudûd* laws.
8.4.2.2. Slaves

The slave does not possess the right of ownership, but he does have a capacity for acquiring obligations pertaining to ‘ibādāt, and for criminal offences.\(^{20}\)

\(^{20}\)Some might observe that slavery no longer exists, so why do we have to study examples that mention slaves? The answer is that a number of legal principles explained by the jurists may fall under this topic. To understand these principles, the discussions of issues related to slavery are sometimes unavoidable. Some of these issues may pertain to human rights.
Chapter 9

Causes of Defective Legal Capacity

The causes affecting capacity are found in those factors that prevent *capacity for acquisition* and *capacity for execution* from taking full effect. The existence of these factors may result in the total absence of capacity or in deficient or incomplete capacity. For purposes of the present discussion, we may refer to all such forms as defective capacity.

The *manāṭ* (legal basis) for the capacity for acquisition, as we have said, is being a natural person (*insānīyah*), and it is death alone that can cause a change in this kind of capacity. We have seen, however, that under certain circumstances a corpse may have such a capacity. *Reason* (*‘aql*) and *discretion* (*rushd*), on the other hand, are the bases for the capacity for execution, and each factor that has the power to influence and affect the normal functioning of the human mind can become a cause for defective capacity.

It is pertinent to note that many of the causes of defective capacity mentioned here will appear to the reader to be the same as the general defences in criminal law, or as other grounds for waiver of liability in civil or ritual matters.

The jurists divide the causes of defective capacity into two kinds: natural causes (*samāwīyah*) and acquired causes (*muktasabah*). We may designate these as natural and acquired causes. Some of these causes have already been explained in the previous chapter, while discussing deficient and imperfect capacities of various persons: women, slaves, *janīn* (foetus), corpse, and fictitious persons. Some of these will not be repeated here, but can be classified under natural or acquired causes.
9.1. Natural causes of defective capacity

These are causes that are beyond the control of the subject (mukallaf), and result from an act of the Lawgiver and Creator. Under this heading, the jurists list ten causes: şighar (minority); jünün (insanity); ‘atāh (idiocy); nisyān (forgetfulness); nawm (sleep); ighmā‘ (unconsciousness; fainting); rīqq (slavery); marād (illness); ḥayd (menstruation); nīfās (puerperium; post-natal state of woman); and mawt (death). We shall discuss a few of these here, the rest are either obvious or have a greater bearing on ‘ibādāt.

9.1.1. Minority (şighar)

It is the state or condition of a human being after birth and before puberty. This, in fact, is not a cause of defective capacity or even an obstacle in its way, but a necessary stage in the growth of the human being. It is considered as a cause for noting its effect upon capacity or ahlīyah.

- Minority does not affect capacity for acquisition or ahlīyat al-wujūb. All rights and obligations are acquired as their establishment requires merely a dhimmah and the manāt (being a natural person), which is the basis for the capacity for acquisition. Minority does not oppose this manāt. The jurists, therefore, maintain that the minor is liable for compensation of property destroyed by him, for goods and services bought, for maintenance of relatives, and also for zakāt according to some.

- Capacity for execution or ahlīyat al-adā‘ requires ‘aql (reason) for its fulfilment, and this the non-discriminating minor (şābī ghayr mumayyiz) lacks, because he does not understand the khitāb. He is, therefore, not liable for the ‘ibādāt, for financial transactions, or for punishments. The Ḥanafīs make an exception in the case of the şābī mumayyiz or one who has attained some discretion. The ‘ibādāt of such a minor are rewarded in the Hereafter, and it is a matter of controversy whether the khitāb of tārghīb or recommendation is addressed to him. He is not liable for punishments, but financial transactions undertaken by him are valid in certain cases. Transactions that are purely harmful for such a minor, like donating his property, have no legal effect. Transactions that are purely beneficial or those that are evenly balanced between profit and loss are allowed, with the prior permission of the guardian or his subsequent ratification. The position of the şābī mumayyiz may be compared with the contract for necessaries by a minor under sections 11 and 68 of the Pakistan Contract Act.
The freedom allowed to the ūrabī mumayyiz by the Ḥanafīs is much wider than that under the law. In other countries, the contracts of a minor may be considered valid with an option for the minor to rescind the contract and return the property.

9.1.2. Insanity (junūn)

Junūn has no effect on ahlīyat al-wujūb, because rights and obligations are established for and against an insane person, who is deemed liable for itlāf (destruction of property), payment of diyah, and the like. The manāṭ of such a capacity is insānīyah, and the majnūn is a human being. Junūn, however, completely negates the ahlīyat al-adā’, because of lack of ‘aql. The insane person, therefore, has no liability for ‘ibādāt or punishments, and all his transactions are void.

While the fuqahā’ consider insanity as effective in negating the capacity for performance they do not describe the meaning of insanity in detail. In Pakistan, section 84 of the Pakistan Penal Code appears to follow what are called the M’Naghten Rules for insanity in England. These rules have been criticized by lawyers as well as doctors as being inadequate. A number of other tests have also been devised, like the “irresistible impulse test,” the “Durham test,” and the “American Law Institute or Model Penal Code test.” It is suggested here that Muslim scholars need to explore these issues in some depth. They may either accept the tests devised in different countries or devise some new tests. The same holds true for idiocy and death illness. Such questions must be answered on the basis of empirical evidence.

9.1.3. Idiocy (‘atah)

It is a state in which a person at times speaks like a sane and normal person, while at others he is like a madman. It is also described as a state in which a grown-up has the mind of a child. The capacity of an idiot is deemed equivalent to that of a ūrabī mumayyiz, who can be permitted by his guardian to undertake some transactions.

2 Ibid., vol. 2, 762.
9.1.4. Sleep and fits of fainting (*nawm, ighmā*)

Sleep and fits of fainting have relevance for purposes of ‘*ibādāt*, as well as for crimes and torts. They do not affect *ahlīyat al-wujūb*, because the attribute of *insānīyah* is intact. Persons in such a condition, however, do not understand the *khīṭāb*. Their capacity to understand things is temporarily affected and prevented from normal functioning. The liability for missed ‘*ibādāt* lingers against such a person and these have to be performed as *qadā*’ (delayed performance). There is no liability for punishments and transactions. If a person, while sleeping, falls on a child during sleep and kills it, there is no liability for punishment, but compensation is another matter for which there may be strict liability.

9.1.5. Forgetfulness (*nisyān*)

This is a state in which a person is not very careful about things though he has full knowledge of them, as distinguished from sleep and fits of fainting in which such knowledge is lacking. Forgetfulness does not affect *ahlīyat al-wujūb* nor does it affect the capacity for execution. The *khīṭāb*, however, becomes operative as soon as the person remembers. Transactions undertaken by such a person are valid and enforceable against him.

9.1.6. Death-illness (*marāḍ al-mawt*)

This is a condition in which the mind of a sick person is dominated by the fact that he will die because of his illness. It is of no consequence whether the person actually dies from this illness or from something else and whether the illness is in fact a terminal illness. Two conditions must be met before an illness may be declared a death-illness:

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3 Ibid., vol. 2, 763–64.
4 This means that loss of life has to be compensated anyway, irrespective of intention to harm. In traditional Islamic law, the burden in such cases is placed upon the *āqilah*, which is the tribe or group with which an individual is considered to be associated.
5 For the details see Şadr al-Sharī‘ah, *al-Tawḍīḥ*, vol. 2, 778 passim.
• The deceased person must be convinced that he is approaching death, irrespective of the nature of the disease. Diseases like common colds and headaches, however, are not taken into account for such purposes. Some jurists associate other circumstances with this state, like a person on a ship that is caught in a storm, or like a person facing a death sentence.

• Death should follow such a conviction, even if it is not caused by the feared illness.

• Some jurists stipulate a third condition here by saying that death must occur within one year of the commencement of illness, because any period above this would mean that the person is accustomed to his illness and that the fear of death is remote.

Marāḍ al-mawt (death-illness) has no affect on the capacity for acquisition or on the capacity for execution, and it is in fact a condition of taklīf, because it is the capacity to perform an act that is affected here and not the capacity to understand it.

A person suffering from such an illness is prohibited from entering into transactions that are in excess of one-third of his wealth. In other words, it takes the ḥukm of waṣīyah. This condition is stipulated to protect the rights of the heirs. The reason assigned is that the rights of the heirs get linked to the estate as soon as marāḍ al-mawt takes hold. The Lawgiver has laid down that such rights are to come into play after the death of the person, but to protect the rights of the heirs and creditors it is assumed that death has already occurred. The justification provided is that the transactions of such a person are not those of one who wishes to live, but of one who is ready to depart.

The following rights are attached to the estate of the person suffering from marāḍ al-mawt:

• Rights of creditors. The creditors have a right prior to all, even if the debts consume all the estate.

• Rights of beneficiaries. The rights of beneficiaries restrict the transactions to one-third of the estate, however, amounts in excess of one-third will be valid if permitted by the heirs.

• Rights of the heirs. These rights are linked to the estate from the time of the commencement of illness, and any transactions undertaken by the sick person will be assigned aḥkām as follows:

1. Transactions with a counter-value. If the person suffering from death-illness concludes a contract of sale with no apparent loss in it, that is, at the market value, then the creditors or the heirs
cannot have it set aside. It is to be assumed that such a sale was undertaken to fulfil his genuine needs and not with the intention to deprive his creditors or heirs. Abū Ḥanīfah maintains that if such a sale is made to one of the heirs, it is to be declared as void even if it is at market value. The two disciples maintain that the sale is valid. The difference of opinion is due to the question whether the right of the heirs is linked to the ‘āyn (substance) of the thing or to its value.

2. **Transactions without a counter-value.** If the transaction is a hibah, waqf, ṣadaqah, or a sale at less than the market value, or a purchase at more than the market value, then such a transaction will be restricted to one-third of the value of the estate, after the creditors have been satisfied.

Three conditions must be fulfilled, before the rights of the creditors can come into play:

(a) That the transaction was without a counter-value or without adequate counter-value. This would cover transactions like gift, charity, *waqf*, sale at a discount, or purchase at a premium.

(b) That the transaction involves the transfer of a thing (*‘ayn*) itself and not its use, provided that the benefit conferred through use will terminate upon the death of the owner. Some Ḥanafīs do not consider the benefits arising from the use of a thing as *māl*. The use of land, or of a house, or of an animal are examples that explain this case. The majority (*jumhūr*) consider the use of benefits as *māl*.

(c) That the transaction must be in *a‘yān* (substance of things) and not in the revenue or profit derived from them. Any assignment of profits arising from a *sharikah* or *mudārakah* will not be affected by this condition.

Besides transactions, any admission or acknowledgement of debts by the person suffering from *marād al-mawt* may also invoke the rights of creditors and heirs. Al-Shāfī‘ī is of the opinion that acknowledgement by a person suffering from death-illness is valid and is not affected by the rights of the creditors or the heirs. The reason he assigns is that a person approaching death would normally tell the truth, even if he is a habitual liar. The Ḥanafīs, on the other hand, make a distinction between two cases:
(a) **Acknowledgement of debt in favour of an heir:** An acknowledgement in favour of an heir can have legal effects if the rest of the heirs permit it. This is due to the apprehension that one heir may have been preferred over the others.

(b) **Acknowledgement of debt in favour of a stranger:** An acknowledgement favouring a stranger is valid. These debts are called *duyūn al-maraḍ* and are to be paid after all other debts, called debts of health, have been satisfied.

The Mālikīs distinguish between cases where an allegation of a “bond of affection” can be made, that is, where a possibility of undue influence is likely. For example in the case of a wife, close relative, or friend. The basis is the bond existing between them and not the blood relationship.⁶

### 9.2. Acquired Causes of Defective Capacity

Acquired causes are those that are created by Man or in which human will and choice are the basic factors. Muslim jurists list seven such causes: ignorance (*jahl*), intoxication (*sukr*), jest (*hazl*), indiscretion (*safah*), journey (*safar*), mistake (*khaṭā’, shubhah*), and coercion (*ikrāh*). We will discuss some of the important causes, noting their effects on the capacity for acquisition and on the capacity for execution.

#### 9.2.1. Intoxication (*sukr*)

Drunkenness is a state caused in a human being due to the use of an intoxicant, which temporarily suspends the proper functioning of the mental faculty.

Intoxication does not cause a change in the capacity for acquisition, as its basis is the attribute of being a human.⁷ Thus, a drunken person possesses a *dhimmah* (legal personality) with a complete capacity for acquisition, and he is held liable for destruction of life and property, and also for all obligations, for maintenance, and even for *zakāt*. All these duties and obligations require the existence of the capacity for acquisition alone, and intoxication does not negate it.

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The basis for the capacity for execution, on the other hand, is 'aql (reason) andrush (discretion); these are negated in the case of the drunken person by the state of drunkenness. The khitāb is not addressed to the drunken person, because he does not comprehend it. The state of such a person is worse than that of one who is asleep, for the latter can be awakened; it is worse than that of an idiot, who may understand parts of the speech addressed to him.

The jurists agree unanimously that the khitāb is not directed toward the intoxicated person if such intoxication has been caused by the legal use of intoxicants. For example, the person who has consumed liquor without knowing what it is or when he has done so under coercion or under duress to save his life. In such cases, the ḥukm for this person will be the same as that of the person under a spell of fainting.

Muslim jurists disagree about the person who is intoxicated when such intoxication is caused by prohibited means. The Ḥanafīs and some other jurists do not consider such a cause to have any effect on the capacity for execution and on the understanding of the khitāb. Thus, the ‘ibādāt are established against such a person and he will be held liable for delayed performance (qadā’), along with the accompanying sin. Any transaction or acknowledgement he makes is valid and enforceable against him. He acquires criminal liability for acts committed in such a state, though he can retract his confession made in this state regarding a case of ḥudūd, as these are pure rights of Allāh.

The argument provided by the Ḥanafīs is that intoxication is a crime and as such cannot be an excuse for waiving punishments. Further, one reason why intoxication has been prohibited is that it leads to other khabā‘ith. Moreover, if the acts of the drunken person are to be exempted from liability, it will become a means for the commission of offences, and for evading liability. Relying on the verse, “O ye believers, approach not prayer when you are intoxicated, until you know what you say,” [Qur’ān 4:43] they maintain that it is obvious that the khitāb is addressed to the drunken person and he is expected to understand the meaning and import of the verse even when he is intoxicated. If this is not the interpretation, it would amount to saying to a person under a spell of madness, “Do not commit such an act when you are insane.” It is for this reason that the drunken person is held liable for his acts.

Some jurists are of the opinion that an intoxicated person has no capacity for execution, because his ‘aql (reason) is completely impaired by the state of intoxication. They maintain that the Lawgiver has already provided a penalty for the offence of intoxication and holding him liable for his transactions as well, that is, those undertaken in such a state, would amount to punishing him twice for the same offence,
a kind of double jeopardy. They argue that the verse about avoiding prayers in an intoxicated state is actually addressed to a sober person telling him to avoid becoming intoxicated before the time of prayer, an act over which he has control, as compared to the person subject to fits of madness over which he has no control.

Modern jurists try to prefer the second opinion as it may be closer to some forms of Western law. It must be noted, however, that consuming liquor is an offence in Islamic law and it may not be so in the law.

9.2.2. Jest (hazl)

When a person uses words without intending to convey either their primary or their secondary meanings, that is, their denotations or their connotations, he is said to speak in jest (hazl). Such a person may, for instance, use words employed for the contract of marriage, but does not intend the hukm (effect) of such a contract.

Speaking in jest has no effect on the capacity for acquisition; rights as well as obligations will, therefore, be acquired. The basis of insānîyah required for this kind of capacity is not altered by jokes.

Hazl or jest cannot negate the capacity for execution either, because such a person has not lost his intellect or discretion. Contracts, on the other hand, require consent and willingness to give rise to legal effects. The person speaking in jest does bring about the apparent form (siğah) of the contract, but has not given his consent in reality. The Ḥanafīs, therefore, consider the transactions of such a person as invalid, except transactions like marriage, divorce, manumission, rujūʿ (retraction), and the like. This is based on the tradition that says, “Three things intended seriously are taken seriously, and if intended in jest are also taken seriously: marriage, divorce, and the freeing of a slave.” Some jurists do not maintain this exemption, and treat all statements made in jest as being ineffective. The Shāfīʿīs maintain that statements made in jest are to be considered valid at all times, because the person has brought about the cause—the siğah (form)—and must, therefore, bear the consequences. This is based on the objective theory of contracts that is followed in Islamic law by most schools.8

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8 It is followed in English common law as well and, therefore, in most countries that adopted this law. For example, it is a view taken by American law that contracting parties shall only be bound by terms that can be inferred from promises made.
9.2.3. Indiscretion (safah)

This defect concerns financial transactions, that is, transactions undertaken carelessly and in a manner that a prudent person is likely to avoid. The result is foolish waste and squandering of property.

The tendency in a person to waste his property affects neither his capacity for acquisition nor his capacity for execution. The effect of safah is that a person, who has attained puberty, is subjected to interdiction (ḥajr) till such time that he mends his ways. This view is upheld by the majority. It is based upon the necessity (darūrah) of preserving his wealth, because preservation of wealth is an acknowledged purpose of the law. Abū Ḥanīfah maintains that interdiction can last only till the age of twenty-five, after which the property of the individual is to be delivered to him, because at this age the individual is to be preferred over property.

9.2.4. Coercion and duress (ikrāh)

Ikrāh is a situation in which one is forced to do something without his willingness.9 It has no effect either on the capacity for acquisition or the capacity for execution, because this state does not affect life or reason and discretion. It does, however, negate free consent and willingness.

9.2.4.0.1. Effect on free will. The jurists disagree about the extent to which ikrāh can affect free will. The views of these jurists may be classified into two opinions:

1. The first opinion maintains that ikrāh is an obstacle in the way of taklīf (creation of an obligation). Thus, the khitāb is not directed toward a person under coercion or under duress, because this person is prevented from understanding the khitāb. Among those who hold this opinion are Şafī’ī jurists,

Contract law does not examine a contracting party’s subjective intent or underlying motive. Judge Learned Hand said that the court will give words their usual meaning even if “it were proved by twenty bishops that [the] party . . . intended something else.” Hotchkiss v. National City Bank of New York, 200 F. 287 (2d Cir. 1911). It appears that in France the subjective theory is followed, because of which some Muslim countries that have been influenced by that law are inclined towards the subjective theory.

9 For the details see Şadr al-Sharī‘ah, al-Tawḍīḥ, vol. 2, 820.
who maintain that free will is a condition of taklīf. Ḥarrāh, according to the Shāfī’īs, arises under a threat of death, hurt, perpetual confinement, and the like. It does not arise for causes of a lesser gravity, like a threat to property. Ḥarrāh defined this way is, in their view, divided into two kinds:

a. Justified coercion. This is like the order of a qādī directing a debtor to pay his debts to his creditors, or his command to a man to divorce his wife after the passage of the period of īlā’, as required by Shāfī’ī law. This kind of Ḥarrāh does not affect the free will of a person, as the duty is imposed by the Lawgiver. Thus, any transaction in property undertaken under coercion for paying off creditors shall not be declared void.

b. Unjustified coercion. Coercion without justification is again of two types. The first type is where acts committed are legally permissible under coercion. Such acts, if committed through words or deeds, have no legal effect and are considered void. If these acts can be attributed to a third person, then, they are attributed to the person coercing or threatening another. For example, compensation for property destroyed through coercion shall be paid by the person who coerces the other. The second type are acts that legally prohibited, like murder and rape. In such cases the person coerced shall be fully liable along with the person who coerced him.

2. The second opinion is held by the Ḥanafīs, who divide Ḥarrāh into three types:

a. First is coercion that negates free will or choice. This is coercion under threat of death or loss of limb.

b. The second type is coercion that negates consent, but makes free will irregular or ḥāsid. This is brought about by confinement for a long period or by beating and torture that does not lead to loss of life or limb.

c. The third type is Ḥarrāh that does not negate consent nor does it make free will ḥāsid. The example is confinement of close relatives. Some Ḥanafi jurists do not accept this third category, and link it with one of the categories above, depending upon the nature of the threat to dear ones.
9.2.4.0.2. Effect of coercion on legal capacity. The Ḥanafīs maintain that the condition of taklīf is the existence of the right to choose and not its validity (ṣīḥḥah). Irregular or fāsid free will, they say, is sufficient for the existence of taklīf. In all the above cases of ikrāh, free will is not invalid (bāṭil) though it may be irregular. Taklīf, therefore, may accompany ikrāh.

To facilitate the understanding of the act, for which coercion is taking place, the Ḥanafīs divide it into three types:

1. Transactions. These are divided into two kinds, on the basis of the effect of ikrāh:
   a. First are transactions that do not accept rescission, and do not depend upon consent, for example, divorce, manumission, marriage, retraction of divorce, zīhār, īlā’, ‘afw (forgiveness) in intentional murder, and oath (yamīn.) All these transactions are valid under coercion, because they amount to a termination (isqāt) or relinquishment of a right, and relinquishment cannot be reverted, because these transactions are not dependent on consent.
   b. Second are transactions that accept rescission or revocation and depend upon consent. These are like sale, mortgage, hire, and other commutative contracts. These contracts accept rescission and depend upon the existence of free consent. The ḥukm of such contracts concluded under coercion is that they are irregular (fāsid.) They can be ratified by the coerced party, after coercion has ceased to exist, in which case they are declared as valid (ṣaḥīḥ).

2. Admissions and confessions. All admissions and confessions, in order to be valid, must be accompanied by free will.

3. Acts in general. Acts, for this purpose, are divided into two kinds by the Ḥanafī jurists.
   a. First is the case when the coerced is a mere instrument in the hands of another, like a person picking up another and throwing him upon another thereby causing death, or hurt, or causing damage to property. If A causes B to fire at a bush knowing that C is hiding behind it, thus, causing the death of C, then, A shall be guilty of murder, while B will be an instrument in his hand. Other cases can be imagined. In such cases the act is attributed not to the instrument, but to one who caused him to move.
b. Second is the case when the coerced cannot become an instrument in the hands of another, for example, in the commission of zinā or eating of food. In such a case, the person coerced is fully aware of his actions. Here the person coerced is guilty of zinā or for compensating property consumed. In the case of drinking of khamr, however, ḥadd is waived on grounds of shubhah.

9.2.5. Mistake and ignorance (khaṭa‘, shubhah, and jahl)

The topics of jahl and khaṭa‘ are usually discussed separately, while the topic of shubhāt is not discussed under defective legal capacity. All three are interrelated and deal with concepts that are similar to what in Western law are called mistake of law and mistake of fact.

The word shubhah is usually translated as doubt. The most important evidence in this respect is the tradition of the Prophet (p.b.u.h.) in which it has been said that the ḥudūd penalties are to be waived in case of shubhah. This is usually taken to mean “benefit of doubt” given to the accused. While this meaning may be covered by the tradition it is not its primary concern. The rule of giving benefit of doubt to the accused is generally accepted as a rule of evidence in Islamic law. Further, this rule deals with the doubt in the mind of the judge as to whether an offence has been proved beyond doubt. The tradition, according to the jurists, deals with doubts in the mind of the subject at the time of commission or omission of an act. These are of several types: shubhah fī al-dalīl (mistake of law); shubah fī al-mīlāk (mistake as to ownership); shubhah fī al-fīl (mistake in the commission of the act); and shubhah fī al-‘aqd (mistake as to the governing law in the contract).

For example, assuming that in the early days there was a person who was under the impression that temporary marriage is permitted, that is, he may not be aware of the abrogating evidence. If he entered into a temporary marriage under this impression, the marriage contract was declared void, but the law would waive the ḥadd penalty in such a case (this does not mean that taʿzīr was also waived). There could have been a possibility of the occurrence of such a case in the early days when people were not aware of the law. Today it is unlikely to happen. In any case, it is an example of shubhah fī al-dalīl as well as shubhah fī al-‘aqd. If some of the heirs pardon the murderer, but some of the other heirs, who have not pardoned him, execute him, they will not be subjected to retaliation due to shubhah fī al-dalīl (mistake of law). They may be awarded taʿzīr. Today, these heirs are not permitted to take the law into their own
hands. It should be obvious that exemptions for mistakes of law are given where the issue is subject to *ijtihād*. Where the matter is not subject to *ijtihād*, and is clearly known, or is supposed to be known to Muslims by necessity, there can be no exemption.

In the early days, when slavery was permitted, a husband may be under the impression that his wife’s slave girl is also within his ownership. Under this wrong impression if he were to consider it *milk yamān* and act upon it he would be under *shubhah fī al-milk*. The *ḥadd* penalty would be waived in such a case (though not *taʿzīr*). If a man aiming at an animal were to hit a human being, he would be guilty of manslaughter (*qatl khaṭa‘*) and not murder. This is an example of *shubhah fī al-fi’il*.

The law, gives, some exemption in such cases and lays down principles that may be applied to new cases. It can be seen with ease, however, that ignorance or mistake does not affect the capacity of acquisition at all. It does not affect the capacity for execution either, the basis for which is understanding or ‘*aql*.

The only problem here is that the understanding of the subject is hampered somewhat, but the law takes notice even of this. This shows that ignorance and mistake are not causes of defective capacity at all, but statutory grounds of defence or exemptions.

*Jahl* (ignorance) may, thus, be that of law or of fact. In general, ignorance of law is no excuse for a subject present within the *dār al-İslām*. This, however, should not be confused with the acts of a Muslim residing in the *dār al-ḥarb*. The Ḥanafīs make an exemption for some of the unlawful acts of such an individual, because he is not enjoying the protection of the Islamic state during his stay abroad. Submission to the Islamic state and being subject to its jurisdiction is also stated as a condition of *taklīf* by some jurists. The issue of jurisdiction of the Muslim state is expressed as a principle by the Ḥanafī jurist al-Dabūsī:

The principle according to our jurists is that the world is divided into two *dārs*: *dār al-İslām* and *dār al-ḥarb*. According to Imām al-Shāfi‘ī the entire world is a single *dār*.\(^{10}\)

In other words, al-Shāfi‘ī does not grant the same exemptions to an individual residing in enemy territory.

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\(^{10}\) Al-Dabūsī, *Tusīs al-Naẓar* (Cairo, 1320/1902) 58.
Part II

The Sources of Islamic Law
Chapter 10

The Primary Sources of Islamic Law

10.1. The Distinction Between Primary and Secondary Sources

The classification of the sources of Islamic law into primary and secondary is nothing more than a collection, and the combined effect, of certain attributes that are identified by the jurists for different sources. The primary and secondary sources are distinguished by the jurists on the basis of the following attributes:

1. **Primary sources are those that are unanimously agreed upon by the four Sunnī schools.**
   The sources unanimously accepted by the four Sunnī schools are: the Qur’ān; the Sunnah; ijmā’ (concensus of legal opinion); and qiyās (analogy). Besides these there are sources that are accepted by some of the Sunnī schools and not by others. Thus, istiḥsān is accepted by the Hanafī and Mālikī schools, but not by the others. Secondary sources are those that are not unanimously accepted by the Sunnī schools. When the range of schools is widened, analogy is excluded from the primary sources and so is ijmā’. The Shi’ah schools do not accept these two sources and the extinct Zāhirī school did not accept analogy as a valid source.

2. **Primary sources are transmitted sources, while secondary sources are mostly rational sources.** This distinction would include the opinion of a Companion among the primary sources, but the previous criterion excludes it, because it is not unanimously accepted as a source of Islamic law.
3. Primary sources are definitive sources, while secondary sources are probable. The khabar wāhid is a probable source, that is, its authenticity has not been established by way of tawātur like that of the Qurʾān and the mutāwātir sunnah, but here we are concerned with the Sunnah as a source of law on the whole and in this sense the Sunnah is a definitive source. Likewise, there are types of ājmāʾ that are not considered definitive, but again we are concerned with consensus as a source of law on the whole and ājmāʾ is considered a primary source. Analogy and other types of rational sources would be classified as secondary sources.

4. Laws discovered through the primary sources may be extended through the rational sources or the secondary sources, while laws discovered through secondary sources cannot be further extended. This, perhaps, is the most important distinction between the primary and secondary sources.

Primary sources, then, are at once agreed upon, transmitted, definitive on the whole, and those upon which further extension can be based. This would mean that the Qurʾān, the Sunnah, and ājmāʾ are the primary sources, while the rest are secondary sources.

To describe the characteristics of secondary sources, just reverse the characteristics listed above. For example, secondary sources are mostly rational sources, or they are mostly disputed sources, or that they depend on the primary sources for their content.

10.2. Grades of the Sources

By grades is meant the priority assigned to a source in the jurists’ search for the ḥukm. This topic pertains to ijtihād and the tarjīh. It is, therefore, discussed briefly here.

Many writers maintain that the first source to be approached is the Qurʾān, the second is the Sunnah, the third is ājmāʾ (consensus of legal opinion) and the fourth is analogy. These writers also maintain, on the basis of this natural order, that it is not proper to move to another source unless the search in the prior source has been exhausted. Thus, the first search for a ḥukm is to be in the Qurʾān. The jurist should not move to the next source, the Sunnah, unless the search in the Qurʾān has been completed. Likewise, the jurist should not move to the consensus of jurists, unless the search in the Sunnah is exhausted. Analogy is to be resorted to only when the search in all three prior sources is completed. These scholars rely upon a number of evidences to strengthen this view.
For example, they rely upon the verse: “O ye who believe! Obey Allāh, and obey the Apostle, and those charged with authority among you. If ye differ in anything among yourselves, refer it to Allāh and His Apostle, if ye do believe in Allāh and the Last Day.” [Qur’ān 4 : 59] In this verse, they maintain, obedience to Allāh means having recourse to the Book of Allāh, obedience to the Prophet (p.b.u.h.) means having recourse to his Sunnah and obeying those in authority means having recourse to ījmā’. The order is, thus, prescribed in this verse.

Another source they rely upon is the well known tradition of Mu‘ādh ibn Jabal:

When the Apostle of Allāh intended to send Mu‘ādh ibn Jabal to the Yemen, he asked: How will you judge when the occasion of deciding a case arises? He replied: I shall judge in accordance with Allāh’s Book. He asked (What will you do) if you do not find guidance in Allāh’s Book? He replied: (I will act) in accordance with the Sunnah of the Messenger of Allāh. He asked: (What will you do) if you do not find guidance in the Sunnah of the Apostle of Allāh and in Allāh’s Book? He replied: I shall do my best to form an opinion and spare no pains. The Apostle of Allāh then patted him on the breast and said: Praise be to Allāh Who helped the messenger of the Apostle of Allāh to find a thing which pleases the Apostle of Allāh.¹

This tradition, these scholars say, determines the order in which the sources are to be approached. It also indicates that analogy is to be resorted to when the search in the texts has been exhausted.

In addition to these two evidences, these scholars mention the letter of ‘Umar ibn al-Khaṭṭāb, may Allāh be pleased with him, written to the famous qāḍī Shurayḥ: “When you are faced with an issue, decide through what is laid down in the Book of Allāh. If the issue you face relates to what is not in the Book of Allāh, then decide by what is in the Sunnah of the Messenger of Allāh (p.b.u.h.).” In another version of this athar the words are: “If you find something in the Book of Allāh, decide through it and do not have recourse to anything else besides it.” A third narration explains this meaning: “Examine what is evident for you in the Book of Allāh and do not ask anyone about it. If nothing is evident for you in the Book of Allāh, follow the Sunnah of the Messenger of Allāh (p.b.u.h.).”

All these evidences show, it is maintained, that there is a determined order for approaching the sources and that the jurist should not move to the next source, unless the first source has been searched thoroughly.

for a solution.

A closer examination of the issue reveals that the statement about the order in which the sources are to be examined needs to be qualified somewhat. This is obvious from the following points:

1. **Approaching the Qur’ān and the Sunnah together:** The first point to notice is that it is not possible for the jurist to understand the meaning of the text of the Qur’ān for the derivation of the aḥkām, unless he has recourse to the explanation and commentary of the Qur’ān. This explanation and commentary is the Sunnah itself. Thus, a jurist may not decide upon the basis of a general or absolute text in the Qur’ān, unless he has ascertained that the Sunnah has not restricted the general meaning or has not qualified the absolute text.

   Take the case of the provisions for the thief (ṣāriq) in the Qur’ān. It provides that the hands of each thief are to be cut. The Sunnah restricts this general rule to the thief who steals wealth equivalent to the nisāb (prescribed scale). It also restricts it to a person who steals a thing that is in protective custody (ḥirz). Likewise, the Qur’ān provides for the payment of zakāt in broad terms, that is, for all kinds of wealth, but the Sunnah excludes several categories of wealth from this wide provision.

   The Sunnah is, therefore, interlinked with the Qur’ān insofar as it restricts its general meaning or qualifies its absolute texts or explains its difficult and unelaborated words. It would, thus, be inappropriate, if not incorrect, for the jurist to take the hukm directly from the Qur’ān without consulting the Sunnah. The statement, then, that the Qur’ān is to be consulted first and the Sunnah is to be consulted only if nothing is found in the Qur’ān, is to be qualified to mean that consulting the Qur’ān implies the consulting of the Sunnah along with it. In other words, there is a special bond between the Qur’ān and the Sunnah and this bond must never be severed.

2. **Giving more weight to the definitive meaning whatever the source:** In their search for rules, the jurists attach a greater weight to a definitive (qat‘ī) meaning arising from a mutawātir Sunnah as compared to a text in the Qur’ān that can be interpreted in more than one way. In technical terms, it means that such a Sunnah is definitive with respect to its transmission as well as its meaning, while a żannī text of the Qur’ān is definitive with respect to its transmission, but probable as regards the meaning. In such a case too, it would be inappropriate for the jurist to look at the text of the Qur’ān alone and not at the Sunnah.
3. **Ijmāʿ and the Texts:** *Hukm* is sometimes established through consensus of opinion (*ijmāʿ*). *Ijmāʿ* is considered definitive by the jurists and the jurist is bound to follow its directives. According to the principles of *tarjīh* (precedence of evidences) it is required of a jurist that he first investigate whether the case he is examining has been settled by *ijmāʿ*. If it has been, he is to follow the settled rule and give up his own *ijtihād*. This process may be compared with the precedents laid down by higher courts. If the higher court has laid down a precedent and has interpreted a statute in a certain way, the lower court is bound to follow the precedent and construe the statute accordingly. It is obvious that consensus of opinion has assigned definitive meanings to texts in which the meanings were not very clear, therefore, *ijmāʿ* will have precedence over the unelaborated or multiple meanings in the texts.

4. **General principles derived from the texts:** According to the methodology of some jurists, especially the Ḥanafīs and Mālikīs, broad general principles that have been derived from the entire law through a process of juristic reasoning are to be preferred over the *khabar wāhid* in certain cases. This is the view of the Ḥanafīs and Mālikīs.

The above discussion shows that the sources cannot be consulted in a simple order of priority advocated by some writers. The matter is much more complex, and it is one task of the subject of *uṣūl al-fiqh* to unravel these complexities for the student and would be practitioner.

The primary sources, then, are the Qur’ān and the *Sunnah*, because these sources contain the law for many cases and also serve as the basis for the extension of the law. Consensus of opinion (*ijmāʿ*) also contains the law, and its provisions can be used for extending the law further, though some would prefer to have recourse to the basis or the *sanad* of *ijmāʿ* for the new case. For this basis, we have to turn to the Qur’ān and the *Sunnah* again, therefore, some jurists maintain that the primary sources are the Qur’ān and *Sunnah* alone, and *ijmāʿ* is a kind of secondary source. It is, however, associated with the primary sources here.

10.3. **The Qur’ān**

Considering the Qur’ān as the *primary source* means that all the other sources are secondary to it; even their legal validity and justification as sources is derived from the Qur’ān. The words al-Qur’ān and al-*ZOOMIN CTRL=* ZOOMOUT CTRL-
Kitāb are used in the same meaning. The jurists are hesitant about providing a definition of the Qurʾān insofar as a definition means enclosing the defined thing within bounds. Yet, many of them, in an attempt to grasp all its noble attributes and characteristics have provided definitions. They maintain that the purpose of the definition is not to grasp the nature of the Qurʾān, but to identify the book in response to the question: Which book do you mean? One such definition recorded here is from al-Bazdawī.

أخلاقُ: هو الكتب المنشلة على رسول الله ﷺ وسلم المكتوب في الصحف، المنقول إليه عنه

This may be rendered into English as follows:

The Qurʾān is the Book revealed to the Messenger of Allāh, Muḥammad (peace be upon him) as written in the maṣāḥif and transmitted to us from him through an authentic continuous narration (tawātūr) without doubt.

The definition emphasizes the following attributes:

1. *The Qurʾān is the speech of Allāh revealed to Muḥammad (peace be upon him).* This attribute excludes other revealed books from the definition, that is, books that were not revealed to Muḥammad (peace be upon him). These are like the Torah (الْهِيْلَةِ) and the Evangel (الْئِلَّةِ).

2. *The Arabic words of the Qurʾān as well as their meanings are both revealed.* This attribute excludes the Sunnah from the definition, because the words of the Sunnah are not those of Allāh though the content is inspired and is considered to be revelation in meaning from Allāh.

The attribute also excludes the *tafsīr* of the Qurʾān and the translation of the Qurʾān from this definition. It is said that Abū Ḥanīfaṣ used to permit recitation in Fārsi during prayers for those who did not know Arabic, however, authentic reports in the Ḥanafī school confine such permission to converts to Islam for a period in which they are able to learn the Arabic text. Thus, the exemption was for necessity and need and was, therefore, limited.

Translation of the Qurʾān is, therefore, not possible and what are termed translations are in fact translations of the *tafsīr* (interpretation) of the Qurʾān.
3. *The Qurʾān is transmitted to us by way of tawātūr.* This means that the Qurʾān was transmitted to us both in its written and memorized form by such a large number of people in each generation starting with the first that any doubt about its not being the original text cannot be conceived rationally. This attribute is intended to exclude a few variant readings of the Qurʾān that were not revealed by way of *tawātūr.*

4. *Iʿjāz of the Qurʾān.* *Iʿjāz* means the inability of human beings individually or collectively to imitate or bring about something similar to the Qurʾān. This inability was acknowledged by the Arabs during the period of the Prophet. The inability also confirms that the Qurʾān is the revealed word of Allāh, and is therefore a source of law.

10.3.1. **The Recording and Revelation of the Qurʾān**

The compilation of the Qurʾān has a detailed and well documented history. These details can be gleaned elsewhere. The reason why it is studied under the title of the Qurʾān as a source of Islamic law is to provide further justification for its having been transmitted by way of *tawātūr* and also to explain the reason for its unique arrangement.

The Qurʾān, as is well known, was not revealed all at once to the Messenger of Allāh (p.b.u.h.), but was revealed in stages and in accordance with incidents faced by the Muslim community. The important aspect of the wisdom behind its revelation in this way is considered to be the ease in its memorization by the Companions. Allāh, the Exalted, says: “(It is) a Qurʾān which We have divided (into parts from time to time) in order that thou mightest recite it to men at intervals: We have revealed it by stages,” [Qurʾān 17 : 106] and “Those who reject faith say: ‘Why is not the Qurʾān revealed to him all at once?’ Thus (it is revealed), that We may strengthen thy heart thereby, and We have rehearsed it to thee in slow, well-arranged stages, gradually.” [Qurʾān 25 : 32]

Another reason for the gradual revelation of the Qurʾān is considered to be the implementation of the law in stages. This has given rise to the abrogating and the abrogated verses. The clearest example of the

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2 For the details of the seven readings transmitted by *tawātūr* and three that are not so transmitted see Khuḍrī Bey, *Uṣūl al-Fiqh,* 251

3 There is a discussion whether *iʿjāz* pertains to individual verses or whole *sūrahs.*
laying down of the law in phases is the case of the prohibition of *khamr*.

The incidents, cases, and questions that often preceded the revelation of the verses help, those who came later, in understanding the meaning and import of the verses. These are called the *asbāb al-nuzūl* or reasons for the revelation. These reasons have facilitated to a great extent the application of the law in all ages.

The Messenger of Allāh used to memorize a verse or verses of the Qur’ān after their revelation. He then recited these for his Companions who used to memorize them. There were also scribes with the Prophet who used to record the verses after their revelation and recitation. These written records were then preserved in the Prophet’s house, while some of the scribes would record the verses for themselves and preserve them for their own use. Jibrīl used to inform the Prophet of the place and location of each verse within its chapter (*sūrah*). Jibrīl during each Ramadān, it is said, used to recite in its proper arrangement with the Prophet what had been revealed of the Qur’ān, and in the last year of his life Jibrīl recited the whole of it in its proper arrangement and the Prophet recited it twice after him. The Prophet, thus, memorized it and recited it for his Companions, who memorized it in this arrangement.

By the time of Abū Bakr, the Qur’ān was to be found in its complete form either memorized or recorded in *suḥuf*. Zayd ibn Thābit, therefore, did not rely upon the memory of the Companions alone when he prepared the official copy; he relied upon both.

10.3.2. **The *ahkām* in the Qur’ān**

There are approximately six hundred verses in the Qur’ān that indicate the *ahkām* of Islamic law. Approximately five hundred of these pertain to the *‘ibādāt* and the remaining to crimes, personal law, and other *mu‘āmalāt*. To be specific, about 70 verses pertain to family law, 80 to trade and finance, 13 to oaths, 30 to crimes and sentencing, 10 to constitutional and administrative matters, 25 to international law and prisoners of war, while the rest pertain to *‘ibādāt*.

A few of all these verses are so clear that they do not need further elaboration. The remaining verses require interpretation and elaboration. The primary means of such elaboration or the choosing of one meaning out of two or more probable meanings is through the *Sunnah*. The texts of the Qur’ān also require analysis through the tools and rules of literal interpretation, even when the *Sunnah* is being
employed for elaboration. The kinds of aḥkām that are contained in the six hundred or more verses of the Qur’ān are as follows:

1. **Aḥkām Pertaining to Aqāʿid (Tenets of Faith)**. These are like belief in One God, His Angels, Books, Prophets, and the Day of Judgement. The discipline dealing with these is that of Tawḥīd.

2. **Aḥkām Pertaining to the Disciplining and Strengthening of the Self**. These rules deal with Qur’ānic ethics. The disciplines that deal with them are ethics and taṣawwuf. Many of the ethical norms of the Qur’ān are to be found clothed in the legal provisions.

3. **Rules of Conduct Arising from the Words and Acts of the Subject**. This category covers the entire field of fiqh. They are divided first into two types:

   (a) **Rules Related to Worship**. The purpose of these rules is to establish the relationship of the individual with his Creator.

   (b) **All Those Rules that Relate to Conduct Other than Worship**. This area is called muʿāmalāt by the jurists. It regulates the relationship of individuals among themselves, the relationship of individuals with states, and the relationship of the Islamic state with non-Muslim states. In short, it covers the entire area of substantive and procedural law or to put it differently, it includes private and public law.

   It is to be remembered that though the particular cases mentioned in the Qur’ān are few, there are many broad and general principles that facilitate the derivation of countless aḥkām.

10.4. **The Sunnah**

The word Sunnah has a literal meaning and several technical meanings. An indiscriminate use of the term leads to confusion, therefore, it is necessary that most of the technical meanings be understood. In its literal meaning the word sunnah stands for the “well-known path,” or the “well-trodden path,” which is followed again and again. This may be the path on which people tread or it may be a practice. It is in this sense that the following saying of the Prophet is understood: “He who establishes a good sunnah has its
reward and the reward of whoever acts upon it till the Day of Judgement, and he who establishes a bad sunnah bears its burden and the burden of whoever acts upon it till the Day of Judgement.” The sunnah of an individual is a practice that he considers binding for himself and that he attempts to protect and uphold.

In its technical sense, the word sunnah is assigned the following meanings:

1. Some jurists apply it to mean recommended acts of worship, while others apply it to supererogatory acts (nawāfil).
2. The word sunnah as an antonym of bid’ah (innovation), that is, innovations in matters of religion. In this sense, it is said, “This act is a sunnah,” that is, it is legal. The meaning of “legal” is assigned to it irrespective of the legality arising from the Qur’ān or the Sunnah. When it is said that such and such act is a bid’ah it means it is not legal according to the Qur’ān and the Sunnah.
3. The term sunnah is used to mean the practice of the Companions (Ṣaḥābah) irrespective of their relying in it on the Book, the Sunnah, or their own ijtihād. An example is the compilation of the Qur’ān.
4. Finally, it is defined as “what was transmitted from the Messenger of Allāh (p.b.u.h.) of his words, acts, and (tacit) approvals.” It is in this sense that the jurists use the term sunnah, that is, as the Sunnah of the Prophet and a source of Islamic laws.

10.4.1. Kinds of Sunnah

The Sunnah is classified in two ways:

1. The kinds of the Sunnah when we look at the channels through which the aḥkām are established. This is also called the classification of the Sunnah according to its nature. This type of the Sunnah is of three types: sunnah qawlīyah or the sayings of the Prophet (p.b.u.h.); sunnah fi’līyah or the acts of the Prophet (p.b.u.h.); and sunnah taqrīriyah or the tacit approval given by the Prophet (p.b.u.h.). These are described below:
(a) **Al-Sunnah al-Qawliyah:** It is defined as the sayings of the Prophet (p.b.u.h.) through which he intended the laying down of the law or the explanation of the *ahkām*. There are a large number of sayings of the Prophet (p.b.u.h.), that is, of the *sunnah qawlīyah*. Some examples are: *al-kharāj bi al-ḍamān* (Entitlement to revenue depends on a corresponding liability for loss); *innamā al-aʿmāl bi al-niyyāt* (The nature of acts is dependent upon the underlying intentions); *lā  ḍarar wa-lā  ḍirār* (No injury is to be caused and none is to be borne); and *al-ʿamd qawad* (Intentional murder leads to retaliation).

It is to be noted that not every saying of the Prophet (p.b.u.h.) is a source of law. To become a source of law, the purpose of the saying should be the laying down of the law or its elaboration.

(b) **Al-Sunnah al-Fiʿliyah:** It is defined as the acts of the Prophet (p.b.u.h.) having a legal content, like his prayer, fasts, *ḥajj*. These acts or the method of their performance that he adopted are to be followed in the same way as his sayings. The acts that do not have a legal content do not become a source of law. This may be understood by distinguishing between: ordinary physical acts performed by every human being, like eating, drinking, walking and sitting; acts that are specific to the Prophet (p.b.u.h.) and the rest of the *ummah* is not to follow him in such acts, as in the case of the number of his marriages; acts that are intended to be explanations of undetailed rules in the texts; and acts that establish new laws. The last category is what the jurist is interested in.

(c) **Sunnah Taqrīriyah:** It is defined as the commission of certain acts, by word or deed, by some Companions and the maintenance of silence by the Prophet without expressing disapproval. His silence in such a case is called *taqrīr* or tacit approval and is considered a *sunnah* that becomes a source for the permissibility of an act or a statement. An example of this type is the statement of Muʿādh ibn Jabal when he was sent to Yemen and the Prophet asked him how he will decide cases. This approval in this case, however, was a little more emphatic than mere silence.

**Classification of the Sunnah**
2. The kinds of the Sunnah with respect to the channels through which it is transmitted to us. This may also be called the classification of the Sunnah according to its written record, that is, the classification of hadith, when this term is used not merely for the sayings of the Prophet (p.b.u.h.), but for the entire written record. Ahadith are divided, with respect to narration, into two types. First, the ahadith whose chain of narration is complete. These are the ones in which the narrators are mentioned from the beginning of the sanad upto the Messenger of Allah, and no narrator is missing. Second, the ahadith from the chains of which one or more narrators are missing. The hadith from which a narrator is missing is called mursal by the Hanafis. The Traditionists (Muhaddithun) confine the term mursal to a tradition from the chain of which the name of the Companion is missing, while they term as munqati a tradition from the chain of which the name of a narrator other than a Companion is missing.

   (a) Hadith Mutasil. The majority of the jurists divided the mutasil ahadith into two types: mutawatir and ahad. In between these two, the Hanafi jurists added a third category called mashhur.

   i. Hadith Mutawatir. The mutawatir hadith is one that is related by such a large number of people that their agreement to propagate a falsehood cannot be conceived. This applies...
to the narration from the beginning of its chain to its end, where it reaches the Prophet. An example of such a ḥadīth is:

إِنَّمَا الْأَعْمَالَ بِالْيَتَابَاتِ،ُو إِنَّمَا لَكُنَّ أَمْرَى،ْمَا نَزَى

Acts are determined by intentions, and to each person belongs what he intends.

In the same category are the reports about the number of daily prayers and the rates of ḥaḍāḥ.

Tawātūr is of two types: words and meaning. When all the narrators are in agreement about the words as well as meaning, the ḥadīth indicates tawātūr by its very words. An example are the words of the Prophet: “He who attributes falsehood to me should prepare his abode in the Fire.” This tradition was related by a large number of Companions in these words. The narration was reproduced in great numbers in the following generation when it was finally recorded. This makes it the tawātūr lařī. The other kind is known as tawātūr ma’nawī, which is a tradition that conveys the same meaning even if the words are not exactly the same. Most of the mutawātir traditions are of the latter category.

ii. Ḥadīth Mashhūr. The mashhūr tradition is one the number of whose reporters do not reach the level of tawātūr in the first generation. Thus, if one or two Companions related the tradition from the Prophet, but in the next generation, that is, the generation of the Tābi‘ūn, a very large number related from them and so on till the end of the chain when the traditions were compiled, then, such a tradition is called mashhūr. The factor that makes such a tradition mashhūr (well-known) is the number of persons in the second and the third generation relating it, because after this compilation started and all traditions became well-known.

The mashhūr tradition, according to Abū Ḥanīfah, falls into a category that is lesser in strength than the mutawātir tradition, but is stronger than the khabar wāḥid. The majority of the jurists, however, consider such a tradition to be a khabar wāḥid. According to al-Sarakhsī, the tradition about the prohibition of marrying the maternal or paternal aunt of an existing wife belongs to this category.

iii. Ḥadīth Āḥād. The ḥadīth āḥād or the khabar wāḥid is reported by one or two persons
from the beginning of its chain up to its end when all traditions were recorded. Thus, the narrators do not reach the level of *tawātur* in either of the first three periods: the period of the Companions, the Ṭabīʿūn, and the Tabīʿīn. After the third period, as stated above, the traditions were compiled and all became well known.

The *khabar wāḥid* is generally not relied upon by jurists in matters of faith (*aqāʿid*), but it is accepted for matters of conduct, that is, in matters covered by the *muʿāmalāt*. In fact, there is generally an agreement of the Muslims about the acceptance of the *khabar wāḥid* in matters of *fiqh*.

(b) **Hadīth that is not muttaṣil.** A tradition that is not continuous (*muttaṣil*) is one that has the names of one or more narrators missing from the chain of narration. This is called a *mursal* report. It is like a reliable narrator from a later generation saying: “The Messenger of Allāh said that . . .” As for the traditionists, they apply the term *mursal* to a tradition from the chain of which the name of the Companion is missing. If the name of someone other than a Companion is missing, they term the tradition as *munqatīʿ*.

The jurists disagreed about the employment of a *mursal* tradition as proof for a *ḥukm*. Thus, al-Shāfiʿī does not rely upon it, unless its authenticity is supported by another factor.

10.4.2. Conditions imposed by jurists for acting upon the *muttaṣil ḥadīth*

The traditions (*ahadīth*) differ with respect to their narration and reporting. It is for this reason that the mujtahids laid down specific conditions for the acceptance of each category. The purpose of these conditions is to verify the strength of the authenticity of the report.

10.4.2.1. Conditions for the mutawātir and the mashhūr

The *mutawātir ḥadīth* is considered certain proof of the *ahkām* insofar as the conditions of *tawātur* are found in it according to all the jurists; so also the *mashhūr* tradition according to the Hanafīs, because it offers certain knowledge coming down from the Messenger of Allāh, even if the strength of this knowledge is a little less than that of the *mutawātir*.
10.4.2.2. **Conditions for the khabar wāḥid**

With respect to the *khabar wāḥid*, each *mujtahid* has laid down specific conditions stipulating when it is to be relied upon for the derivation of the law.

1. **The Ḥanafī School:** The Ḥanafīs stipulate three conditions for the *khabar wāḥid*:

   (a) *That the narrator should not have acted against the implication of the report.* If he does act against it, the reliance will be upon his reported act rather than on the report. A narrator does not act against a report from the Prophet, unless he knows that the content of the report was abrogated. A deliberate act against the report would raise doubts about the *‘adlālah* of the narrator, and his report would not be acceptable, because the presumption is that the narrator is *‘adl*.

   (b) *That the report should not pertain to a matter of universal need,* that is, something which is performed often and continuously repeated. Such an act requires that it be known to many people due to their need to know it prior to performance. An act that should be known to many people by necessity will push its report to the level of a report that is *mutawātir* or *mashhūr*, and it cannot be the subject-matter of a *khabar wāḥid*. The narration of an individual regarding such a matter provides circumstantial evidence of its not having been said or done by the Prophet.

   (c) *That it should not oppose analogy* (*qiyyās*). By this is meant opposition to general and fundamental principles. If a report opposes a general principle it ceases to be a valid proof for the *ahkām*. The reason is that the principle is usually not derived from a single text, but is based upon a number of texts, which together indicate a definitive meaning. As compared to this, a *khabar wāḥid* indicates a probable meaning that cannot be preferred over a definitive (*qat'ī*) meaning. The Ḥanafīs made an exemption from this rule in the case of traditions reported or upheld by Companions who were well known as jurists and *mujtahids*, like the first four caliphs, Ibn ‘Abbās and Ibn Mas'ūd.

2. **The Mālikī School:** Imām Mālik (God bless him) stipulates for the *khabar wāḥid* that it should not oppose the practice of the people of Medina. If it does oppose it, the obligation is to follow the *ahkām*.
practice of the people of Medina and to forgo the requirement of the \textit{khabar w\textacute{a}hid}. The reason is that the practice of the people of Medina amounts to a \textit{mutaw\textacute{a}tir} report, and the \textit{mutaw\textacute{a}tir} being definitive is to be preferred over the \textit{khabar w\textacute{a}hid}, which is probable. It appears that he would also uphold the condition stipulated by the \textit{Hanafis} about analogy above.

3. **The Sh\textit{af\textacute{i}} School**: Im\textae{m} al-Sh\textit{af\textacute{i}} (God bless him) does not stipulate for the \textit{khabar w\textacute{a}hid} any other condition except that it have a sound and complete chain of narration. If this condition is met the report is to be accepted.

4. **The \textit{Hanbal\textacute{i}} School**: The condition stipulated by Ahmad ibn \textit{Hanbal} (God bless him) is similar to that laid down by Im\textae{m} al-Sh\textit{af\textacute{i}}, however, he sometimes accepts traditions that do not strictly meet this condition. He is reported to have preferred even \textit{mursal} traditions over analogy.

10.5. **Status of the Sunnah With Respect to the Qur\textae{\textacute{a}n}**

The jurists maintain that the \textit{Sunnah} is the second source among the sources of Islamic law. If the \textit{mujtahid} does not find a text in the Qur\textae{\textacute{a}n} for a case he has to settle, he has recourse to the \textit{Sunnah} for the derivation of the \textit{hukm}. The \textit{Sunnah} being an elaboration and commentary on the Qur\textae{\textacute{a}n}, it is not required to have recourse to it unless a text requires elaboration and commentary. If the text of the Qur\textae{\textacute{a}n} is explicit (\textit{nass}) in its meaning it is to be acted upon, but if it is apparent (\textit{z\textacute{a}hir}) having more than one meaning it is necessary to have recourse to its commentary, which is the \textit{Sunnah}.

As the \textit{Sunnah} is a primary source of law, the jurist has recourse to it for the derivation of the \textit{ahk\textacute{a}m}; it is secondary and complementary to the Qur\textae{\textacute{a}n}. The authority of the \textit{Sunnah} as a source of law is derived from the Qur\textae{\textacute{a}n}. The \textit{ahk\textacute{a}m} derived from the \textit{Sunnah} are, therefore, considered an explanation of the meanings in the Qur\textae{\textacute{a}n}. Even when the \textit{Sunnah} appears exclusively to be dealing with a \textit{hukm}, a close examination reveals that the \textit{ahk\textacute{a}m} so revealed are based upon principles found in the Qur\textae{\textacute{a}n} and the \textit{Sunnah} is merely extending the meaning of these principles or is linking up the rule with the principle. This may be elaborated in the following points:

1. **The Sunnah is a commentary of the Qur\textae{\textacute{a}n}**. The \textit{ahk\textacute{a}m} are often found in the Qur\textae{\textacute{a}n} in general, undetermined, or unelaborated form. The \textit{Sunnah} restricts, qualifies, or elaborates these \textit{ahk\textacute{a}m}.
Examples of the Sunnah elaborating the unelaborated are like (1) the timings of prayer and their number as well as their rak'as; (2) elaboration of the kinds of wealth in which zakāt is to be paid and the amount to be paid in each as well as the time of obligation; (3) the case of riba.

An example of the restriction of a general meaning is to be found in inheritance: “For the male two shares of the female.” The Sunnah explains that the murderer will not inherit.

2. **The Sunnah links a vacillating case with a known principle.** The Sunnah sometimes lays down rules that are not mentioned in the Qur'ān. These rules appear to be additions over the meanings in the Qur'ān and cannot be considered as elaborations or qualifications. Some jurists, however, are of the opinion that a closer examination reveals that these rules are an elaboration in the sense of classifying a rule under a principle. Often a case vacillates between two principles and the Sunnah links up the case with one of these principles.

For example, the Qur'ān has in a general way permitted all good things and has commanded the avoidance of khabā‘ith. The Sunnah has linked with the khabā‘ith the consumption of animals with molars and birds with claws, just as it has prohibited the consumption of domesticated donkeys.

3. **The Sunnah performs analogy on the basis of a rule in the Qur'ān.** The Qur'ān sometimes lays down a principle or a rule without elaborating all the categories falling under that principle or covered by the rule. The Sunnah links a resembling case with this rule, and this function appears to be similar to analogy.

The Qur'ān prohibits marriage of two sisters to one man and then says that what is besides this is permitted. The cases of a woman along with her maternal or paternal aunt are also similar because of a common underlying cause. The Sunnah, therefore, prohibits such marriages too.

4. **The Sunnah lays down general principles.** The Sunnah sometimes lays down a general principle the individual categories of which have been mentioned by the Qur'ān. For example, the Sunnah lays down the principle: “No injury is to be caused or borne.” The Qur'ān mentions a number of cases in which injury to others has been prohibited, like injury to parents because of their child or injury to wives and so on. The prohibition of injury or harm is a general principle that is formulated by the Sunnah.
5. The Sunnah elaborates the meaning of words in the Qur’ān. An example of this the distinction of the white thread from the black thread during the month of Ramaḍān. The Sunnah explains that this is the light of day and the darkness of the night.

10.6. Consensus of Legal Opinion (Ijmā‘)

The word ʿijmā‘ is used literally in two senses. The first is determination and resolution. The words of the Exalted: “Determine your plan and among your partners,” [Qur’ān 10 : 71] convey this meaning, that is, decide and determine the matter. So also the words of the Prophet (p.b.u.h.), “The person who has not resolved to fast prior to dawn has no fast,” convey the meaning of deciding and resolving. The second way in which the word is used is agreement upon a matter. It is said: “the people agreed upon such and such matter.” The difference between the two literal meanings is that ʿijmā‘ in the first meaning is possible from one person, but in the second sense it requires two or more persons.

In the technical sense, ʿijmā‘ is defined as:

إِنَّفَاقَ اَلْمَجْهُدِينِ مِنْ أَمْثَالِ مُحْقَقِ صَلَالِهِ عَلَيْهِ وَسَلَّمَ بَعْدَ وَفَاتِهِ فِي عَصْرِ مِنَ الْعَصُورِ عَلَى حُكْمِ شَرِيعِ

The consensus of mujtahids (independent jurists) from the ummah of Muḥammad (p.b.u.h.), after his death, in a determined period upon a rule of Islamic law (ḥukm shar‘ī).

10.6.1. Conditions for the Validity of Ijmā‘

The definition given above shows that there are seven conditions that must be met before ʿijmā‘ can be said to have taken place. These conditions are imposed by the majority of the jurists. Two more conditions (nos. 8 & 9) are imposed by some of the jurists, however, the majority do not follow them.

1. The agreement or consensus must take place among mujtahids, that is, those who have attained the status of Ḣijhād. Thus, an agreement among those who have not reached this status or who are not qualified will not constitute ʿijmā‘. This will exclude all non-mujtahids, the general public, the members of a modern legislature, unless all of them are mujtahids. As to the number
of mujtahids agreeing upon a legal issue, there is a disagreement. Some say that this number must reach the level necessary for tawātūr, while others say that three is enough.

2. The agreement must be unanimous, that is, among all the mujtahids. If the majority of them agree upon a hukm shar‘ī, it will not amount to ijmā‘ according to most jurists, howsoever small the number of the opposing minority. The reason is that there is a possibility that the minority opinion may be correct.

There are, however, those jurists who consider a consensus of the majority as valid ijmā‘ when they are being opposed by a minority. Some jurists, on the other hand, consider the agreement of the majority as persuasive, but would not call it ijmā‘.

3. All the jurists participating in ijmā‘ must be from the ummah of Muḥammad (p.b.u.h.). Thus, an agreement of the jurist of another ummah, one of the earlier nations of the earlier prophets, will not be considered ijmā‘.

4. The agreement or consensus must have taken place after the death of the Prophet (p.b.u.h.). Thus, an agreement during his lifetime is not considered ijmā‘. If the Prophet (p.b.u.h.) agreed with the Companions on an issue, then, he was the source of the rule and not ijmā‘. If he went against their agreement, their agreement was not considered nor did it become a rule of law.

5. The agreement must be among the mujtahids of a single determined period, even if some of the jurists of the following or subsequent period opposed them. The reason is that the constitution of ijmā‘ depends upon the unanimous agreement of jurists and this is only possible in a determined period, like a generation.

6. The agreement must be upon a rule of law, the hukm shar‘ī. An agreement upon the rules of grammar in Arabic would not be ijmā‘ nor an agreement upon other rational propositions, like the creation of the universe. Thus, the rule must state that a certain thing is prohibited, permitted, valid, or void. All non-legal matters are excluded from the domain of ijmā‘.

7. That the mujtahids should have relied upon a sanad for deriving their opinion. A sanad is an evidence in one of the accepted sources of law.

8. The death of those jurists who participated in the ijmā‘, either explicitly or by silence, is not a condition for the validity of ijmā‘ according to the majority of the jurists. Ijmā‘,
according to these jurists, becomes valid as soon as agreement is found. There are a few jurists who maintain that it is possible for a jurist to change his view and as long as a jurist is alive, this possibility exists.

9. That the *ijmā‘* should have been transmitted to the later jurists by way of *tawātur*. The argument is that as *ijmā‘* is a definitive evidence, its mode of transmission should also be definitive. The majority of the jurists, however, do not accept this condition.

10.6.2. Types of *ijmā‘*

*Ijmā‘* is divided into two types on the basis of the way it is made known. These two types are: 1) *ijmā‘* *ṣarīḥ* or *ijmā‘* *qawlī* and 2) *ijmā‘* *sukūtī* or tacit *ijmā‘*.

1. Explicit *ijmā‘* or *ijmā‘* *qawlī*. *Ṣarīḥ* or explicit *ijmā‘* is one in which the legal opinions of all the jurists of one period converge in relation to a legal issue, and each one of them states his opinion explicitly. This may happen when all of them are gathered in one session and an issue is presented to them and they collectively express a unanimous opinion. It may also take place when an issue is raised in a certain period and all the jurists, in turn, issue similar *fatwās* independently and at separate times.

2. Tacit *ijmā‘* or *ijmā‘* *sukūtī* This form of *ijmā‘* takes place when some mujtahids, one or more, issue a verdict on a legal issue and the rest of the mujtahids come to know of it during the same period, but they keep silent; they neither acknowledge it nor refute it expressly.

10.6.3. The legal force of *ijmā‘* as a source

The majority of the jurists agreed upon the rule that explicit *ijmā‘* is a definitive source and it is obligatory to act upon it; its opposition is prohibited. Further, the issue that has been settled through such *ijmā‘* can no longer be opened up again and subjected to *ijtihād*. In other words, the issue is no longer a moot point.

As for tacit *ijmā‘*, some of the jurists who upheld the binding strength of explicit *ijmā‘*, objected to the strength of tacit *ijmā‘* as a source of law. Some of them even refused to call it by the name of *ijmā‘*. Among...
these jurists are Imām al-Shāfi‘ī as well as Mālikites. The majority of the jurists, however, maintained that tacit *ijmā‘* is a legally binding source, but they differed with respect to its strength. Some said that it is a definitive source, like explicit *ijmā‘*, and these are the Ḥanafī jurists and Imām Ahmad ibn Ḥanbal. Their argument is that evidences for *ijmā‘* in the Qur‘ān and the Sunnah do not differentiate between explicit *ijmā‘* and tacit *ijmā‘*. Some of the jurists said tacit *ijmā‘* is a probable (zannī) source. Among these jurists is al-Karkhī, the well known Ḥanafī jurist and al-Āmidī, a later Shāfi‘ī scholar.

10.6.4. **Role of *ijmā‘* in the modern world**

In earlier as well as modern times various objections have been raised against the principle of *ijmā‘*. Some of the objections pertain to the conditions of *ijmā‘* as stipulated by the jurists, while others relate to the possibility of its occurrence. Some practical difficulties have also been pointed out. *Ijmā‘* is a source that is accepted by all the Sunnī schools, just as they accept the two primary sources, yet there is no established system for its transmission. The only transmission of *ijmā‘* one finds is within the schools; in the books of each school. Further, some of the cases or instances of *ijmā‘* that are cited do not meet the conditions stipulated for *ijmā‘* when they are examined outside the schools of *ijtihād* and *fiqh*.

Due to these factors and objections, some modern scholars have said that *ijmā‘* does not appear to be a practical principle and cannot operate as a source of law, at least in the modern times. The correct view, however, is that the very fact that *ijmā‘* has been accepted as a primary source of law for so many centuries by the leading jurists of Islam, it has to have a greater or deeper role than is exhibited by the external conditions imposed by jurists. In other words, the matter needs to be examined a little more deeply, perhaps, in the context of modern law.

An examination of the principle of *ijmā‘* in a general way reveals that all it is saying is that if a rule or principle is upheld collectively by the highest legal forum in the land, then, such a principle or rule must be followed by those subordinate to this forum. This is exactly what the doctrine of *stare decisis* says in the English common law system. The deeper the examination of the principle of *ijmā‘*, the greater is the conviction it requires that the decision of the higher forum, or the full bench of the highest court (en banc), so to say, must be followed and maintained by the lower courts.

In the earlier stages of the growth of Islamic law, the forum was confined to the jurist Companions.
Later, when the schools of law emerged, the forum moved to the leading jurists of each school and operated within the schools. Today, when the *ummah* is composed of different jurisdictions in Muslim countries, the forum would automatically be the highest court in each Muslim country. In fact, the principle fits in perfectly with the legal system in those countries that have the English common law as the modern tradition.
Chapter 11

Secondary Sources

Secondary sources are of two types: rational and transmitted. The term “rational” with respect to secondary sources means that these are not material sources in which the rules are stated. The rational sources are techniques of legal reasoning that the mujtahid employs during his ijtihad. The material sources used during this legal reasoning are the Qur’ān, Sunnah and ijmā’, and the rational secondary sources provide means of extension for the law stated in these primary sources. The rational secondary sources of Islamic law are: qiyās (analogy); istihsān (juristic preference of a stronger principle); and istiṣḥāb al-ḥāl (presumption of continuity); mašlahah mursalah (extended analogy); and sadd al-dhāri‘ah (blocking the lawful means to an unlawful end). As compared to these, the transmitted secondary sources are: the opinion of a companion; the earlier Scriptures; and custom.

11.1. Qiyās (Analogy)

In its literal meaning, the word qiyās (قِيَاسٍ) means measuring or estimating one thing in terms of another. Thus, measuring cloth against the metre rod is qiyās. It also applies to making two things equal, that is, comparing. This comparison may be physical or it may be rational.

In the technical sense, as defined by the jurists, it applies to “the assignment of the hukm of an existing case found in the texts of the Qur’ān, the Sunnah, or ijmā’ to a new case whose hukm is not found in
these sources on the basis of a common underlying attribute called the ‘illah of the ḥukm.”

If the texts of the Qur’ān or the Sunnah, or ijmā‘ contain a case whose ‘illah is known to the mujtahid, that is, the underlying reason because of which the ḥukm has been laid down, and he then sees a new case which has the same ‘illah in it, he will assign the ḥukm of the existing case to the new case. By such an assignment, he renders the two cases equal in terms of the ḥukm. This assignment or rendering equal is called qiyās in the terminology of the jurists.

11.1.1. Elements of qiyās

The definition of qiyās shows that it has four ingredients or elements:

- the case (set of facts) mentioned in the text with its ḥukm;
- the ḥukm of the set of facts mentioned in the text;
- the ‘illah or the underlying cause that has led to the ḥukm; and
- the new case or the set of facts for which the ḥukm has not been explicitly mentioned and which needs a ḥukm.

The case mentioned in the text (the first element) is called the ṣasl, that is, the root case or even the base. It is also called the maqīs ‘alayh or the case upon which analogy has been constructed. The ḥukm of this case (the second element) is called the ḥukm al-ṣasl. The underlying cause of the ḥukm, which is determined by the jurist, is called the ‘illah or the ḥukm. The new case to which the ḥukm is extended is called the far‘ or the offshoot. It is also called the maqīs or the case for which analogy is constructed. The ḥukm that has been established for the new case is called the ḥukm al-far‘.

1 Far‘ (فرع) literally means branch.
11.1.2. Examples of qiyās

We may now look at some examples to understand the operation of qiyās:

1. The prohibition of khamr (wine from grapes) is laid down in the Qur’ān. The text prohibits khamr along with a statement of the disaster it leads to, that is, enmity and hatred among people. Now, khamr, according to some jurists (the Ḥanafīs), is the name of an intoxicating liquor made from grape juice, called wine in English. The Arabic term khamr in their view does not include other intoxicating liquors like whiskey and beer. The other intoxicants, according to the Ḥanafīs, are prohibited by the texts of the Sunnah. The Ḥanafīs, therefore, see no need to use analogy in this case. The majority, however, say that even if the word khamr, in its literal meaning, does not cover other types of intoxicating liquors, the ḥukm of khamr can be extended to them through qiyās (analogy). Their reasoning takes the following form:

The jurists first decide that the ‘illah, or the underlying cause for which khamr has been prohibited is intoxication. On examining the other intoxicating liquors, they find that the property of intoxicating is found in them. When it is verified that this property is found, they extend the ḥukm of khamr, which is prohibition, to the other intoxicating liquors as well.

Thus, khamr in this case is the aşl, or the maqīs ‘alayh, each one of the other intoxicants is the far‘ or the maqīs, and the property of being an intoxicant is the ‘illah. The prohibition of khamr is the ḥukm al-aşl, while the prohibition of whiskey, say, is the ḥukm al-far‘, which has been established through qiyās.

2. There is a tradition from the Prophet (p.b.u.h.) that says: “The murderer will not inherit.” This tradition prohibits the granting of inheritance to an heir who kills his predecessor from whom he is to inherit. The punishment for such an offender, in addition to the punishment for his crime, is deprivation from inheritance.

What about a bequest (waṣfiyah)? The tradition mentions inheritance alone and not bequest. Supposing a legatee murders the testator, who has bequeathed his property to the legatee in his will.
The offending legatee will be prevented from taking the bequeathed property on the basis of *qiyyās*, because the ‘*illah* in the two cases is similar, which is “hastening the benefit prior to its appointed time through a criminal act.”

Murdering the predecessor in the case of inheritance mentioned in the tradition is the *asl* or the *maqīs ‘alayh*, while murdering the testator is the *far‘* or the *maqīs*. Hastening death prior to its appointed time through a criminal act is the ‘*illah*, because of which the *ḥukm* has been assigned. The *ḥukm al-asl* is prevention from inheritance, while deprivation from the bequest or legacy is the *ḥukm al-far‘* established through *qiyyās*.

3. A tradition from the Prophet (p.b.u.h.) says: “A believer is a brother to his believer, therefore, it is not permitted for a believer to make a proposal (for marriage) where the proposal of his brother is still pending, or to make an offer of sale where his brother’s offer is pending.” This tradition proscribes proposals or offers to the same party till such time that similar offers made to this party by another person are pending and have not been refused or accepted. The underlying cause or ‘*illah* is causing harm to another’s interest. This tradition does not mention the hiring of services or property. The proscription can be extended to hire through analogy.

4. Indulging in sale when the call for the Friday prayer is made is prohibited by the text of the Qur’ān. The underlying cause is reducing the incentive to offer the Friday prayer. This *ḥukm* can be extended to other contracts like pledging or marriage that may have been planned at such a time.

11.1.3. *Qiyyās jālī* and *qiyyās khāfī* or manifest and concealed analogy

The term *qiyyās jālī* (manifest analogy) has been used in various senses by the jurists, depending upon the school they belong to. In the previous section, the term was used for the second type of analogy where the *ḥukm* established is of the same strength. Some have used it for the first type as well. Under this heading we are concerned with the way the Ḥanafī jurists have used it.

The Ḥanafīs use the term *qiyyās jālī* to mean analogy for which the underlying cause is more or less apparent or can be discovered with relative ease. The jurist does not have to ponder too much over the attributes of the ‘*illah*. Almost all types of analogy are classified under this meaning. As compared to this,
where the real ‘illah is less apparent and the jurist has to expend considerable effort to discover it; the ‘illah is concealed so to say. This type of analogy is considered qiyās khafī or concealed analogy. In reality this is not analogy at all. In Islamic jurisprudence concealed analogy is called istiḥsān. The next section deals with this form of analogy: istiḥsān.

11.2. Istiḥsān (Juristic Preference)

In its literal sense the word istiḥsān means “to consider something good.” It is also applied to mean something towards which one is inclined or which one prefers, even if it is not approved by others.

Technically, it has been defined in several ways. Al-Pazdawī (al-Bazdawī) defines it as “moving away from the implications of analogy to an analogy that is stronger than it, or it is the restriction of analogy by an evidence that is stronger than it.” Al-Ḥalwānī defines it as “the giving up of analogy for a stronger evidence from the Book, the Sunnah, or ijmāʿ.” The Mālikī jurist, Ibn al-ʿArabī defines it as “sacrificing some of the implications of an evidence by way of exception insofar as the exception opposes some of these implications.”

From all these definitions it is obvious that istiḥsān means the preference of a stronger evidence over analogy. In other words, it means:

- The preference of qiyās khafī over qiyās jālī.
- It also means following the requirements of a stronger general principle that requires something different from strict analogy.
- It may also mean the creation of an exception to a general principle due to a stronger evidence when the general principle is based upon analogy.

Al-Sarakhsī points out that some jurists have criticized istiḥsān on the grounds that analogy is being given up for the personal opinion of the jurists. He responds that this is totally misfounded for how can a jurist give up a hujjah (legally admissible authority) for something that has no authority. In modern times, the words “juristic preference” may have implied something similar. The reader should note that analogy
is given up by the jurist only when he has a stronger evidence to rely on and this stronger evidence is one that is valid according to the shari‘ah. Istihsân, he says, is merely the comparison of two valid evidences (sources) and the preference of the stronger over the relatively weaker. It may also mean the restriction of one with the other. He concludes that “giving up of qiyâs is sometimes due to the text, and at other times due to ījmā‘ or due to the principle of necessity.”

11.2.1. Examples of istihsân

1. Abū Hanifah on deciding the issue of the person who eats during a fast out of forgetfulness, is reported to have said: “Had it not been for the report by the people, I would have said that he should repeat his fast.” What he meant by this was that strict application of the rules of fasting requires that anyone eating food has broken the fast. A report from the Prophet (p.b.u.h.) says that “liability for three things has been lifted from my Ummah: forgetfulness; mistake; and duress.” This is a case of istihsân on the basis of preferring a text over analogy.

2. Qiyâs prohibits the contract of salam, because it involves delay in the exchange of food items listed in the tradition of ribā. There is, however, the tradition from the Prophet (p.b.u.h.) that says that “he made an exemption in the case of salam.”

3. Similar to salam is the case of the contract of istṣnâ‘ or the manufacturing contract with advance payment. Analogy prohibits it on the basis of the same rules as in the case of salam. It is, however, permitted on the basis of ījmā‘ according to the Ḥanafis.

4. Analogy requires that ritually pure water should be used for ablution. In the case of wells in which dirt or carcasses of animals have fallen, following strict analogy would mean the non-use of these wells, and this would cause hardship to the people. The principle of necessity requires that use of these wells be permitted. This is done after observing formal cleaning methods.

5. The general principle of sale requires that a thing that does not exist cannot be sold. In the contract of hire (ijârah), the benefits or services that are being paid for do not exist at the time of the contract.
The contract has been permitted on the basis of necessity, seeking support from the contract made by the Prophet Ya‘qūb (Jacob) as mentioned in the Qur‘ān.

In all these cases, the consequences of the application of strict analogy have figured significantly in the decision and the decision preferred was one that had more healthy consequences for the people.

11.3. *Istīshāb* (Presumption of Continuity)

The word *istīshāb* means the continuance of companionship. Technically it means the presumption of continuance of an earlier rule or its continued absence. In this sense it means the maintenance of a status quo with respect to the rule. The previous rule is accepted, unless a new rule is found that goes against it. As an easy reference one may refer to *istīshāb al-hāl* as the “accompanying rule.” In reality, *istīshāb al-hāl* is not a source of law nor is it a source for establishing new rules; it is merely a set of presumptions.

The following general principles form the basis of *istīshāb*:

1. The original rule for all things is permissibility, that is, the presumption is that all things are permitted, unless prohibited by the *sharī‘ah*. This rule applies to beneficial things alone, like food, drink and benefitting from all good things. It is known that spilling blood without justification is prohibited. The taking of wealth without a legal right is prohibited. Indulging in sex without lawful permission is prohibited. In general, the commission of any act that is injurious to another is prohibited, like defamation and all kinds of falsehood. This narrows down the scope of this principle. It is for this reason that some of the Ḥanafīs are considered to maintain the opposite principle: (the presumption is that all things are prohibited, unless the *sharī‘ah* permits them). If we assume that most beneficial things are originally permitted, it means that they have been permitted by the Lawgiver. Can the state today prohibit some of these things? It is obvious that the evidence to do this must come directly from the sources of Islamic law. This shows that the principle may have some problems.
2. البَرَاءةُ الْذِّمَةَ, also called *barā‘ah aššīyah*. This principle means that there is no presumption of liability against anyone, and all liability has to be proved. This principle is more of a procedural nature and places the burden of proof on the person making a claim.

3. اليَتِينُ لا يُزولُ بِالشَّكِ (certainty does not give way to doubt). This means that once a thing is established beyond doubt, it can only be set aside through an equally certain evidence. If a person is sure that he has performed ablution and later doubts this he is presumed to be ritually pure till he is certain that he is not.

The above principles highlight the different ideas associated with the principle of *istiṣḥāb*. To use *istiṣḥāb* to establish a new rule is a grave mistake according to al-Sarakhsi. *Istiṣḥāb al-ḥāl*, he says, is the name for the continued following of a *ḥukm* that had been established through a valid evidence. Where there is no such *ḥukm*, the principle of *istiṣḥāb* does not apply.

11.3.1. *Istiṣḥāb al-ḥāl* and the Islamization of laws

The law obtaining in Pakistan is based on the English law. It is the practice of some institutions to say that where a direct evidence is not found to show that the law is against the Qur’ān and Sunnah it will be accepted as valid. According to this reasoning some people can be heard saying that only 5% of the laws need to be changed, because they clash with the texts and the rest should be accepted as Islamized. In the same spirit, perhaps, the Council of Islamic Ideology says that they have reviewed a large number of laws.

The principle of *istiṣḥāb* requires that the continuance of a rule is conditional upon the fact that it was originally established by an evidence from the *sharī‘ah*. Does the acceptance of existing Western laws, on the grounds that they are not repugnant to the Qur’ān and the Sunnah, enough to justify their validity? Will it not be better if each and every law on the statute book is justified *ab initio* on the basis of the sources of Islamic law? Will this not help in the application of these laws by the judiciary who deal in general principles as well as rules? It is, therefore, suggested that the CII should publish its legal reasoning underlying recommendations.
11.4. *Maşlaḥah Mursalah* (Extended Analogy)

*Maşlaḥah* is defined in its literal sense as “the acquisition of *manfa’ah* (benefit) or the repulsion of *maḍarrah* (injury, harm).” In the technical sense it means “the preservation of the the purposes of Islamic law in the settlement of legal issues.” The purposes of the law are interests recognized by the *sharī‘ah*. *Maşlaḥah mursalah* is also referred to as *istiklāl mursal* or simply *istiklāl*.

11.4.1. Illustrations of *maşlaḥah mursalah*

The jurists provide a number of examples to elaborate the meaning of *maşlaḥah mursalah*. Some of these are listed below:

1. The compilation of the Qur’ān after the death of the Prophet (p.b.u.h.). Although the Prophet had indicated the order of the *sūrahs*, he had not given the orders for its compilation in book form. The Companions were, therefore, not sure whether this should be done, because it was something that the Prophet had not done himself. They decided that it was essential to gather it and compile it in the “interest of the preservation of *dīn*.” History has shown that this was a very wise decision.

2. The rule for murder (*qatl ‘amd*) provided in the texts was that one life could be taken for one life by way of retaliation. It was not clear whether a number of persons could be subjected to *qiṣāṣ* when they participated in killing a single person. Hadhrat ‘Umar decided that all of them should be put to death. This rule it is said was based on the “preservation of life,” which is a purpose of Islamic law. This is strengthened by the words of the Qur’ān: “In retaliation there is life for you.” ‘Umar is reported to have said (in this decision) that if all the people of Sana had conspired to kill a single person he would put all of them to death.

3. The rule for artisans accepting goods from people for doing work on such things was that they were not required to show negligence if the thing was destroyed. The burden of proving negligence was on the customer. The artisans started misusing this facility. The Companions, therefore, decided to change the rule. After this decision, if a thing was destroyed in the hands of the artisans, the artisan would be required to show that there was no negligence on his part. The decision is based upon the need to “preserve the wealth of the community.”
4. Al-Ghazālī has stated that on the basis of *māṣlaḥah mursalah* it is permitted to the ruler to impose taxes if the coffers are empty and he needs money for *jihād* or for preserving the security of the Muslim Ummah.

5. There is no penalty in the Qurʾān for drinking of wine. In the Sunnah the traditions vary, with some providing 80 lashes and others 40. Hadhrat ‘Alī (R) fixed the penalty at 80 on the analogy of *qadhf*.

11.5. *Sadd al-Dhāriʿah* (Blocking the Lawful Means to an Unlawful End)

The word *dhārāʿiʿ* is the plural of *dhārīʿah* (means to an end). It is the means to an end irrespective of the end being lawful or unlawful, beneficial or harmful. The term *sadd al-dhāriʿah*, however, means “blocking the lawful means to an unlawful end.” As compared to this, the term *fath al-dhāriʿah* is also used, which means “permitting the unlawful means to a lawful end.”

The principle of *sadd al-dhāriʿah* is attributed to Imām Mālik. Some modern writers insist that its use can be seen in the rulings of most schools.

The principle is not concerned with unlawful acts, because those are prohibited anyway. It is concerned with lawful acts that may be prohibited as they lead to unlawful results. For example, the cultivation of poppy has been banned in many countries, because it is leading in most cases to the production of opium and heroin, which is a deadly drug that is being misused. Here an act that was basically lawful has been declared unlawful. This prohibition in the terminology of the jurists would be called *sadd al-dhāriʿah* or the “blocking of lawful means to an unlawful end.” The question would be: Is the end unlawful according to the *sharīʿah*?

Although the jurists have deemed *sadd al-dhāriʿah* to be an independent principle, there is no reason why it cannot be considered part of *māṣlaḥah mursalah*.

11.6. Opinion of a Companion (*Qawl al-Ṣaḥābī*)

A Companion, according to most jurists, is someone who saw the Prophet (p.b.u.h.), believed in him, supported him and was in association with him for some time so that he could understand something of the ways of the *sharīʿah* from him. After the death of the Prophet (p.b.u.h.), it was the Companions who...
interpreted the law and developed it where needed. They undertook *ijtihād*, issued rulings, settled cases and became source of guidance for later generations.

The main issue faced by the jurists under this source is whether *the opinion of a Companion is to be preferred over analogy (qiyās) undertaken by a later jurist?* In general, the Ḥanafīs maintain that if there is a clash between the opinion of a Companion and analogy, the analogy is to be given up and the opinion of the Companion is to be followed. The Shāfīʿīs uphold that it is not binding on the jurist to give up analogy, he may or may not do so at his discretion.

Al-Sarakhsī, the Ḥanafi jurist, has the following to say:

In the opinion of a Companion there is a chance that it is based on a narration of the revelation. It appears from their practice that if one of them possessed a text, he would either narrate it or he would base his opinion on it. There is no doubt that the opinion in which there is a chance of transmission from the Prophet (p.b.u.h.) (the possessor of the revelation) is to be preferred over mere opinion. It is in this context that the preference of the opinion of the Companion over opinion is analogous to the preference of a *khabar wāḥid* over analogy. And even if their view was based upon analogy, their view is stronger than all who are not Companions. The reason is that they were witness to the practice of the Prophet (p.b.u.h.) in the elaboration of the *ahkām* and they saw the events that were the cause of revelation. It is on this basis that their view is to be preferred over the view of those who did not witness any of these things.

The second area in which the Ḥanafīs maintain that it is binding to follow the opinion of a Companion is where the Companion is talking about quantities, numbers and periods. The reason is that analogy has no role to play in this area, and most jurists are agreed that the opinion of a Companion is to be followed. Al-Sarakhsī points out that it is for this reason that the opinions of Companions have been considered binding in the following cases (examples):

- The rates of *zakāt*.
- The determination of the amount of dower.
- The determination of the minimum and maximum for the period of menstruation.
• The determination of the post-natal period.
• The determination of the maximum gestation period.

Those who do not consider the opinion of a Companion to be binding maintain that they are under
an obligation to follow the Qur’ān and the Sunnah, as well as those sources that are indicated by these
two primary sources. These primary sources have not asked us to follow the opinion of a Companion as a
source of law.

Al-Sarakhsī maintains that there is no dispute that the opinions of the Tābi‘īn are not binding in the
sense that analogy should be given up in their preference. If one of them holds an opinion contrary to the
consensus of the Companions, his opinion is not given weight in opposition to theirs.

11.7. Earlier Scriptures (*Shar‘ Man Qablanā*)

The meaning of *shar‘ man qablanā* is the body of rules ordained by Allah for the nations before the Muslim
Ummah through revelation to their Prophets and Apostles. Muslim jurists have differed somewhat about
the relationship of such laws with the *sharī‘ah*, as well as about their binding force for the Muslims.
Some maintained that it was abrogated by our *sharī‘ah*, while others said that those parts that were not
abrogated are binding on us.

11.7.1. Types of earlier laws

1. **Rules that have been repeated in the Qur’ān or the Sunnah and made obligatory.** These
texts themselves provide the evidence about the binding nature of the laws and we do not have to
refer to the earlier scriptures. These laws are binding on us just as they were binding on the earlier
nations. Example: Fasting during Ramadān [Qur’ān 2:183].

2. **Rules that have been described in the Qur’ān or in the Sunnah, but are considered
abrogated.** Rules about carrion, blood, flesh of swine and the like.
3. Rules that are not mentioned in the Qur‘ān and the Sunnah, but are found in the earlier Scriptures. There is no dispute that these are not binding on us.

4. Rules that are mentioned in the Qur‘ān and the Sunnah, but there is no evidence whether or not they are to be followed. The example given by some jurists under this heading is that of qisāṣ (retaliation). There is, however, ample evidence in the texts that it is binding on us.

This shows that the real source for all such rules are the Qur‘ān and the Sunnah, and they become binding on the Muslims when these primary sources grant the authority. To elaborate the basis for not accepting the rules in the earlier Scriptures, Al-Sarakhsī makes the following statement:

The most authentic statement in our view is that what is confirmed as an earlier law through the Book of Allah, or the elaboration by the Prophet (p.b.u.h.), becomes a law for us, unless it is abrogated. As for what is transmitted by the People of the Book or is understood by the Muslims from their Scriptures is not binding on us, because of the established evidence that they altered their Books. Their transmission is, therefore, not accepted on the assumption that what is transmitted is entirely changed.

11.8. Custom (‘Urūf)

The earlier jurists make only a passing reference to custom, and they have never considered it as a source of law. In modern times, under the influence of Western jurisprudence, some writers have given more importance to custom as a source of law. Custom has been a source of law, but in a limited sense. This will be obvious from the discussion below.

The word ‘urūf is usually associated with the word ma‘rūf (good) in the texts. In this sense, it is what the sharī‘ah considers to be good, and not what human reason or the prevalent practices consider to be good. If some of these practices are approved by the sharī‘ah, then, they are acceptable to the law. The process of approval, prior to acceptance, is necessary.
11.8.1. Types of ‘urf

There are different ways of classifying ‘urf, and each classification is intended to bring out its nature. ‘Urf is divided first into ‘urf qawlī (usage) and ‘urf fi‘lī.

1. ‘Urf qawlī. The first type, or usage, may be analysed into the following types:

(a) The meaning of terms during the period of the Prophet (p.b.u.h.). This is the usage that was prevalent during the time of the Prophet. The meaning assigned to words at that period is used to understand the true intention of the Lawgiver.

(b) Technical terms of the law or ‘urf shar‘ī. The jurists usually employ the term ‘urf shar‘ī to denote the technical sense that a term may have acquired in Islamic law. This technical meaning is usually different from the literal meaning in which the term is used. Thus, the word șalāt means any type of prayer or supplication, but in the technical sense it means the entire form of the prayer that has been transmitted from the Prophet (p.b.u.h.). The word ribā literally means excess and in general usage it means “interest” in the sense of sūd in Urdu, but in the technical sense it has a much wider and comprehensive meaning assigned to it by the Sunnah. For legal purposes, it is the ‘urf shar‘ī that has to be followed.

(c) Usage in a local area for purpose of transactions. It is obvious that people using languages other than Arabic, undertake their transactions in their own language. Islamic law will recognize the meaning in such usage, but only if it conforms with the forms prescribed by the law, that is, if such use of words achieves the same purpose as the one prescribed. If it does not, the law will declare it fāsid. In other words, such usage has to be measured against the permitted rules before it can become permissible. It will not be recognized automatically.

It is obvious that none of these can be called a source of law in the sense that we understand custom to be a source in Western law.

2. ‘Urf fi‘lī. This is of two types:

(a) The practices prevalent during the period of the Prophet (p.b.u.h.). These practices were either approved by the Prophet (p.b.u.h.), either expressly or tacitly, or they were rejected.
As such they became part of the Sunnah. The source of the law here was not custom, but the Sunnah, even though customs and practices did provide the raw material. Each practice was subjected to the norms of the shari‘ah by the Prophet himself, and was either accepted or rejected.

(b) Practices during the later periods. These practices were faced by the jurists like new instances or cases and each one of them was subjected to scrutiny by the jurists. The jurists either justified these practices in the light of the principles of Islamic law or rejected them in the light of the same principles. No practice could automatically be approved just because it was a long standing custom.

We see from the above that though custom may provide the raw material to be considered by the jurist, no practice or custom can automatically be accepted as law. It has to be analysed and Islamized before it may be accepted. It may be noted that even in Western law, customs become law only when they are recognized by courts as such, and recognition means weighing them against the rest of the law for compatibility.

11.8.2. Can the Western laws obtaining in Pakistan be treated as custom?

It has been suggested by some that all the laws prevalent in Pakistan may be treated as ‘urf (custom) and thus declared valid. The idea behind this suggestion is that customs attain automatic validity just by being called customs. The idea is used by those who maintain that only five percent of the law needs to be changed for purposes of Islamization and the rest should be left untouched. This is not correct. Each prevalent law must be treated as a new case and be analysed in the light of the principles of Islamic law. It is not sufficient to say that there is nothing in the Qur’ān and the Sunnah that clashes with a certain law, that is, the law has passed the repugnancy test. This way the law will not develop further on Islamic lines. Each law must be shown to be valid according to a principle of Islamic law. The Courts will then be able to develop the law and the principles further.
11.9. Islamic Law and Roman Law

A number of Orientalists have suggested that Islamic law has borrowed considerable details from Roman law. Foremost among them have been Max Weber and Joseph Schacht, and more recently Crone. The answer to this is that all civilizations borrow something from other civilizations; the same is true of legal systems. While considering this issue the following points may be kept in mind:

1. First, even Roman law has borrowed many things from earlier civilizations. Many of these civilizations flourished in areas that later came under Muslim rule. Even the Jewish law borrowed many things from the areas now called Iraq and Iran, because the Jews after the diaspora lived in these areas and the Babylonian Talmud was written there. When the jurists of this area accepted Islam, it was natural that they would benefit from their knowledge.

2. Secondly, the human mind works in the same way and there is no reason why legal concepts cannot be developed in different systems independently. The true nature of these concepts depends on the material to which they are applied.

3. Thirdly, we have seen in the discussion of ‘urf above that all new concepts or rules must be subjected to the Islamization test before being absorbed into the end. This what the jurists did and the same is being done today or should be done.
Chapter 12

*Mašlaḥah* and the *Maqāṣid al-Sharīʿah*

As Islamic law attained maturity, the principle of *mašlaḥah* based upon the *maqāṣid al-sharīʿah* (the purposes of Islamic law) grew to envelope all the rational sources of Islamic law. Accordingly, each rational source is today considered part of the larger doctrine of *mašlaḥah* and the principle is considered the most important and the most comprehensive instrument of *ijtihād* for the modern times. We will, therefore, consider it in a little more detail here.

The meaning of *mašlaḥah* is discussed first and is followed by a description of the purposes of Islamic law or the *maqāṣid al-sharīʿah*.

12.1. The Meaning of *Mašlaḥah* (Interest)

The words *mašlaḥah* and *manfaʿah* are treated as synonyms. *Manfaʿah* means “benefit” or “utility,” that is, it leads to some kind of benefit. In its literal meaning *mašlaḥah* is defined as جلب المنفعة ودفع النصمة (jalb al-*manfaʿah* wa-dafʿ al-*maḍarrah*) or the seeking of benefit and the repelling of harm. If this literal meaning is pursued further it will lead to something similar to the principle of utility expounded by Jeremy Bentham, which means securing the maximum human happiness. *Manfaʿah* (benefit or utility), however, is not the technical meaning of *mašlaḥah*. What Muslim jurists mean by *mašlaḥah* is the seeking of benefit and the repelling of harm as directed by the Lawgiver. The seeking of utility in Islamic law is not
dependent on human reason and pleasure. Al-Ghazâlî, therefore, defines *maslahah* as follows:

As for *maslahah*, it is essentially an expression for the acquisition of *manfa‘ah* (benefit) or the repulsion of *ma‘ṣṣarah* (injury, harm), but that is not what we mean by it, because acquisition of *manfa‘ah* and the repulsion of *ma‘ṣṣarah* represent human goals, that is, the welfare of humans through the attainment of these goals. **What we mean by *maslahah*, however, is the preservation of the ends of the *shar‘*.**

12.2. Islamic Law and the Interest of Man

The main issue underlying the discussion of *maslahah* is whether the Lawgiver laid down laws in the interest (*maslahah*) of Man? If this is true, can the interest of Man be an independent source of laws? Is Man free to determine his own interest, or is it predetermined by the Lawgiver? This issue is extremely important for *ijtihād* and the framing of new laws in the present times. The reason is that in the absence of a direct and express evidence in the Qur‘ān and the *Sunnah*, laws are to be framed in the light of the interest (*maslahah*) of Man as determined by the Lawgiver.

The majority of the Muslim jurists agreed that the Lawgiver lays down laws in the interest of Man. There have been some voices against this idea too, notable among them being the objections of the illustrious Imām al-Rāzī (d. 606). He gave extremely powerful arguments against this idea. Al-Rāzī did concede though that whenever we consider the laws and the interests of Man, we find them lying side by side, or existing together, yet we cannot establish a causal relationship between them, that is, the laws are laid down because they serve the interest of Man. The problem may be explained in a simple way.

Take the case of a factory producing something. The sole purpose of the existence of this factory is the creation of a product. Every directive that is issued to the workers is intended to enhance the quality of this product or to create it on time, or to create a product that is more useful. The factory does not exist for the workers, but for the creation of that product. The effective production of goods, however, requires that the interest and welfare of the workers be kept in view, for that will lead to a better product. If the

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worker performs well he is rewarded or promoted, because he is in harmony with the process leading to
the ultimate product. If he does not perform well, he will not be rewarded and may also be penalised for
a breach of discipline. The factory does have laws to regulate the activity of the workers. These laws are
laid down primarily to ensure an effective production of goods, though the laws may indirectly serve the
interest of the worker.

Is Man the final product of this universe created by Allah, or is the purpose of this universe something
larger, larger than Man?

What! Are ye the more difficult to create or the heaven (above); (Allah) hath constructed it.
[Qur’an 79 : 27]

If Man is the sole purpose, then, all laws must have been made to serve his interest. On the other hand,
if the purpose of the creation of the universe is something other than Man as may be understood from
the above verse, then, is Man in the position of the worker, a servant of Allah (‘abd Allah), who is to be
rewarded if he performs well and punished if he misbehaves? The laws in this case would appear to be
lying side by side with the interest of Man, as al-Rāzī maintains, because they are actually serving some
larger purpose. Again, if Man is the sole purpose of the universe, the laws would be laid down to serve his
interest alone. Thus, there would be a causal relationship between the laws and the interest of Man.

Whichever approach we take on this issue it does not alter the decision on the interest of Man. There
is some relationship between the interest of Man and the \textit{hukm} of Allah. It does not matter if this is a
causal relationship. The majority of the jurists, therefore, agree that \textit{maṣlaḥah} or the interest of Man may
be employed for the derivation of new laws. This in no case means that the Muslims are free to make
laws in accordance with whatever they deem to be their interest. The interest of Man is determined by
the Lawgiver Himself, and there is a determined methodology for identifying this. The jurists have taken
great pains to lay down this methodology in a way that the laws derived through it may still be termed
as the \textit{aḥkām} of Allah. This methodology is based entirely on an understanding of the purposes of the
\textit{shari‘ah} and their interaction with the general principles of this law. We will, therefore, confine ourselves
to the explanation of the \textit{maqāsid al-shari‘ah} in this chapter.
12.3. *Maqāṣid al-Sharī‘ah* or the Purposes of Islamic Law

The purposes of law are divided by al-Ghazālī into two types:

- *dīnī* or purposes of the Hereafter.
- *dunyawī* or purposes pertaining to this world.

Each of these is divisible into *taḥṣīl* or securing of the interest and *iqbā‘* or preservation of the interest. *Taḥṣīl* is the securing of a benefit (*manfa‘ah*) and *iqbā‘* is the repelling of harm (*maḍarrah*). The phrase *ri‘āyat al-maqāṣid* (preservation of the *maqāṣid*) is used to indicate both *taḥṣīl* and *iqbā‘*.³

The worldly purposes (*dunyawī*) are further divided into four types: the preservation of *nafs* (life), the preservation of *nasl* (progeny), the preservation of *‘aql* (intellect), and the preservation of *māl* (wealth). Each worldly purpose is meant to serve the single *dīnī* purpose. When all types are taken together, we find the ultimate purposes of the law arranged in the following way:

1. *Ḍarūrāt* (necessary interests). Necessary interests are those without the protection of which there would be anarchy and chaos in society. The absence of protection for these interests would mean the loss of everything that we hold dear. These prized social interests are five in number:

   (a) Preservation and protection of religion (*ḥifż ‘alā al-dīn*).
   (b) Preservation and protection of life (*ḥifż ‘alā al-nafs*).
   (c) Preservation and protection of progeny (*ḥifż ‘alā al-nasl*).
   (d) Preservation and protection of intellect (*ḥifż ‘alā al-‘aql*).
   (e) Preservation and protection of wealth (*ḥifż ‘alā al-māl*).

2. *Ḥājāt* (supporting needs). The second type of interests are called *ḥājāt* or supporting interests required by the necessary interests for their smooth operation and implementation. If these supporting interests are not protected by the law there would be hardship and loss in the performance of social interests.

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functions. This means that the primary or necessary interests would not be lost, but there would be considerable friction and difficulty in their protection. The examples of these interests given by jurists pertain mostly to exemptions granted by the law. For example, the exemptions available due to illness or journey in case of worship serve these interests, just like the contract of salam (advance payment) works as an exemption to facilitate transactions. The necessary interests do not depend on these exemptions or supporting needs, but their operation is facilitated.

3. Taḥṣīnāt (complementary interests). These interests provide additional rules that lead to the moral and spiritual progress of the individual and society. Examples are: voluntary ṣadaqah and many ethical and moral rules (like the command not cut trees or to kill animals during war). In reality, the taḥṣīnāt tell us that there is a moral shell around the necessities and supporting needs provided by the sharī‘ah. Thus, morality goes hand in hand with the law and there is no separation as may be found in Western law.

12.4. What is Beyond the Purposes?

If we move beyond the ultimate values recognised as the purposes of the law, we reach the area of weaker attributes, which are also used by the jurists for extending the law. This is the area of the asbūh. These too are organised in the form of the particular and the general. This is the area of the probable or ẓannī maqāṣid.

Thus, the purpose beyond these purposes could be the building of civilisation, security, the maintenance of equality, freedom, and many other values that are preserved and protected by each society and they are expressed as the aims of justice in Western law.4 The Muslim jurists did not deal with such values, because they are probable and do not fall in the area of certain rationality. An attribute depicting such values is called wasf ba‘īd or a distant value; it is distant in comparison with the ẓarūrāt, each of which is a wasf qarīb or near value.

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4 Bodenheimer, Jurisprudence, 196.
12.5. *Maqāṣid al-Sharī‘ah* and the Texts

The purposes of Islamic law have been determined from the texts through a process of induction (*istiqrā‘*) rather than through deduction. This is the reason why the *maqāṣid* are considered definitive (*qaṭ‘ī*), and can be relied upon without a doubt, and the same pattern is to be found in the other details of the *sharī‘ah*. Jurists quote a large number of verses of the Qur‘ān to show how the ultimate purposes are indicated by the texts.

12.6. The Nature and Structure of the *Maqāṣid*

The structure of the *maqāṣid* is understood by appreciating the relationship of the primary purposes among themselves, and their relationship with the secondary and supporting purposes. As the *maqāṣid* are designed to ultimately serve the interests of the Hereafter, it is this relationship that may be examined first.

12.6.1. Primary purposes in the service of the Hereafter

The first purpose of the *sharī‘ah* is to secure the interest of Man that pertains to the Hereafter. It is for this reason that the purposes are divided into *dīnī* or purposes of the Hereafter and *dunyawī* or purposes restricted to this world. The worldly purposes, in combination, seek to preserve and protect the interest of *Dīn*.

Al-Ghazālī says that the second purpose, which is the preservation and protection of life, may be considered by some to have a higher priority than *dīn*, because without life there would be no religion. This argument takes collective life into consideration, and in this sense it would also hold true for the intellect too, because the existence of ‘*aql* is considered by jurists to be a condition of *taklīf* (legal obligation). He points out, however, that some provisions of the law clearly support the superiority of the interest of *Dīn*. For example, the interest of *Dīn* is preferred when the subject is asked to give up his life in the way of Allah, that is, for *jihād*. The relationship of the necessities or the primary purposes is seen through the following figure:
Al-Shaṭībī devotes three of the thirteen rules, in which he discusses the relationship among the purposes, to the discussion of the Hereafter. The most important point he makes in this context is that the identification of the interests of Man has not been left to the whims and fancies of human beings, that is, to human reason, because all the purposes seek to establish and maintain life in this world to serve the interests of the Hereafter.

He also discusses the concept of utility and points out that benefits and harms are relative; they may vary from individual to individual, and from one situation to the other. If harm and benefit cannot be established directly from the texts, then, it is to be linked to what is usually considered beneficial or harmful. The general rule that he derives is that since the *maqāṣid* serve the interests of the Hereafter the
determination of what is beneficial and what is harmful cannot be left to human reason. He seeks support
from a number of Qur’anic verses. One of these is:

وَلَوْ آتَنَّهُمْ أَحْوَاهُمْ لَفَسَدَتْ السُّرُوُّاتُ وَالأَرْضُ وَمَنْ فِيهِنَّ

And if the Truth had followed their desires, verily the heavens and the earth and whosoever is
therein had been corrupted. [Qur’an 23 : 71]

In his view, the role of human reason begins after the sharī‘ah has laid down the essential principles.5
The first of the thirteen rules he expounds is devoted to this point.

The primary purpose of the sharī‘ah, then, as indicated already, is to free Man from the grip of his
own whim and fancy, so that he may become the servant of Allāh by choice, just as he is one without it.6
The preservation and protection of Dīn is intended by the Lawgiver to achieve this.

12.6.2. The two faces of the maqāsid

Perhaps the most important feature of the maqāsid is their dual thrust. Al-Ghazālī discusses this dual
nature in detail in his book called Jawāhir al-Qur‘ān.7 This point has been ignored by almost all the later
jurists, except for al-Shāṭibī.

The dual feature of the maqāsid is evident in the use of the terms ibqā’ and ḥifẓ, which we may
call preservation and protection. Al-Shāṭibī considers these the two aspects of ḥifẓ. The first he says
is “what affirms its elements and establishes its foundations.”8 The second is “what repels actual or
expected disharmony.”9 The focus of later jurists, and hence that of modern scholars, has been on the
aspect of protection alone. Each purpose, however, has a positive or aggressive aspect and a negative or

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6 Ibid., vol. 2, 38, 168.
7 Al-Ghazālī, Jawāhir al-Qur‘ān (Beirut: Dār Iḥyā’ al-‘Ulūm, 1985), 32-35
9 Ibid.
defensive aspect. From the positive aspect, the interest is secured by establishing what is required by the sharī'ah through each of its maqāṣid. Thus, the interest of Dīn is secured by the creation of conditions that facilitate worship and establish the other essential pillars of Islam. The interest of life is secured by creating conditions for the existence of life. The interest of progeny is supported by facilitating and establishing family life. The interest of intellect is secured by promoting the means for the growth of the intellect. The interest of wealth is secured by creating proper conditions for the growth of wealth.10

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From the defensive or the protective aspect, interests are secured by preventing the destruction or corruption of the positive aspect. Thus, jihād is prescribed for defending Dīn, while prayer, fasting, pilgrimage, and zakāh help establish it. It is the duty of the imām to ensure proper conditions for both, while it is binding upon each subject to fulfil these duties, individually and collectively. Life is preserved through the provision of sustenance and the maintenance of good health, while it is protected or defended through the provision of penalties for those who destroy life without legal justification. Nasl is promoted through the maintenance of healthy family life and the institution of marriage, while penalties are provided for those who would corrupt it and destroy its values. The preservation of ‘aql is achieved through the provision of education and healthy conditions for its growth, while penalties are provided for the consumption of substances that destroy the intellect. Preservation of wealth is achieved by encouraging its growth, while theft or misappropriation of wealth is punished through penalties.

12.6.3. Primary and secondary purposes

The jurists break up the maqāṣid into three levels. This has already been pointed out. The first level is that of the necessities (darūrāt), which have been maintained by all societies and without which the social

10 Ibid., 2, 9.
structure will collapse. These are the primary *maqāṣid* and the jurists focus mostly on these. They are supported by the supporting needs (*ḥājāt*). The third level is that of complementary values and norms (*taḥsīnāt*).

The important point made by jurists about the significance of each level is that the primary purposes are supported by the two other levels. However, if the last two levels are abolished the primary purposes will stand by themselves. This is not true for the lower levels. The existence of *ḥājāt* and the *taḥsīnāt* depends upon the primary purposes and they cannot be maintained on their own.
are stated. Thus, Din has precedence over life, life has precedence over nasl, nasl has precedence over aql, and aql has precedence over mal. This is not all. Each of the primary purposes may divided into public and private purposes. The public purposes seek to preserve the interests of the community as whole, while the private purposes protect the rights of individuals. Again, the purposes are divisible into those securing the rights of Allâh and those preserving or protecting the rights of the individuals. There is a fine distinction between the two kinds of divisions, though many modern scholars tend to consider them identical. The distinction lies in the fact that there are three kinds of rights to be identified rather than two. These are right of Allâh, the right of the community as whole, and the right of the individual.

The relationship that exists between the primary purposes may be highlighted by visualising outer shells serving or protecting the inner shell or shells. Thus, the innermost shell is represented by the preservation and protection of Din. This represents the foremost purpose of the sharî’ah. The shell surrounding it is that of life, which is itself surrounded by nasl and so on. The outermost shell is that of the preservation of wealth that serves all the inner shells and is subservient to them.

Each primary purpose considered to be a necessity has its own supporting needs and complementary norms. These are also to be viewed as shells, one inside the other. Considering the example of prayer (salât), al-Shâṭîbî says that the essential parts of the prayer are its arkân (elements) and farâ’îd (obligations). Whatever is besides these is meant to complete and complement it.11 The parts of prayer are distributed among the maqâsid in such a way that each outer shell forms a protective boundary for the inner shell. One who crosses the outer shell or boundary will soon demolish the inner shell. Thus, the person who gives up the nafl (supererogatory) prayers will soon give up the sunan, and will finally demolish the farâ’îd. There are many instances in the law, he says, that correspond with the analogy of nafl and

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farā’id. For example, even a drop of wine or a small quantity of it is prohibited, because it leads to the consumption of larger quantities, though it does not intoxicate or damage the intellect. In the same way, the ethical and moral norms hover around and protect the main and essential legal norms. The ḥājī and the taḥsīnī are, therefore, to be considered the servants of the darūrī.

12.6.4. Priorities within the maqāṣid

The relationships described above indicate that some purposes have a higher priority than others, that is, they would be preferred in case of a clash between two interests. This fact also highlights an important point that while deciding a legal case or while attempting to understand the position of Islamic law on an issue, one cannot look at one purpose or interest alone. There is always a clash of two or more interests. This is achieved through the machinery of organised political society that seeks to strike a compromise between the conflicting wants, desires, and claims of individuals and between the competing interests.

12.6.4.1. Rule 1: The stronger interest shall prevail

The inherent strength of the interests secured by Islamic law is reflected in the order in which the maqāṣid are listed by the jurists. Thus, the preservation and protection of Dīn, as we have pointed out earlier, has preference over the preservation and protection of life; life has a higher priority than nasl; nasl is prior to ‘aql; and ‘aql is preferred over māl.

<table>
<thead>
<tr>
<th>Dīn</th>
<th>Life</th>
<th>Family</th>
<th>Intellect</th>
<th>Wealth</th>
</tr>
</thead>
<tbody>
<tr>
<td>First</td>
<td>Second</td>
<td>Third</td>
<td>Fourth</td>
<td>Fifth</td>
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</tbody>
</table>

In practice this would mean, for example, that jihād has priority over preservation of life, and if an individual is asked to participate in it and give up his life in the cause of Allāh, there is legal justification for it. Preservation of life has a higher priority than the protection of ‘aql. Therefore, if a person is facing...
death in a desolate place due to lack of water and the only thing available to him is wine, he is under an obligation to save his life by drinking the wine. Life has priority over māl too and it is permitted to take the property of another person without fear of penalty during a famine, if such taking results in the saving of life or lives.

In the same way, the darūrāt have priority over the ḥājāt, which in turn have priority over the taḥsīnāt.

12.6.4.2. Rule 2: The public interest is prior to the private

The different categories of the purposes can be understood in terms of public and private interests. Whenever a public interest is in conflict with a private interest, the public interest will prevail. The example used by the jurists is that of material handed over to artisans and craftsmen. The original rule of deposit (wadī‘ah) required that this material being a deposit would not be compensated by the craftsmen in case it was destroyed, and the burden of proving tort (ta‘addī) or negligence would be upon the customer, the owner of the property. This rule was changed to conform with the public interest, because the craftsmen were misusing the facility. The burden of proof was shifted to the craftsman, who had to show the absence of negligence. The Ḥanafīs based this change on istihāsān. The example is expected to show that the public interest requiring security of transactions and protection of property of the general public was given preference over the interest of individuals, that is, the craftsmen.

12.6.4.3. Rule 3: The definitive interest prevails over the probable

This rule has been the cause of confusion for some jurists following al-Ghazālī, and the confusion is witnessed in the works of some modern scholars too. Al-Shāṭibī states very clearly that all the interests preserved and protected by the sharī‘ah are definitive (qat‘ī). He repeats this point over and over again, and it is in fact a fundamental assumption of his work. The question, therefore, arises that if all interests are definitive, where does the probable interest come from? The answer to this issue is that the probable goals of the law belong to the area that is beyond the purposes and has been discussed above. These purposes have not been discussed by the jurists in detail. Most of the goals like building of civilisation, maintenance of security, equality, freedom and others would come under this heading. From another perspective, these goals have neither been rejected by the Lawgiver nor have they been directly acknowledged.
Part III

*Ijtihād* and *Taqlīd*
Chapter 13

The Meaning of Ijtihād and its Modes

13.1. The Meaning of Ijtihād

The literal meaning of ijtihād is the expending of maximum effort in the performance of an act. Technically, it is the effort made by mujtahid in seeking knowledge of the ahkām (rules) of the sharī‘ah through interpretation. This definition implies the following:

- That the mujtahid should expend the maximum effort, that is, he should work to the limits of his ability in deriving the rule so much so that he realises his inability to go any further.
- That the person expending the effort should be a mujtahid. An effort expended by a non-mujtahid is of no consequence, because he is not qualified to do so.
- The effort should be directed towards the discovery of the rules of the sharī‘ah that pertain to conduct. All other types of rules are excluded.
- The method of discovery of the rules should be through interpretation of the texts with the help of the other sources. This excludes the memorization of such rules from the books of fiqh or their identification by the muftī. Thus, the activity of the faqīh, the muftī cannot be called ijtihād.
13.2. The Task of the **Mujtahid**

The primary task of the *mujtahid*, as is evident from the above definition, is to discover the *ahkām* of the *shari‘ah* from the texts. An important fact revealed in the previous study is that the texts of the Qur‘ān and the Sunnah, dealing with legal matters, are limited, while the new problems are unlimited. The task of the jurist, therefore, after a study of the primary sources, is to:

- discover the law that is either stated explicitly in the primary sources or is implied by the texts, that is, literal interpretation;
- extend the law to new cases that may be similar to cases mentioned in the textual sources, but cannot be covered through literal methods; and
- extend the law to new cases that are not covered by the previous two methods, that is, they are neither found explicitly or impliedly in the texts nor are they exactly similar to cases found in the texts.

The three tasks mentioned above not only tell us something about the nature of the sources, the way they point to legal rules, but also highlight the manner in which interpretation of the texts or *ijtihād* is to take place. In other words, these tasks tell us something about the different methods or the modes of *ijtihād* exercised by the jurist. An understanding of the modes of *ijtihād* helps draw a clear line between the literal methods of extending the law and the rational methods.

13.3. The Modes of **Ijtihād**

The jurists in general practice three types or modes of *ijtihād*. In reality, the activity of the jurist cannot be split up into separate modes. *Ijtihād* is a single seamless process, but for simplification and ease of understanding this activity is divided into three types as follows:

1. **The first mode.** In the first mode, the jurist stays as close as he can to the texts. He focuses on the literal meaning of the texts, that is, he follows the plain meaning rule. In doing so, he first tries to
find explanations for difficult or unelaborated words from the texts themselves.\(^1\) He moves to other sources, like the meaning of words in literature, later.\(^2\) This also depends on whether the words have been used in the texts in their literal sense or their use is figurative (ḥaqīqah and majāz).

The text may not indicate the required meaning through a plain reading. In such a case, the jurist will use other techniques, called dalālāt, through which the implied meanings are ascertained.

2. **The second mode.** When the first mode of literal construction is exhausted by the jurist, he turns to syllogism, which is called qiyyās. This mode is confined to strict types of analogy. These are called qiyyās al-ma‘nā and qiyyās al-‘illah. Certain loose forms of analogy like qiyyās al-shabah or analogy of resemblance are rejected by some jurists. The reason why only strict methods of analogy are approved is again the desire of the jurist to stay close to the intention of the Lawgiver. If very loose methods are adopted the Islamic colour of the legal system may be lost. Qiyyās is, therefore, designed to be a strict type of analogy and may be said to apply to the process of finding an exact parallel. The second mode of *ijtihād* is confined to the use of qiyyās.

3. **The third mode.** The second mode of *ijtihād* is confined to the extension of the law from individual texts, while in the third mode the reliance is on all the texts considered collectively. This means that legal reasoning is undertaken more in line with the spirit of the law and its purposes rather than the confines of individual texts.

The spirit of the law and its purposes can be witnessed clearly in the general principles of the legal system. The principles are used by methods like *istiḥsān* and *maṣlāhah mursalah*. The third mode of *ijtihād* provides the jurist with the opportunity to generate new principles provided he observes a prescribed methodology and fulfils the conditions imposed for such legal reasoning.

\(^1\) He looks for such explanations in the texts of the Qur‘ān as well as the *Sunnah*.

\(^2\) The jurist is equally concerned with the technical meanings that the words in the texts have been assigned by the texts themselves. Thus, words like *ṣalāt*, *zakāt*, and *riba*, used in the Qur‘ān have technical meanings assigned to them by the *Sunnah*. It is these technical meanings that are used in the law.
13.4. The Complete Process of *Ijtihād*

It has been stated above that all three modes of *ijtihād* are practiced as a single seamless activity. An understanding of these modes in not enough for visualizing the total activity of *ijtihād*. There are some other processes involved that complete it. The following states and activities collectively depict the process of *ijtihād*.

- The *mujtahid* acquires the qualifications necessary for *ijtihād*.
- The *mujtahid* understands the different forms of *bayān* or elaboration of the texts, which is usually provided by the Lawgiver Himself, and also identifies the occasions on which such *bayān* is invoked.
- The *mujtahid* exercises all three modes of *ijtihād*, if necessary, in his effort to derive the law from the sources.
- The *mujtahid* understands abrogation (*naskh*) and identifies the occasions on which rules have been repealed by the Lawgiver.
- The *mujtahid* exercises preference (*tarjīh*) and reconciliation (*jamʿ*) among apparently conflicting sources.

All these activities when combined indicate the complete process of *ijtihād*. To understand *ijtihād* fully all these processes are to be understood.

13.5. The Qualifications of the *Mujtahid*

The qualifications for a *mujtahid* appear to be a later development in the history of Islamic law. No such qualifications appear to have been prescribed during the first two centuries of the Hijrah. It is only after the time of Muḥammad ibn Idrīs al-Shāfiʿī, the founder of the Shāfiʿī school, that such conditions were given greater importance. Prior to this, it was the performance of the jurist in the field of Islamic law and his acceptance by the people, who reposed their faith in him, that he came to be accepted as a *mujtahid*. Nevertheless, some conditions are deemed necessary and these are listed below:

1. Knowledge of the Arabic language.
4. Knowledge of Ijmāʿ.
5. Knowledge of the maqāṣid al-sharīʿah.

6. Aptitude for ijtihād: Another condition that some writers lay down is a natural aptitude for law and ijtihād. This is more like a God given gift than something that can be acquired. Just like a good knowledge of Arabic does not make a person a poet, the fulfilment of the above conditions will not make a person a mujtahid.

13.6. Who is a mujtahid today?

In the present times, possession of all the above qualifications is not likely to bestow the status of mujtahid on a person. The reason for this is that much depends on acceptance by the people. As there are established schools today, the need for such acceptance by the people does not exist. It is for this reason that jurists like al-Sarakhsi, al-Ghazali, and many others who may be said to possess all the qualities of full mujtahids were not granted such a status.

Ijtihād is primarily a legislative function, and today the state has a monopoly over legislation. An opinion issued by a mujtahid would have no significance unless it is accepted by the state and converted into law through legislation. In certain cases, the courts too may recognize an opinion and grant it weight in their decisions. The mujtahid in such a case would be the state and not the individual.

In Pakistan today, the Council of Islamic Ideology cannot be deemed to have the qualifications of a mujtahid; its status is more like that of a muftī, whose opinions are not binding. The CII itself is part of the state. At the international level, the Islamic Fiqh Academy of the OIC has a similar status as its opinions are mere recommendations and are not binding on anyone.

The general rule is that an opinion derived by a mujtahid is binding on him and he is supposed to act upon it. This is only possible today in private matters; in the rest of the law, he is bound to follow the law laid down by the state. This shows that there is limited scope of ijtihād by individuals today. There is, however, tremendous scope in modern times for the faqīh. This has been true for a sizable period of Islamic history.
13.7. Abrogation (Naskh)

The literal meaning of naskh is cancelling or transferring. In its technical sense it is used to mean the “lifting (raf‘) of a legal rule through a legal evidence of a later date.” The abrogating text or evidence is called nasikh, while the repealed rule is called mansūkh.

All the four Sunni schools unanimously accept the doctrine of abrogation, though they may disagree on the details. Most of the independent jurists also accepted this doctrine. It may, therefore, be assumed to be a kind of consensus. The concept of “repeal” and “overriding laws” is a necessity in a legal system and Islamic law acknowledges it. Such repeal in the texts, though, could only occur during the lifetime of the Prophet (p.b.u.h.).

According to al-Sarakhsi the Jews did not accept this concept in their legal system. We may guess the reason for this: they had very little chance of implementing their system through a state, and their law has remained theoretical. It is only in the modern times that they have been able to establish a state. Some modern Muslim scholars, who do not appreciate the working of a legal system, have also tried to deny the doctrine of abrogation. As stated, however, it is a fact established by the unanimous agreement of the schools of law and their jurists.

One of the earliest cases of repeal of an earlier command was the directive to change the direction of the qiblah from Bayt al-Maqdas to the al-Masjid al-Ḥaram. The repealing verse is:

Naskh is total (kulli), where it may lift the entire law and substitute another one for it, or it may be partial (juz‘i), when the law is repealed for a certain class alone. This is what may be called the overriding of a general law by a special law. For example, a general law in the Qur’an provides penalties for all those who falsely accuse chaste women of sexual intercourse. It then provides a special law in the case of spouses accusing each other of unchastity. The provisions of the general law are not applicable to spouses, because the special law overrides that provision.

It is generally acknowledged that Islamic law works for the interest (maslahah) of human beings. Interests may keep on shifting with a change in circumstances, and the law adjusts accordingly. The law was laid down in the period of the Prophet (p.b.u.h.) gradually and in stages. The aim was to bring
a society steeped in immorality to observe the highest standards of morality. This could not be done
abruptly. It was done in stages, and doing so necessitated repeal and abrogation of certain laws.

13.8. The Rules of Preference (*Tarjîh*)

There is no conflict between the texts or evidences of the *sharî'ah*. The conflict lies in the mind of the
*mujtahid*. The primary reason for this is that he does not know the dates on which the evidences were
revealed. Where the dates are known, the jurist follows the doctrine of abrogation. In case he does not know
the dates, he adopts the methods of preference (*tarjîh*) and reconciliation (*jam‘*). The rules of preference
are as follows:

1. The explicit meaning (*naṣṣ*) is preferred over the manifest meaning (*zâhir*).
2. The elaborated meaning (*mufassar*) is preferred over the explicit meaning (*naṣṣ*).
3. The *muḥkam* is preferred over all other meanings.
4. The rule established through a plain reading of the text (*‘ibârat al-naṣṣ*) is preferred over one proved
   through an indirect implication (*ishârat al-naṣṣ*).
5. The rule established through an indirect implication (*ishârat al-naṣṣ*) is preferred over one established
   through its implication (*dalâlat al-naṣṣ*).
6. Preference is undertaken through the power of the argument rather than through the number of
   evidences. This has some sub-rules:
   
   (a) The evidences from the Book and the *Sunnah* are preferred over analogy.
   (b) *Ijmâ‘* is preferred over analogy. Consensus is definitive and will be preferred over probable
       evidences in case of conflict. It is for this reason that al-Ghazâlî sates that the first thing a
       jurist must do is to find out if a consensus has occurred on the point under consideration.
   (c) A *mutawâtir* tradition will be preferred over a *khabar wâhid*.
   (d) A *khabar wâhid* transmitted by a Companion who enjoys a reputation as a jurist will be preferred
       over another *khabar wâhid* transmitted by a Companion who does not enjoy such reputation.

There are a large number of other rules, but the above should suffice as a representative sample.
Chapter 14

Taqlīd or Juristic Method

Taqlīd, as generally understood, means following the opinion of the schools of Islamic law in matters of conduct. Thus, a Ḥanafī follows the opinion of the Ḥanafī school, while a Shāfiʿī follows the opinion of the Shāfiʿī school. As opposed to this, ijtihād means that the person in need of an opinion does not follow the opinion of any school, but derives the rule of conduct for himself directly from the sources of Islamic law. Such a person would obviously be designated as a mujtahid, and the mujtahid must have some basic qualifications that we have studied in the previous chapters. Further, the mujtahid must follow a system of interpretation; either an established system of a school or one that he has devised for himself. All persons who cannot lay claim to the status of a mujtahid, due to the lack or requisite qualifications and skills, must follow the opinion of some mujtahid, that is, they must perform taqlīd. Yet, we find that in modern times many scholars have condemned taqlīd, and have insisted on the necessity of ijtihād.

The reason for this is that in the writings of some of the earlier jurists taqlīd is considered mandatory for all jurists and independent ijtihād is not permitted. This is also termed as the “closing of the gates of ijtihād.” There have been many discussions on this issue in modern fiqh literature. In the light of these discussions, many modern scholars maintain that the doors of ijtihād were never closed and this activity should be carried on in the modern world, and taqlīd should be shunned.

Do these scholars mean that every layman should interpret the sources of Islamic law for himself and should avoid following the opinions of the schools of law? Do they mean that some scholars should...
undertake *ijtihād* and the rest should follow their opinions?

The word *taqlīd* is derived from *qalādah*, which is an ornament tied around the neck (like a necklace) or it is the strap that holds the sheath of the sword and is usually swung around the shoulders. The word *qalādah* is also used to mean the strap by which a piece of wood is hung from the neck of an animal; it prevents the animal from running astray, because it strikes it on the knees when it tries to run. In this sense, the word *taqlīd* carries a restriction within it, and this restriction is found in the technical meaning of the term.

In its technical sense, *taqlīd* is defined by Ibn al-Ḥājj as “acting upon the word of another without ḥumajj (proof or lawful authority).” There are two ways in which this definition has been understood, and has led to some confusion about the meaning and role of *taqlīd* in the present times.

The first meaning is assigned by modern writers. Abdur Rahim, for example, understands it to mean the following of the opinion of another without knowledge or authority for such opinion. In other words, when a person asks a jurist for an opinion, he should not ask him about the basis for his opinion, whether it has been derived from the Qur‘ān, the *Sunnah* or *ijmā‘* or some other source; he should follow it without question. This meaning is accepted generally by most modern writers, and it is this form that they condemn. The earlier jurists do not understand the meaning of the definition in this way.

According to the earlier jurists, the word *ḥumajj* means permission given by the *sharī‘ah*. *Taqlīd*, therefore, means following the opinion of another when the *sharī‘ah* has not given permission to do so. This meaning makes *taqlīd* unlawful, that is, whoever follows the opinion of another without permission of the *sharī‘ah*, is committing and unlawful act.

Following the opinion of a jurist does not fall within this meaning of *taqlīd*. The Muslim jurists maintain that following the opinion of a qualified jurist is permitted by the *sharī‘ah*, and does not fall within the prohibited meaning of *taqlīd*.

14.1. *Taqlīd* in the Pakistani Legal System

The Constitution of Pakistan permits *taqlīd* in articles 189 & 201. These articles make the judgments of the Supreme Court binding on all courts and the judgments of the High Courts binding on courts subordinate to them. The doctrine of precedent and *stare decisis* are nothing more than institutionalised
forms of taqlid. When the lower courts follow the opinions of the higher courts they are undertaking taqlid.

In addition to this, laymen accept the opinions of lawyers in their daily legal problems. Likewise, the courts accept the statements of witnesses, unless their veracity is challenged. The opinions of experts are accepted in a host of other matters.

The conclusion we may draw from this is that taqlid is an essential principle of our daily lives and is based upon division of labour where some persons specialize in certain areas and become experts. The mufti or the faqih is an expert in his area and there should be no hesitation in accepting his opinion by those who are laymen in his field of specialization.
Part IV

Islamic Business Law and Property
Chapter 15

Property and Ownership

15.1. The Nature of Property and Ownership

The word used by Muslim jurists for ownership is milkīyah and that used for property is māl. The term milk, however, is sometimes used for ownership and at other times for the subject-matter of ownership.

15.1.1. Ownership (milkīyah) and possession (milk al-yad)

Ownership (milkīyah or milk) is defined by Muslim jurists as “the relationship that exists between a person and a thing that gives absolute control and right of disposal over it to the exclusion of others.” This definition, as it can be seen, is very close to the definition of ownership given by Savigny on the basis of Roman law. Some Muslim jurists define it as “the relationship between man and property that has been established by the sharī’ah through which he exercises exclusive control and right of disposal over it as long as there is no shar‘ī restriction.” This, however, does not change the essential nature of the definition with respect to “control” and “exclusion of others.”

15.1.2. Types of ownership

Ownership (milk) is classified in various ways. Some of these are given below:
1. **Classification on the basis of participation.** Ownership is classified on the basis of the persons participating in the ownership into three types:

   (a) **Sole ownership.** This is ownership by a single person of a particular property with all the attached rights and control.

   (b) **Co-ownership also called sharikat al-milk.** When two or more persons jointly hold property it is called co-ownership. It is treated as a kind of partnership in Islamic law and is called *sharikat al-milk.* Closely related to this type of ownership is the concept of *mushā’,* which is joint ownership in each particle of the undivided property. This concept, along with the right of pre-emption, has a bearing on the issue whether the undivided share can be sold to a stranger. Some modern scholars are trying to use it for the right to sell shares in a company.

   (c) **Communal or public ownership.** These are things that are jointly shared by the entire community including land, grass, fire. An individual does not have the right to exclude another person from such things, unless it has been converted to his personal ownership or possession through a legally valid mode of acquisition. Out of these there are certain things that do not accept individual ownership. These are fire, water, grass, air, public roads and commons. The evidence for this is a tradition to the effect that all mankind are partners in three things: water, grass and fire. This does not mean that all mankind share the water that comes out of private tube-wells or the grass on private property. There are other things that can be converted to private ownership as is the case in gathering firewood or cultivation of barren lands.

2. **Classification on the basis of corpus (‘ayn), usufruct (manfa‘ah), and use (istimtā’).** A person may own a thing as well as the benefits flowing from it, although he may temporarily alienate the benefits through contract, like an owner renting out his house to another person or mortgaging it as security for a debt. The Ḥanafīs do not make a distinction between the ownership of the corpus and ownership of benefits or services for purposes of ownership. Both are attached to the same thing. The owner may contract out the use of a thing to another, but that does not make the other person the owner. The benefit of this rule is that the other person not being the owner of the benefits does not have a right of further disposal in them. Thus, a tenant in a house cannot further sublet it. The
majority of the jurists do make a distinction, with some of them distinguishing between the right to *manfa'ah* and the right of *intifā'*. The word *istimtā'* pertains to conjugal rights. They arise from the marriage contract.

3. **Classification on the basis of complete and incomplete ownership.** The word *milk* is also used to qualify other legal categories that are related to ownership, but are not ownership proper. The word *milk* or ownership is employed in three senses: *milk al-raqabah* (proprietary rights); *milk al-yad* (possession); and *milk al-tasarruf* (right of disposal). Thus, *milk al-raqabah* is ownership proper that includes both exclusive control and the right of disposal. Possession or *milk al-yad* consists of exclusive control and the right to keep others out of such control, but it does not include the right of disposal. This is discussed below. The third type involves the right to dispose of property on behalf of the owner. This type of ownership belongs to the guardian, the executor and the agent and with some restrictions to the mortgagee and the bailee as well.

4. **Classification on the basis of primary and incidental rights.** Primary rights are associated with the property itself, while incidental rights are those that may be related to other property because of the primary rights. These incidental rights give rights to easements like the right of passage (*ḥaqq al-murūr*), the right to flow of water (*ḥaqq al-majrā*), the right to water (*ḥaqq al-shirb*) and the rights of a neighbour (*ḥaqq al-jiwār*). The last right may also lead to the right of pre-emption.

15.1.3. **Possession**

Possession (*milk al-yad*) may become a means to ownership. It possesses most of the attributes of ownership—control and the right to exclude others—as against all except the original owner. It is of two types: actual physical possession (*ḥaqiqi*) and legal possession (*ḥukmi*). In the first case, a person may be wearing his coat or holding his horse, but this is not possible for all things. When it is not possible to take physical possession of a thing, like possession of land, the law treats it like physical possession when there is intention to keep others out. This intention may be exhibited in various ways that the law recognizes. The intention must also be accompanied by sufficient control to keep others out.
Possession in both its forms is distinguished from the right to possess. In the case of *ghaṣb* (unlawful possession), the usurper has a right to be in possession not only against strangers, but also against the original owner, who may seek possession through due process of law. The rules appear to be somewhat similar to those for possession in Roman law.

15.2. **The concepts of property (*māl*) and ownership (*milk*)**

In Islamic law, the terms *milk* and *māl* are intimately related. It is by understanding this relationship that we understand the discussions in *fiqh* about ownership and property. The word *milk*, as already stated, is sometimes applied to mean ownership and at other times to mean the subject-matter of ownership. When the word is applied to mean the subject-matter of ownership it may include the following four things:

1. **Things having a corpus (body)**. This body can be destroyed or consumed independently of anything else. Once destroyed it may be liable to compensation. Such things qualify for being called *māl* according to all the jurists, unless the *shari‘ah* specifically excludes some of these things.

2. **Things generated from something that has a corpus**. These are benefits that we derive from the use of different things. *Manfa‘ah* or usufruct or services fall in this category. These benefits cannot be destroyed independently of the body from which they are generated. In other words, they have no existence independent of the corpus from which they are generated. The transactions through which ownership of benefits is transferred are commodate loan (*i‘arāh*), hire (*ijārah*), charitable trust (*waqf*) and bequest (*waṣīyah*).

3. **Things that have a body and can qualify as *māl*, but are not considered *māl* due to some technical reason**. For example, a slave is owned by a person, but is not referred to as *māl*, because a human being cannot be *māl*.

4. **Pure rights that do not have a body of their own**. Like the right to stipulate an option, say *khiyār al-sharṭ*.

The position of the schools of law on the above categories is as follows:
1. According to the Ḥanafī school it is only things with a corpus that can qualify as *māl* (property). The other three are not *māl*, but can be the subject-matter of ownership. Benefits arise in contracts like *ijārah* (hire). In such contracts, the Ḥanafīs say that the corpus from which future benefits will arise is substituted in place of the non-existent benefits so that the offer and acceptance can be linked to it. They do not consider pure rights as *māl*. They also do not consider such incorporeal things like knowledge to have the quality of *māl*.

2. The Mālikīs and Shāfiʿīs consider benefits to be *māl*. They do not consider pure rights to be *māl*, because they do not arise directly from a corpus.

3. The Ḥanbalīs consider pure rights to be *māl* although they have not clearly indicated this. They consider the ‘*urūbūn* (earnest money) as legal on the basis of a solitary tradition. By acknowledging this they acknowledge the sale of options and pure rights. The OIC has preferred this tradition and opinion.

We thus see that traditional Islamic law has a somewhat narrow concept of *māl* and does not treat incorporeal rights, like patents and copyrights, as *māl*. Modern jurists, courts and the Islamic Fiqh Academy of the OIC have attempted to expand the concept of property to include such rights.

It may be argued that intellectual property rights cannot be placed in the category of non-existent benefits. In fact, they are benefits that have been extracted and stand packaged for use. They come closer to things with a corpus than do benefits. So if benefits can be sold, whatever the legal reasoning behind it, why not intellectual property rights.

The sale of options, however, is a different matter. These are pure rights that are being sold and are considered to have an intrinsic value. The acceptance of the Ḥanbalī opinion on earnest money should open the way for the trading of options and derivatives on the commodity and stock exchanges as well as in the world of finance generally.

15.3. The different classifications of *māl*

The jurists have classified property (*māl*) in different ways for understanding the operation of the rules:
1. **Marketable and non-marketable.** Marketable things are those that can be converted to private property and whose use has been permitted by the shari’ah. These things are called mutaqawwam. Non-marketable things are those that cannot be converted into private property like birds in the air, air, sunshine, fish in the sea and so on. They also include those things whose sale and purchase has been disallowed by the law, like wine, swine-flesh. The second type are marketable for non-Muslims. A contract for non-marketable things is not valid.

2. **Moveable and immovable.** This is the classification into ‘aqar and manqul. It has the same meaning as that in law. The classification affects many rules. For example, bay’ al-wafâ and shuf’ah are applicable to immovable property. Moveable property is divided into things sold by measure of capacity, weight and count. This division for purposes of ribā is one that was followed at the time of the Prophet (p.b.u.h.). Thus, if wheat was sold by measure in those days, but was later sold by weight, the earlier classification is followed for purposes of the derivation of the rules.

3. **Fungible and non-fungible.** This is the division into mithli and qimî. Fungible things are those for which a substitute can be found by weight or measure and quality. Thus, wheat and rice of a certain quality will have a substitute. Non-fungible or qimî property comprises those goods whose similars cannot be found and have their own value, that is, their value is determined by valuation. Thus, a horse, a water-melon and a dress have no exact substitute in the market. The fungible goods need only be mentioned in a contract by weight or measure and quality, but non-fungible goods have to be examined at the time of the contract. Further ribā does not run in non-fungible goods. The term ‘urūd is generally considered to apply to moveable property, but the way al-Sarakhsi has used it gives the impression that it is being used for goods called qimî.

4. **Consumable and non-consumable.** Currency, food and the like are consumed when used. Non-consumable goods like a house, a horse for riding and the like are not consumed by use. Again, ribā does not run in non-consumable goods.
Chapter 16

General Principles of Contract

16.1. Function of Contracts in Islamic Law

Contract law in any system ensures the parties to private agreements that any promises they make will be enforceable through the machinery of the legal system. This principle is stated clearly in the Qur’ān:
“O ye who believe! Fulfil your agreements,” [al-Mā’idah: 1] “And mention in the Book, Ismā’īl, he used to keep his promises,” [Maryam: 45] “Those who keep their promises when they make them,” [al-Baqarah: 177] “I too promised, but I failed in my promise to you.” [Ibrāhīm: 22 This is the statement by Satan]. There are many traditions that convey similar meanings. Islamic law of contract, in addition, is governed by the following general principles:

1. The Prohibition of Ribā.
2. The Prohibition of Gharar (Uncertainty Leading to Dispute).
3. Principle of Liability for Loss and Entitlement to Profit. This principle is stated in a tradition of the Prophet: al-kharāju bi’d-damān. It means that profit or revenue belongs to the person who bears the liability for loss of the profit generating source, that is, risk of loss.
4. Principle of Unjustified Enrichment. This principle is called akl al-māl bi’l-bāṭil. It is based upon a verse of the Qur’ān: “Do not consume your wealth among yourselves through unlawful means.”
16.2. The Meaning of ‘Aqd

The literal meaning of the term ‘aqd is joining, knot, tie, and conjunction. In this sense, it is called an agreement. The Qur’ān has used this term in the same meaning: “O ye who believe! Fulfil your agreements.”

There are two ways in which a contract has been defined in its legal or technical sense. There is a strict or narrow meaning of ‘aqd and a wider and more general meaning. In the narrow meaning a contract, or an agreement enforceable at law, is defined as: “The union of the declaration of one of the contracting parties with that of the other in a shar‘ī (legal) manner, the result of which is reflected in their subject matter.”¹ In its wider sense, a contract is defined as iltizām or any statement or word that has the effect of legally binding a person to fulfil an obligation or to perform a duty. The Majallah upholds the meaning of iltizām for the word contract, which is the state of being legally bound through an act or statement.

The latter definition is more suitable for purposes of a theory of contracts, but the narrower definition is used here to draw some important distinctions. This narrower definition tells us what the requirements are for an agreement to change into an enforceable contract. These are: existence of an agreement; existence of the subject-matter (mahāl) or consideration; parties must have contractual capacity (ahlīyah); the contract must be legal; there must be genuine assent; and the contract must be concluded in the prescribed form.

These six conditions emerge from the definition. The first four are treated as the elements or arkān of the contract by the majority of the jurists, while the remaining two may lead to certain type of defences. According to the Hanafis, the contract has a single rukn; namely, the form of the contract, and the rest are conditions associated with the form. Their view is that if there is a defect in the rukn, the contract is void, but a defect in the conditions will make a contract fāsid (unenforceable), not void. The majority do not have a category called fāsid. The six conditions mentioned are discussed in detail below.

16.3. Agreement and its Form (Ṣīghah)

The Hanafis maintain that there is only one element for contracts, and this is the ṣīghah. The literal meaning of ṣīghah is form, however, technically it means offer and acceptance. This element also implies additional conditions, like the existence of the parties to the contract and that of the subject-matter or

¹See al-‘Ināyah on the margin of Fath al-Qadīr.
mahall of the contract. The majority of the jurists, therefore, consider the elements to be three, because
together these come to three elements.

Offer and acceptance are based on consent or riḍā. As riḍā or assent is an internal matter and subjective
intent is exceedingly difficult to determine and prove, Islamic law follows what is called the objective theory
of contracts. The Lawgiver has determined that the ṣīghah, composed of offer and acceptance, is to be
taken as evidence of the subjective intent.

16.3.1. The meaning of ījāb (offer) and qabūl (acceptance)

Ījāb is the statement in an agreement that issues forth from one of the parties to the contract, and qabūl
is the statement that is made by the second party in response to the ījāb. If one of the parties says: “I
have sold this car to you for $10,000,” and the other party says, “I accept,” then, what has been said by
the seller is ījāb (offer) and the acceptance of the buyer is qabūl (acceptance). If the buyer had said, “Sell
me this car for 10,000,” and the seller had said, “accepted,” the statement of the buyer would have been
ījāb and that of the seller qabūl. This is the opinion of the Hanafi school. The majority of the schools, on
the other hand, maintain that ījāb is the statement of the owner of property, while qabūl is always the
statement of the buyer.

Form is the instrument or means through which the conclusion of the contract takes place. The means
adopted are sometimes expressed in words or writing or gestures or physical acts (conduct). The majority
are of the opinion that forming contracts through gestures or indications is not allowed for a person who can
speak or write. The Mālikī jurists permit such contracts as the rule in their view is that whatever conveys
the subjective intention of the parties is sufficient irrespective of words being used. An example of sale by
conduct is when a person says to another, “I sell you this book for $10,” and the other person places $10
in front of him and picks up the book. The Shāfī‘ī jurists do not allow the formation of contracts through
conduct. As a general rule silence is not to be construed as acceptance. The only way silence amounts to

²It is a view taken by American law that contracting parties shall only be bound by terms that can only be inferred
from promises made. Contract law does not examine a contracting party’s subjective intent or underlying motive. Judge
Learned Hand said that the court will give words their usual meaning even if “it were proved by twenty bishops that [the]
party . . . intended something else.” Hotchkiss v. National City Bank of New York, 200 F. 287 (2d Cir. 1911).
acceptance is when it is accompanied by conduct or gestures as indicated above. One exception to the rule may be in the case of nikāḥ where some jurists permit the contract even with the silence of the woman.

16.3.2. The conditions of offer and acceptance (ṣīghah)

The jurists have laid down certain conditions for offer and acceptance without the fulfilment of which the agreement cannot turn into an enforceable contract. These conditions are: 1) Conformity of the offer and the acceptance on the same subject-matter. 2) The issuance of the offer and the acceptance in the same session (majlis). 3) The existence of the offer till the issuance of qabūl. We shall now take up the description of these conditions.

16.3.2.1. Conformity of offer and acceptance

It is necessary that the acceptance conform with the offer in all its details. If the offer contains any material change in, or addition to, the terms of the original offer, it will not be accepted. These additional terms will become a counteroffer and the offeror may or may not accept them. Supposing A says to B: “I have sold this house to you for 100,000.” B replies: “I have accepted it for 100,000.” Here the offer and acceptance conform with each other. If B had said, “I accept it for 90,000,” the acceptance would have constituted a counteroffer, which A is at liberty to accept or reject. A counteroffer is a new offer in Islamic law.

16.3.2.2. Offer and acceptance in the same session (majlis)

If both parties are present in the session, the condition is easy to imagine. If one party is missing, and the communication is by messenger, then, the session lasts till the knowledge of it reaches the other party and he replies and communicates his acceptance to the offeror. Today, the standard or reasonable time will have to be applied to such situations.

The jurists disagree about the time that may lapse between the offer and acceptance. The Shāfi‘ī jurists are of the opinion that the offer lapses or ceases to exist as soon as it is issued, however, necessity demands that only such time be granted to the offeree as is necessary for the issuance of the acceptance. If such acceptance is delayed then the offer has terminated and the contract cannot be concluded.
The majority of the jurists, on the other hand, grant time to the offeree for as long as the session lasts. The Ḥanafīs maintain that this is based upon *istiḥsān* and the basis is that each party is in need of some time to ponder and reflect over the terms of the offer before the issuance of the acceptance. The *sanad* (basis of reliance) on *istiḥsān* here is necessity and avoidance of hardship.

The Shāfi‘īs argue that the time needed for weighing and examining the terms of the offer are available to the offeree after the contract has been concluded. This is available through what is called the option of the session or *khiyār al-majlis*. The Ḥanafīs do not hold such option to be valid as it is unnecessary and artificial in their view.

### 16.3.2.3. Assent must be genuine

The person giving his consent may not be mentally competent or he may be a person subjected to coercion or undue influence. It is for this reason that there are two views about the objective theory in contracts, that is, taking the statements of the parties at their face value and not probing or prying into the inner or actual meanings that the parties wished to assign to their words. The Ḥanafīs and Shāfi‘īs uphold the objective theory and follow the ordinary meanings that can be assigned to the statements of the parties in their offers and acceptances. If the meaning is clear and poses no ambiguity, these jurists follow ordinary meaning, unless it can be proved that the parties were not serious or that their statements were made under undue influence or duress. There are detailed views about these issues and we shall take up some of them in the section on genuineness of assent.

### 16.3.2.4. Clash between objectives

The objectives of the contract must not clash with the objectives determined by the Lawgiver. This case pertains to the issue of legality of contracts in Islamic law and the purposes of contracts. It will be discussed in the next section after we have studied the conditions laid down by Islamic law for the subject-matter.

Examples of such contracts are: selling of grapes to a person who uses them for making *khamr* (wine); the contract of *‘inah* also called the buy-back agreement in which one person sells something on credit to another and then buys it back for cash on less, the difference representing the amount of interest—this contract is prohibited when it is known that the persons or one of them gives out loans on interest.
a bank; and buying a slave girl in the evening and selling her back to the seller at a slight loss the next
morning; making a gift of one’s property or selling it to a near relative just prior to the completion of the
hawl in order to avoid payment of zakât—the relative may gift it back to the original owner the next year
at the same time.

The Shâfi’îs taking an extreme position with respect to the objective theory of contracts allow such
contracts without questioning the objectives. In other schools, there are different views about the selling of
grapes in the above case and also about the marriage of a divorced woman to another person to facilitate
the remarriage of the divorced couple. The Mâlikîs and Hanbalîs, for instance, would hold these contracts
to be void if the objectives are proved. There are, thus, two extreme views about the objective theory
with the Hanafîs following a middle course.

16.3.2.5. Existence of the offer till the issuance of acceptance

The contract, we have said, is the relationship or the bond between the offer and acceptance in the pre-
scribed legal manner that produces a legal effect in the subject-matter. Such a bond can only be established
when the offer continues to exist at the time of the issuance of the acceptance or its communication. If
the offer has terminated before the communication of acceptance, the contract cannot be concluded. We
may, therefore, turn to the causes of the termination of the offer and the termination of the acceptance.

16.3.3. Termination of the offer (iğâb)

The Muslim jurists usually list two types of termination of the offer. The first is by the action of the
parties and other is by the action of the law. In the first case, the termination may be through revocation
by the offeree or rejection of the offer by the offeree or when the offeree makes a counter offer, which is
another form of rejection.

The power of the parties to enter into a lâzim (binding) relationship may be terminated by the law,
that is, by the general propositions of Islamic law if some conditions are met. The offer may be terminated
by the termination of the session (majlis). The majlis is actually a way of fixing time for the issuance
of the acceptance. If no time of acceptance has been specified by the offeror, the majlis will terminate
when the parties part, or when one gets up and walks away. If the offeree has not accepted the offer either
within the unspecified time of the *majlis* or within the specified time, the law will come into operation and terminate the offer.

An offer is automatically terminated by operation of the law if the specific subject-matter of the offer is destroyed before the offer is accepted. Thus, the existence of the subject-matter is a condition for the existence of the offer.

Finally, the offeree has no power to accept the offer when the offeror or offeree dies or is deprived of the capacity to enter into the proposed contract. This rule will apply whether or not the other party has notice of the death or loss of capacity. The right is personal and cannot be inherited.

16.4. **Consideration and Islamic law of contracts**

The meaning of contract is first distinguished from an agreement on the basis of enforceability. A primary basis of enforcement, however, is consideration. Consideration is something that motivates the exchange of promises or performance in a contractual agreement. The consideration, which must be present to make the contract legally binding, must result in some detriment to the promisee or a benefit to the promisor. The same is true if it is looked at from the point of view of the promisee. One major function of consideration is to distinguish contracts based on mutual promises from those transactions that are purely gratuitous, that is, promises for giving something or gifting something to another, and those that are bargained-for exchange.

The narrower meaning of *‘aqd* discussed above attempts to do the same thing. It tries to point out that there is a consideration on the basis of which promises are exchanged. In its wider meaning it also includes those gratuitous transactions that are based on unilateral declarations. The narrower meaning, thus, distinguishes contracts from gifts.

The concept of consideration employed in Islamic law shows that most of the conditions the jurists lay down for the subject-matter are similar to those laid down for consideration by Western jurists.

16.4.1. **The mahall (subject-matter) and legality**

The topic of legality is most important in Islamic law of contracts. In fact, we can say that most of the other rules pertaining to agreements, capacity and other elements may be found to be quite similar to
those in Western law, but it is the difference in the idea of legality that really distinguishes Islamic law from any other legal system, and determines its nature and unique character.

The term-subject matter is used in a slightly different meaning than consideration by Western jurists, however, when we are talking about the subject-matter or *mahall* of the contract, it should be assumed that it is the same thing as consideration. In the previous section, we have indicated the role consideration plays in distinguishing contracts from unilateral declarations. Here we will examine, however briefly, some of the conditions laid down for consideration.

16.4.1.1. **The meaning of *mahall al-ʻaqd***

The *mahall al-ʻaqd* or the *maʻqūd ʻalayh* is the thing for which an agreement has been made, and in which the effects of the contract are visible. It is something having a legal value. This is sometimes a thing with a corpus, like property offered for sale or for mortgage. At other times it is the benefits derived from something like hired property or services offered or even the benefits to be derived from married life. In other words, it is a value given in return for a promise and may also be a return promise for refraining from an act or the creation, modification and destruction of a legal relationship. All these meanings are also to be found in the term consideration used in the law.

Some jurists consider the *mahall al-ʻaqd* as an essential element of the contract, while others consider it an essential condition of a single element in contracts—the agreement. This difference does not diminish its importance. The jurists usually lay down four conditions for the subject-matter and some add a fifth. The conditions are as follows:

1. The subject-matter must have legal value.
2. It must be in existence at the time of the contract.
3. It should be potentially capable of delivery at the time of the contract.
4. It should be something known to the parties.
5. It should be something that is clean (*tāhir*) and is not filthy or affected by filth. This condition is laid down by the majority of the jurists and not by the Ḥanafīs. It can be easily merged with the first condition.
These conditions vary for different contracts, and are discussed under the individual contracts, but mostly under the contract of sale.

16.5. **Legality of Contracts in Islamic Law**

Legality of contracts is perhaps the most distinctive feature of Islamic law. Legality of contracts and the theory of options (khiyārāt) make Islamic law of contract a completely different system. The general structure of the types of illegality found in the Islamic law may be covered under two heads: contracts that are contrary to the *sharʿ* and contracts contrary to public policy, which also covers contacts in restraint of trade and unconscionable contracts. Let us first examine contracts that are contrary to the the *sharʿ*, by which we mean here those contracts that are prohibited explicitly in the texts of the Qurʾān and the Sunnah.

16.5.1. **Contracts contrary to Islamic law (*sharʿ*)**

In Western law such contracts usually are in violation of the prohibition of usury, gambling, Sabbath laws (now mostly abolished) and the licensing statutes. By usury is meant an illegal rate of interest, that is, lending at a rate above the maximum legal rate of interest fixed by statute. As compared to this a judgment rate of interest may also be fixed and applies to monetary judgements. In the United States of America, for example, many states have made exceptions to this rule for small loans to facilitate business. Again, in some states Sabbath laws were observed that declared many contracts illegal if they were concluded on Sunday. There were also Blue Sky laws that prohibited the sale of alcoholic beverages on Sunday. Exceptions to the Sabbath laws were contracts for necessities. Most states have now abolished these laws, while those that still have them do not enforce them. Licensing statutes apply to professions and trades that must be licensed.

Islamic law not only prohibits usury in the meaning of an exorbitant illegal rate of interest, it prohibits all kinds of interest (*ribā*). Gambling is also prohibited. Contracts are considered disapproved at the time of the Friday congregational prayer, but opinions differ as to the status of a contract concluded at this time; most consider it valid, some deem it *fāsid*, while a few deem it void. In addition to this, there are certain transactions that are considered contrary to public policy in Western law, but are in direct conflict...
with the Islamic legal provisions. These are contracts promoting illegal acts, like prostitution. Islamic law prohibits unlawful sexual intercourse, therefore, any act promoting immorality would not only be contrary to public policy, contrary to the law as well incurring penalties under the criminal law. To this we may add the sale of alcohol as far as the Muslim subjects are concerned. The following contracts, then, are in direct conflict with Islamic legal provisions:

1. Contracts in violation of the prohibition of *ribā*.
2. Contracts at the time of the Friday congregational prayers.
3. Contracts promoting unlawful sex and obscenity.
4. Contracts in violation of the prohibition of alcoholic beverages for Muslims.
5. Some other contracts may be added to this list on the basis of juristic opinions like the sale of musical instruments, but the purpose should be kept in the forefront, that is, whether they are promoting immorality or fulfilling a genuine need.

Out of these, for commercial transactions, the prohibition of *ribā* has the most widespread effect on Islamic law of contracts. Almost every contract is checked for such violation before it can be declared legal. The proper place for the discussion of the principle of *ribā* is under the contract of sale. It may be mentioned here, however, that *ribā* is prohibited on the basis of a very broad principle laid down in the Qurʾān: Allah has permitted exchange (trade) and prohibited *ribā*. This means that all kinds of exchange is permitted except that involving *ribā*. The extent of the application of this prohibition is realized only when the broad meaning of the word *bayʿ* (exchange) is understood; it applies to all kinds of trade or contracts.

16.5.2. Contracts contrary to public policy

In general, all contracts promoting immorality would be contrary to public policy in an Islamic state. In fact, the question of musical instruments and the like should be under this head. The most important principles of policy that may be listed under this head are those of the avoidance of uncertainty leading to dispute and litigation (*gharar*) and the avoidance of unjustified enrichment, which includes unconscionable contracts.
16.5.2.1. The prohibition of gharar (uncertainty leading to dispute)

The concept of gharar is explained by the jurists as something whose future is unknown, that is, it is not known whether it will exist or not exist. It is also defined as something whose future is concealed. In this sense, it pertains to an uncertain consideration for a contract, that is, the future of the subject-matter is risky, but risk here means uncertainty that is likely to lead to disputes and litigation in the future. The general policy of avoiding gharar would cover gambling, wagering contracts and speculation in essential items.

There are express provisions in the Sunnah about the sale of food before possession and even the prohibition of ribā in food items is interpreted by Imām Mālik to mean the prevention of speculation in food and essential items. Gambling and wagering contracts are condemned by the Qurʾān.

16.5.2.2. Contracts in restraint of trade

Restraint of trade is not allowed in Islamic law. The general policy is that there should be a free circulation of goods and prices should be determined in a natural unhindered manner. The obvious example of this type of rule is to be found in what is called the prohibition of bayʿ al-ḥādir liʾl-bāḍīʿ, that is, sale by a town-dweller on behalf of a person from the countryside bringing goods into the town for sale. A similar prohibition is that of talaqqī al-rukbān (going out to meet caravans approaching the town). Ibn ʿAbbās interpreted this prohibition to mean that the town person should not become a broker for his brother from the countryside. Imām Mālik considered the wisdom underlying this prohibition to be the protection of the public from higher prices resulting from artificial restraints.

This idea can be extended to all covenants that are intended for the prevention of competition. Covenants not to compete will also cover employees who may agree not to work for competitors.

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4 Al-Sarkhī, al-Mabsūṭ, vol. 12, 194.
16.5.2.3. Unconscionable contracts

An unconscionable contract or clause is one that is against public policy, because it forces one party to accept terms that are unfairly burdensome. This is achieved through the powerful bargaining position of the other party. In Islamic law most unconscionable contracts would fall under the principle of *akl al-māl bi’l-bāṭil*. It is a very wide principle based upon a verse of the Qur’ān: “Do not consume your wealth among yourselves through unlawful means.” It covers the Western principle of unjustified enrichment that “no one will be allowed to enrich himself at the expense of another.” It plays a role in contracts as well as torts.

The major source of unfair terms today could be standard contracts called *‘idh‘ān* in Arabic. These are adhesion contracts that are drafted by the party in a dominant position and then presented to the other party on a take it or leave it basis. Unconscionable contracts, in general, are those that are so unfair that they would “shock the conscience” of the court.

Another provision of Islamic law that we may list under this heading is the prohibition of *iḥtikār* (hoarding or creating a monopoly). Hoarding of essential items is prohibited in Islamic law, but what flows from this is that positions of monopoly usually give an unfair and dominating position to the monopolist, who then dictates terms to the weaker party and thus becomes a source of unconscionable contracts. The last category is also relevant under restraint of trade.

16.5.3. The effect of illegality

The effect of illegality of a contract is explained under the section on the types of contracts and the effects of contracts (see page 210). In Western law, the effect of illegality is that the contract becomes void and is deemed never to have existed. There may be certain exceptions to this rule, like the justifiable ignorance of facts in the case of an innocent party and in certain other cases like the Blue Sky Laws in America. When a person has been made to enter into an illegal contract through fraud, duress, or undue influence, the party can recover the value or enforce the contract.

In Islamic law too the contract is declared *bāṭil* in most cases according to the majority, however, in some cases the Ḥanafī doctrine of *fasād* steps in and provides different rules. See the section on the effects of contracts for details.

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16.6. Contractual Capacity

Contractual capacity is discussed by jurists within the discipline of usāl al-fiqh, which is a discipline that provides the theoretical foundations of Islamic law along with the methods of interpretation of the texts. The topic under which it is discussed is that of the ḥukm sharī (law; rule). One of the elements of law is the subject also called the mahkūm ʿalayh. The legal capacity of the subject is explained and analysed from different perspectives. Here we are concerned with the contractual capacity of the subject. To understand the meaning of legal capacity in Islamic law, the reader should refer to the sections on ahlīyah and causes of defective capacity discussed earlier.

16.7. Genuineness of Assent

A contract, in order to be valid, should be entered into by parties who have full contractual capacity and all the conditions pertaining to legality should also be met. The subject-matter should also support the contract. Nonetheless, the contract may be unenforceable if the parties have not genuinely assented to the contract. Genuine assent may be lacking, in Western law, because of mistake, fraudulent misrepresentation, duress, or undue influence. In this section, the aim is to examine the various causes that may affect genuine assent, that is, whether these causes are different in Islamic law or are similar to those in Western law.

As mentioned earlier, ridā (consent; agreement) in contracts, in Islamic law, is to be conceived, for purpose of analysis, as being accorded in two stages. This is true for contracts that accept the stipulation of an option (khiyār). In the first stage partial consent is given in form and the parties agree to enter into a contract. At this stage, an option either exists by the operation of the law or one is stipulated by the parties. The contract after this stage is valid (ṣāhīḥ) and the parties have shown their intention to form it, however, the option renders the contract revocable or ghayr lāzīm. In the second stage, the option is exercised and the parties now agree not only to the formation of the contract, but also to its āthār (effects).

In the first stage, Islamic law applies the objective theory of contracts in all purity, that is, the subjective element or inner consent is not taken into account. In the second stage, which is the assent to the effects of the contract, Islamic law again follows the objective theory, but takes the subjective element
into consideration also if it is shown that assent for some reason was not genuine. Thus, if it can be shown that the consent of the party was obtained by duress or undue influence, the contract becomes voidable and the party under duress is given the option to ratify the contract or revoke it. The rules, however, vary for different situations as will be obvious from a study of the causes that make the consent non-genuine.

16.7.1. Mistake (khaṭa‘ or shubhah not ghalat)

In Western law, a distinction is first made between mistakes as to judgement of value or quality and mistakes as to facts. It is mistakes as to fact alone that have legal significance. Thus, if a person believes that thing bought has a higher value when it actually does not, it is a mistake of value and the courts generally will not let such a mistake affect enforceability. Mistakes of fact can occur in two forms: unilateral and bilateral. A unilateral mistake is one if only one party has made a mistake, while in a bilateral mistake both parties are mistaken, that is, it is a mutual mistake.

In unilateral mistakes, one party makes a mistake as to some material fact. For example, if A wishes to sell his horse for 950, but mistakenly writes to the other person that the horse is for 900. This mistake does not affect the contract and it is valid. An exception may be made if the other party knew about the error while accepting the offer. Another exception may be a mistake due to mathematical error, as when two things were being sold, one for 500 and the other for 450 and the person mistakenly mentions the total as 900. The law will allow the mathematical error to be corrected. On the other hand, in a bilateral mistake, when both parties are mistaken about the same fact, the contract can be rescinded by either party. Thus, American law follows the objective theory, but makes some allowances for mistake. The purpose of the objective theory is to provide security of transactions, while that of the subjective theory is to prevent any kind of injustice that may result where the parties did not really give their consent. When we say that American law follows the objective theory we do not mean that the subjective element is totally ignored.

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5 See, e.g., Foster & Marshall, Inc. v. Pfister, 674 P.2d 1215. In this American case a mistake was made in the calculation of the number of shares.

6 See, e.g., Raffles v. Wichelhaus, 159 Eng. Rep. 375. In this case, a merchant bought cotton that was placed on a ship called Peerless, which was to sail from Bombay. In fact, two ships of the same name set sail during the period from Bombay. The confusion led to a mistake and Wichelhaus rescinded the contract. The court agreed that it was a bilateral mistake.
In systems that are based upon the French law, like the Egyptian legal system, the position is almost reversed. In such systems, it is the subjective theory that is given more emphasis. The emphasis on the subjective intention led scholars like ‘Abd al-Razzāq al-Sanhūrī, and later Muṣṭafā al-Zarqā, to spend considerable time on showing that Islamic law does uphold the doctrine of mistake, which is called ghalat (from the French erreur—error) in Arab law. As compared to these writers, some writers, like Chafik Chehata, ‘Abd al-Fattāḥ ‘Abd al-Bāqī, John Makdisi and Susan Rayner have tried to show that Islamic law does not acknowledge the concept of mistake and has no doctrine of mistake. It is implied, though not by all, that this is a kind of defect in Islamic law and the law tries to rectify or correct it through the stipulation of options (khīyārāt).

It is difficult to agree completely with both opinions. First, it must be recognized that Islamic law is a complete system and it has its own solutions for problems. There is a doctrine of mistake in Islamic law, but it is confined to the rights of Allah. This is what goes under the name of shubhah fī al-dalīl and shubhah fī al-fi‘l or mistake of law and mistake of fact. The word shubhah here is not be taken in its literal meaning of doubt and is not to be applied to benefit of doubt, which is doubt in the mind of the judge and is acknowledged as a rule of evidence. These mistakes arise due to doubts in the mind of the subject. This doctrine, being applicable to the rights of Allah, is confined to the ḥudūd penalties and qisāṣ. In the case of ta‘zīr, which the Ḥanafīs classify as the right of the individual (or individuals collectively) the different kinds of shubhah are not operative. In those cases where the right of the individual is found mistake or fault is ignored and the rule is based on strict liability for purposes of diiyah or other types of reparation. As contracts belong to the area of the right of the individual, this doctrine is not applicable in the law of contract. It would, therefore, be correct to say that there is a doctrine of mistake in Islamic law, but it is not applied to contracts. This means that as far as mistake is concerned, the objective theory of contracts is applied in all purity.

‘Abd al-Razzāq Sanhūrī, in the attempt to prove that the doctrine of mistake exists in Islamic law of contract, gave a number of examples, from fiqh literature, like a person buying a sapphire that turns out to be glass, or one buying a book by Muhammad (al-Shaybānī) finds that the book is by someone else. ‘Abd al-Bāqī has given a complete analysis of all these examples and shown that none of these transactions
amounts to mistake. They either cause the contract to be void *ab initio* or render it vitiated.\(^7\) The question of mistake arises later in a valid contract.

The other writers have used the same examples to show that *khiyārāt* are used to rectify these mistakes. For some examples this view is not applicable, because the contract is void and there is no mistake to correct. In a few cases, the view is correct, but the distinction must be made that these are not mistakes in the sense of Western law that are rectified after the conclusion of the contract, nor is this a defect in the Islamic law of contract. It is a unique feature of the Islamic law that it tries to prevent unnecessary litigation and claims for damages by making provisions for correction prior to the finalization of a binding contract. Makdisi has also stated that this system was rejected by Arab law, because the stipulation of options delays or slows down business activity. This too is difficult to accept, because the reasons why Arab law has rejected this system is not the speed of business activity, moreover, it is not binding upon the parties to stipulate all kinds of options. There are only two that have been prescribed as mandatory by the law to protect the innocent. Those who desire speed are not hindered.

16.7.2. *Khilābah, taghrīr, tadlis, ghabn*—fraudulent misrepresentation

The terms *khilābah* and *taghrīr* and even *ghabn* are used in *fiqh* for fraudulent misrepresentation, while the term *tadlis* is preferred in Arab law, but is used in *fiqh* too. The word *khilābah* is believed by some to include all the other meanings.

In Western law, fraud is a tort, but it also affects the genuineness of consent. The innocent party is given the option to rescind the contract or enforce the contract or seek damages for the injury caused by the fraud. There are four elements of the act: a misrepresentation of a material fact must occur; there must be an intent to deceive; the innocent party must rely on the misrepresentation; and the innocent party must suffer an injury. Misrepresentation may occur by conduct, it may occur by silence, or it may be misrepresentation of law (wrong advice). In case of fraud, the courts award punitive or exemplary damages over and above the actual compensation.

Islamic law, prescribes the option called *khiyār al-shart* to enable the parties to take precautions against fraud or misrepresentation. It does not, however, rest at that and provides the option to the party to revoke

\(^{7}\)’Abd al-Baqī, *Naẓariyat al-‘Aqd* (Cairo, 1984) 325–31

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the contract or ratify it if the fraud or misrepresentation is discovered later on. The well-known case is that of *tasrīyah*, where a goat with a bloated udder was sold for a higher value after creating the impression that it yields more milk than it actually did. The other cases are those of *najsh* (false bidding to raise prices). Misrepresentation may also occur in cases where one party is relying upon the statement of the other party about the price, as in *murābahah* (stated cost price plus mark up), *wādi‘ah* (sale with a mark down) and *tawliyah* (sale at cost price).

16.7.3. **Undue influence and maraḍ al-mawt**

Undue influence arises from relationships in which one party can greatly influence another party and overcome his free will. This is reflected in many types of relationship, like guardians and wards or confidential fiduciary relationships like attorney-client, doctor-patient, parent-child, husband-wife, accountant-business, director-corporation. Undue influence if proved renders a contract voidable.

In Islamic law, the most obvious case is that of *maraḍ al-mawt* or a person who is in the throes of death. It is not necessary that such a person may be acting under the influence of another. His actions may be erratic due to his illness and will thus qualify him for defective contractual capacity. Islamic law, however, does not consider such a person to possess a defective capacity, because it acknowledges the transactions up to a third of the estate of the person. This person may, therefore, be said to be under the influence of death, without going into the question whether it is undue. A person who is ill may, however, be susceptible to the influence of others. On the basis of the principle laid down in this case, we may assume that the other relationships listed above may also be covered by Islamic law, especially when there are no direct rules for the case, as there are for the relationship between guardian and ward, parent-child, or husband-wife.

16.7.4. **Coercion and duress (*ikrāh*)**

This topic has been discussed in detail under the section on defective legal capacity and may be seen there. The topic of jest is important for cases where a statement made in jest by way of offer or acceptance may be taken seriously at least by the Ḥanafīs.
16.8. Types of Contracts and Their Effects

The phrase “the ḥukm of the contract” means the effects or āthār that a contract has in terms of the rights and obligations created. As distinguished from this, the term ḥuqūq means the rights of performance and the right to enforce performance. The latter may belong to an agent when the contract is negotiated by him. The basic rule is that effects (āthār) are assigned only to those agreements that have become enforceable contracts, that is, they fulfil all the conditions of formation and validity and they are free from the defects that may invoke the prohibition of the Lawgiver. The effects of contracts are understood better when the contracts are analysed into various types.

Contracts are classified in different ways keeping in view their various effects. There is one primary classification, and the rest are secondary. The secondary classifications are actually divisions of the valid or ṣaḥīḥ contract.

16.8.1. Ṣaḥīḥ, bāṭil and fāsid contracts

The majority of the schools divide contracts into two types: ṣaḥīḥ and bāṭil. They merge the fāsid contract into the bāṭil. The Ḥanafīs add a third category of fāsid (vitiated also called irregular).

For a ṣaḥīḥ contract to exist, three conditions must be met:

1. all the elements required by the law must be complete;
2. the additional conditions must be fulfilled;
3. the purpose of the contract and its subject-matter must be legal, i.e., the Lawgiver should not have prohibited the contract.

A valid or ṣaḥīḥ contract is assigned all its effects that the Lawgiver has determined for it. The vitiated contract (fāsid) also called the irregular contract is one whose essential ingredients are present, but an external attribute is attached to the contract and this has been prohibited by the Lawgiver. Examples of vitiated contracts are: contract under coercion; sale at an undetermined price or for undetermined credit; contract bearing ribā; and sale of a thing that cannot be delivered, except at an apparent loss, like a beam
in the roof of a house being used. In all these cases the element (rukn) is sound and legal and so are the conditions, but the wasf or the external factor is not legal.

The ḥukm of the vitiated contract is split into two parts: before performance and after performance. Before performance, no legal effects are assigned to the vitiated contract. This rule is applied by the Hanafi jurists to a vitiated contract in which no party has performed his part of the contract, for example, possession of property has not been given nor the price paid. Thus, ownership in the either subject-matter is not transferred and no consequential rights or obligations have arisen. Such a contract, according to these jurists, must be revoked or rescinded. The right to rescind the contract belongs to either party and consent of the other party is not needed.

If the parties have already performed the contract, for example, the sold property has been delivered and the price paid, then, this contract is strengthened somewhat as compared to the position before performance. The result is that the right of revocation that existed for both parties before performance is now vested in the party whom the offending stipulation favours. This, however, is not true in all cases. It may apply to cases like sale with an open credit, but those agreements in which ribā is stipulated or where one of the exchanged commodities is khamr, the right to revoke still rests with both parties, and the contract can be validated by waiving the offending condition.

A bāšil agreement is defined by the Hanafis as one which is illegal in its asl as well as wasf. Asl, as already stated, is the rukn or element along with the essential conditions, while wasf is the external attribute. The bāšil agreement does not give rise to any legal effects. No ownership is transferred nor is any other obligation of performance created. In fact, no enforceable contract is created. The agreement is prohibited and what is prohibited cannot give rise to rights. Performance of this agreement is not possible and none of the parties can enforce it. If performance under the void agreement has been made, like the delivery of goods, then, the property has to be returned to the other party whether or not such illegality was known to the parties. If the buyer sells the goods to a third party after taking delivery, the original seller cannot be prevented from claiming the goods. The reason is that ownership cannot be transferred through a void agreement. This ḥukm is clearly different from that for a vitiated or fāsid contract discussed above.
16.8.2. Immediate and suspended contracts or nāfīdh and mawqūf contracts

A ṣaḥīḥ or valid contract is one that is legal both as regards its asl and wasf. This type of contract must give rise to the effects assigned to it by the Lawgiver. Some jurists maintain, however, that there are valid contracts the effects of which can be delayed till the happening of a further event. These contracts are called mawqūf or suspended contracts. This is the opinion of the Ḥanafis, Mālikis and some Ḥanbalis. The Shāfis and most Ḥanbalis do not admit delay in the effects of the contract. According to these jurists a valid contract must give rise to its effects immediately, that is, it must be nāfīdh. Mawqūf or suspended contracts, thus, have no existence in the opinion of these jurists.

The causes due to which a valid contract may be suspended arise either from: 1) defective capacity, like the contracts of a discriminating minor (ṣabi mumayyiz) undertaken without authority from the guardian or those of a person placed under interdiction (ḥajr) due to prodigality or because he is an idiot (ma‘tūḥ); or 2) from lack of proper authority, like the contracts of an unauthorized person (fuḍūl), who is neither a guardian, agent or the owner; or 3) from the right of a third party (istihqāq), as when the owner sells property that is mortgaged and this would depend on ratification by the mortgagee. The cases of terminal illness (marad al-mawt) and usurpation or misappropriation (ghaṣb) can also be considered causes of suspension of contracts. In most suspended contracts ratification is the solution. A mawqūf contract is, therefore, similar to the voidable contract in law, which is voidable at the option of the parties or one of the parties.

16.8.3. Binding and terminable contracts or the lāzim and ghayr lāzim (or jāʾiz) contracts

A contract that is ṣaḥīḥ (valid) and is also nāfīdh (immediate) is further divisible into the lāzim (binding) and ghayr lāzim (non-binding) contracts. The non-binding contracts are also called jāʾiz (permissible or terminable).

A lāzim contract is one in which none of the parties has the right to revoke the contract without the consent of the other party, unless options have been granted to a party by virtue of which the right to revoke can be exercised. These are contracts like sale and hire.

In a ghayr lāzim or terminable contract the right to rescind can be exercised by either party without the consent of the other party. There are two reasons due to which a contract becomes non-binding or
terminable: nature of the contract; or option (khiyār). The nature of the contract allows independence to both parties like agency (wakālah), partnership (sharikah), deposit or bailment (wadi‘ah), surety (kafūlah) and several others. These contracts are jā‘iz or ghayr lāzim with respect to both parties or to one of them. An option (khiyār) is stipulated in the contract that prevents it from becoming binding or lāzim. Thus, the party possessing the option can revoke the contract without the consent of the other party within the period of the option.

16.8.4. Bilateral contracts versus unilateral contracts (wa‘d)

Every contract involves at least two parties. The offeror is the party making the offer and the offeree is the party to whom the offer is made. The offeror always promises to do or not to do something and thus is also a promisor. Whether a contract is bilateral or unilateral depends on what the offeree must do to accept the offer and to bind the offeror to a contract. If to bind the offeror, the offeree must only promise to perform, the contract is a bilateral contract. Hence, the bilateral contract is a promise for a promise. The contract comes into existence the moment the promises are exchanged. This is also the position in law.

If, however, the offeror phrases the offer or his promise in such a way that the offeree can accept only by completing the contract performance, the contract is called a unilateral contract. For example, if A says to B, who is working for A. “If you sit late tonight and keep on working, I will give you an extra $50.” B does not say anything, but continues to sit late as asked. B here is entitled to the extra money, but if B chooses not to sit late there are no legal consequences. Another more common example is that of the real estate agent. A person comes to him and asks him to find a house for him for which he will pay him one month’s rent as a commission. The broker finds a house which the person agrees to rent. The broker is entitled to his commission.

A unilateral contract is, therefore, a binding promise that the offeror makes and is conditional upon the performance by the offeree. This type of binding promise in Islamic law is called wa‘d. The jurists, especially the Ḥanafīs and the Mālikīs approve this type of promise and hold it to be binding. They use the word of ta‘līq for the underlying condition of performance by the offeree. The Shāfi‘īs and some Ḥanбалīs do not permit it. There has been some debate about this issue in the context of Islamic banking in the
recent past. Binding promises are considered to be very important for modern commercial transactions, especially options and derivatives at the stock and commodity exchanges.

The unilateral contract is also to be distinguished from what the jurists call *ji‘alāh*, which is a promise by the offeror to anyone from the general public to undertake a task. The unilateral contract contains a promise made to an identified person.

16.8.5. Valid, void, voidable and unenforceable contracts

This is a classification used in the law. It is obvious that there is no problem about the valid and void contracts. The *fāsid* contract in Islamic law is not similar to voidable. On the other hand, it is similar to the unenforceable contract, which is unenforceable due to the operation of some statute. The voidable contract in law is similar to the *mawqūf* category in Islamic law as well as contracts that are *fāsid* due to coercion.

16.8.6. Executed and executory contracts

The other categories like executed versus executory, found in the law, present no problem and it is easy to see that such a classification is possible in Islamic law. The prominent examples of executory contracts are *salam* and *istiṣnā’*.

We have now understood the various types into which Islamic law classifies contracts and we have also tried to see the *ḥukm* or effects of each type.

16.9. Option (*Khiyār*) and the Effects of Contracts

A *khiyār* (option) in Islamic law has the effect of rendering an otherwise *ṣaḥīḥ*, *nāfīdh* and *lāzim* contract into one that is *ghayr lāzim*, that is, revocable for a period of time in which the option is to be exercised.
16.9.1. **Khiyār al-Shart or the Option to Revoke the Contract**

*Khiyār al-shart* is an option by virtue of which one party or both of them stipulate for themselves or for some third person the right to revoke the contract within a determined period. The result of this option is that a contract that is otherwise binding and non-revocable becomes revocable with the stipulation of this option. As soon as the period fixed for the exercise of the option is over, the contract becomes binding and subject to performance. This is a general and broad option that does not assign any reason or basis for its stipulation. It gives time to the parties to go home and think about the transaction that they have undertaken, perhaps, under the pressure of the market conditions. If they do not like what they have done, they can withdraw from the contract. It provides flexibility to those parties who are generally cautious.

*Khiyār al-shart* is permitted in those contracts that accept *faskh* (revocation), like sale, hire, settlement (*sulh*) and tenancy (*muzāra‘ah*). It cannot be stipulated in contracts or unilateral declarations that do not accept revocation, like marriage, divorce and manumission. As for those contracts that are revocable by nature, like agency and partnership, the stipulation of the option to revoke would be futile, as they are revocable at the will of the parties.

*Khiyār al-shart* is a multipurpose and generic option. It can have many variations based on different reasons. Accordingly, some jurists have derived a large number of options from it. Ibn ‘Ābidīn lists more than twenty such options, but it is better to leave this to the parties.

16.9.2. **Khiyār al-Ta‘yīn or the Option to Ascertain the Subject-matter**

The basic rule is that the subject-matter must be known, that is, ascertained at the time of the contract. There is, however, a genuine need of the people to buy an unascertained thing out of a number of ascertained things with a right to determine one out of these later. For example, a person buying a piece of jewellery out of three pieces that she likes. She may need time to thing which piece she will buy eventually. The reserving of the right to ascertain the bought item later is known as the *khiyār al-ta‘yīn* or the option of ascertainment.

This option is stipulated and exercised by the buyer alone and it causes a *lāzim* contract to become *ghayr lāzim* in favour of the buyer.
16.9.3. **Khiyār al-Ru’yah** or the Option of Examination

Knowledge of the subject-matter at the time of the contract is an essential condition. Such knowledge is possible through an examination of the subject-matter at the time of the contract or by description in a manner that removes all kinds of uncertainty or *jahālah*.

Some of the jurists consider examination at the time of contract essential and hold that any condition permitting examination later would make the contract *bā'il*. The Ḥanafīs allow the sale of things that have not been seen or examined at the time of the contract. They grant an option to the buyer to examine or inspect the goods later. If he finds the goods or property to his liking, he may accept; otherwise he may revoke the contract. This is known as the option of examination or *khiyār al-ru’yah*.

16.9.4. **Khiyār al-‘Ayb** or the Option of Defects

This option has been imposed by the Lawgiver, and the parties do not have to stipulate it. It is, therefore, a necessary condition of every *lāzim* contract. The goods are liable to be rejected if undeclared defects are discovered. If the seller specifically states that he is not responsible for the defects, the buyer acts at his own risk and the goods and the goods cannot be rejected. This is called *barā’ah* (being absolved from liability).

The option is based upon traditions: “He who defrauds is not one of us,” and “It is not permitted for the seller to sell things that are defective, unless he makes these defects known to the buyer.”

The option operates in favour of one buying or hiring property. It is valid in case of goods that need to be specified like a house, land or any goods that have their own individuality.

16.10. Third Party Rights and Discharge of Contract

16.10.1. Assignments and delegations

In Western law, once a valid and legally enforceable contract exists, it is the rights and duties of the parties that become the focus of attention. A contract is treated as a private agreement between the parties who have entered into it, and the general rule is that it is the parties alone who have rights and duties under
the contract. This exclusive relationship between the parties is called **privity of contract**. It establishes a basic concept that gives no rights to third parties who are not party to the contract. There are, however, two exceptions to the rule of privity of contract. The first exception permits a party to the contract to transfer rights arising from the contract to a third party and also to transfer or delegate the duties he has under the contract. The transfer of rights is called the assignment of rights to third parties, while the transfer of duties is called the delegation of duties. Thus, rights under a contract are assigned and duties are delegated. The second exception is available mostly in US law and is called the third party beneficiary contract. Here the rights of a third party are not assigned, but arise from the original contract itself. In fact, such a contract is made in the first place to benefit a third party.

Normally, all rights can be assigned to a third party except when a statute bars such assignment or when the contract prohibits such transfer or when the contract is personal in nature, like that of a doctor or a teacher. Another condition is that the assignment of rights should not materially alter the obligations of the other party to the contract, called the obligor. Likewise, duties can be delegated, except when the duties depend upon the personal skills of the delegator or when special trust has been placed in him or when the contract prohibits this or when the performance of the other party will be materially altered. There are detailed rules about when the persons to whom rights have been assigned or duties have been delegated can sue the other party to perform the contract.

In modern Arab law some of these issues are discussed under the topic of *insirāf al-‘aqd* and the rights of third party beneficiaries *ishtirāt li-maṣlaḥat al-ghayr*. In Islamic law, assignments and delegations are acknowledged, but have not been fully developed in theory. Assignments take place through the contract of *ḥawālah* and delegations through the various types of *wakālah*.

The contract of assignment (*ḥawālah*) is normally applicable to the transfer of debts and is very well known in the law governing negotiable instruments. The type of *ḥawālah* that needs to be investigated further for extracting the rules of assignments is perhaps *ḥawālat al-ḥaqq*. This type of assignment is permitted by the Ḥanafī and also by others.

The contract of *wakālah* is a very versatile contract and provides many instances from which a theory of delegation of duties to third parties can be developed, especially from the types of *wakālah* that are

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called *wakālah bi-qabd al-‘ayn* and *wakālah bi-qabd al-dayn*, that is, delegated rights for the possession of the goods or of the payment. These delegations give the delegatee, who is a third party, the right to seek performance of the contract from the obligor. Al-Dabūsī has recorded a general rule from Abū Ḥanīfah as follows:

The principle according to Abū Ḥanīfah (God bless him) is that anything a person does not possess cannot be assigned to another by delegation.

In Islamic law, the term *istihqaq* is usually applied to mean third party rights, but this is neither assignment nor delegation. It is the prior right of a third party in the subject matter of the contract, like the sale by a *fudūlī* of someone else’s property.

Instances of third party rights and duties and even third party beneficiaries can be found in abundance in Islamic law, however, what needs to be investigated through intensive research is whether third parties or third party beneficiaries are given the right to sue the party who is required to perform the contract.

16.10.2. **Conditions of performance**

In Western law, most conditions or promises of performance are not expressly conditioned or qualified. These are called absolute promises. They must be performed or the party promising the act will be in breach of contract. In Islamic law, the absolute promises are contained in the *hukm al-‘aqd* or *hukm al-‘asli*, that is, what we have called the effects of the contract in the previous sections.

In addition to this, there are conditions that may be stipulated by the parties to suit their convenience and to facilitate the performance of the contract. The performance of the contract may also be made to depend on these conditions. There are three types of conditions in law: precedent; concurrent and subsequent. In Islamic law, all three types are permitted. The following rule illustrates the discussion by the jurists:

The principle according to Abū Yūṣuf is that the conditions pertaining to a contract after its conclusion are considered to exist at the time of the contract. According to Abū Ḥanīfah and Muḥammad they are not to be considered to exist at the time of the contract. This governs cases.
Here the disagreement is not about the conditions themselves, but about the exact form in which they are considered to be operative. Another rule about conditions is:

The principle according to Abū Ḫānīfah (God bless him) is that the contrary implication of a contract is not permitted, but the contrary indication of a condition is permitted. The two disciples maintain that the contrary indication of a contract is permitted.

Conditions are generally divided into three types: ṣahīḥ, fāsid and bāṭil. Those that are void are the conditions that are either against the law or are those that restrict the future right of one party in the subject-matter of the present contract, that is, they are injurious to one party. Almost all other conditions are permitted and the details can only be studied in individual contracts. There is a tradition from the Prophet that says that there cannot be two conditions in a contract of exchange. This has been interpreted to mean two contradictory conditions.

16.10.3. Discharge of contract

The most common way to discharge a contract is through performance. This is true for Islamic law as well as for Western law.

16.10.3.1. Discharge by performance—tanfidh

The contract comes to an end when both parties have fulfilled their duties by performance of the acts they have promised. Performance in law is analysed into three types: complete or strict performance; substantial performance; and inferior performance, which constitutes a material breach of a contract.

In Islamic law there is some disagreement about the inferior and even superior performance of a contract. This type of performance is permitted by Abū Yūsuf, but not by Abū Ḫānīfah and Muhāammad. Let us illustrate this through the principle mentioned above by adding a few examples to it. This also covers discharge by accord and satisfaction.

The principle according to Abū Yūsuf is that the conditions pertaining to a contract after its conclusion are considered to exist at the time of the contract. According to Abū Ḫānīfah and Muhāammad they are not to be considered to exist at the time of the contract. This governs cases.
First case: Among its cases is one that has been mentioned in the book of settlement (ṣulḥ) that if a person has made advance payment for medium quality wheat and the seller brings a higher quality and says, “Take this and give me another dirham,” or he brings a lower quality wheat and says, “Take this and take back a dirham,” this is not permitted according to the Zāhir al-Riwayah in the opinions of Abū Ḥanīfah and Muhammad. According to Abū Yūsuf this is permitted. He links this condition to the original contract so that the contract is reformed to include the condition from the beginning.

Second case: He has also mentioned that if an advance payment is made for a medium quality dress and the seller brings one that is lower in quality or one shorter in size and says, “Take this and I will return a dirham to you,” it is not permitted according to both of them. According to Abū Yūsuf it is permitted and he treats it as if the contract was not concluded without it.

The distinction between the two cases is that one is in a fungible, while the other is in a non-fungible item.

We see here that both inferior and superior performance is permitted by Abū Yūsuf and even the conditions of payment are changed. For the ease of the parties, he permits the reformation of the contract so to say. The important point to notice in this case is that there is no material breach of duty in these cases. For example, in place of wheat if the seller had brought rice, it would have amounted to a material breach of the contract. Thus, these are cases of minor breach that are permitted. The contract can be cured in the opinion of Abū Yūsuf. It may also be treated as a precedent for novation or substitution through a new substituted agreement, i.e., discharge by accord and satisfaction.

16.10.3.2. Discharge by agreement

Islamic law provides different ways to discharge a contract, if the parties agree not to perform it for whatever reason. This may take the form of rescission, novation, accord and satisfaction or impossibility of performance.

1. Rescission (iqālah). Rescission (iqālah) of the contract and restitution of property is acknowledged in contracts. Iqālah is a negotiated rescission of the contract by the parties in which the sold property is sold back to the seller at the same price. In other words, the parties are returned to their original
positions before the contract. The position in Western law is almost the same. For rescission by agreement it is required that there be an offer, an acceptance and a consideration. This is exactly the same thing as iqālah.

2. Reformation Reformation of the contract is permitted by some jurists in Islamic law. This is done by stipulating additional conditions that correct the contract. A leading Ḥanafi jurist says: “According to Abū Yūsuf, the conditions stipulated in a contract after its conclusion are assumed to exist at the time of the contract. According to Abū Ḥanīfah and Muhammad they are not to be considered to exist at the time of the contract.” The cases discussed in the previous section also explain the point.

3. Accord and satisfaction. Discharge through sulḥ is what is called discharge by accord and satisfaction in Western law. There is a new accord in which the parties agree to accept new terms different from those in the original contract. The duties under the original contract are discharged only when the accord is satisfied. Sulḥ is sometimes translated as settlement in Islamic law, because it plays a role in the law of crimes as well. The cases mentioned above for superior and inferior performance are also related to accord and satisfaction.

Islamic law also provides the method of ībrā’, which is actually an extinction or discharge of a claim, but this is a voluntary act on the part of one of the parties.

4. Discharge by impossibility of performance—ītāf, ghaṣb and other cases. Discharge by impossibility of performance is also similar in Islamic law and Western law. Thus, if one of the parties to the contract dies or becomes incapacitated prior to performance, the contract is discharged, but this applies to contracts that cannot be inherited. The contract is discharged when the subject-matter of the contract is destroyed. In Western law, there is something called the doctrine of commercial impracticability, that is, when the transaction is not feasible for one party, for example, when one party has to pay ten times more than the original cost. This, however, results in cases where the compensation is not settled beforehand, and Islamic law requires that the terms be settled in both cases. Another distinction that is made in the law is about temporary impossibility. In both cases,
the basis is the injury or the injustice that may be caused to one party. The issues can be settled in the light of the principles of ḍarar (injury) in Islamic law.

16.11. Breach and Remedies

In law, if it is shown that one party has breached the contract, the non-breaching party has two types of remedy: legal and equitable. Legal remedies are monetary awards or damages. Equitable remedies usually do not involve money and are only awarded when money is an inadequate remedy. These are awarded on the condition that the plaintiff seeking the remedy must act promptly and in good faith. We shall first look at specific performance, restitution, reformation and recovery based on quasi-contract. Thereafter we shall examine the question of damages.

16.11.1. Specific performance—ṣiḥṭ

The party failing to perform the contract is called a debtor. If he refuses to perform the contract, or pay the debt (dayn), the court has the power to imprison him till he agrees to perform the contract. There are detailed rules about ḥabs in such cases.

16.11.2. Rescission and Restitution (faskh and irjā’)

Restitution means restoring the parties to their original position or the position they were in before the contract. Restitution is achieved through (faskh), which is usually linked with fasād (vitiation), and is possible before and after possession of the property has been taken or delivery has been made. There are detailed rules for this type of remedy in books of fiqh.

16.11.3. Reformation

This has been discussed above, but here it will be ordered by the court.
16.11.4. Recovery based on quasi contracts

The Ḥanafi jurists maintain that “liabilities associated with the dhimmah do not become obligatory except by one of two factors: acquisition or a condition. If both are missing the liability is not created. Among the cases of this rule the acquisition that takes place through misappropriation, taking possession of rahn, taking over found property without witnesses and so on.” Liabilities arising through these situations may be likened to quasi-contracts, and as they are attached to the dhimmah, they can be enforced.

16.11.5. Principles of compensation and damages

In law, there are a variety of damages that may be awarded to the party seeking relief. These are: compensatory damages; consequential damages; punitive damages; and nominal damages. Here we are concerned with the first two types because they have caused some confusion even for people like ‘Abd al-Razzāq al-Sanhūrī.

There is no problem about compensatory damages in Islamic law. Compensatory damages are called damān, which literally means compensation. The value depends on the amount of performance promised in the contract. This may be the value of the commodity sold or services rendered or other consideration. Consequential damages occur as a result of the breach and are usually lost profits.

For example, if A hires a truck from B to transport goods and does not return the truck, then, according to the Ḥanafis, the ownership of the truck stands transferred to A from the time he usurped the truck, i.e., committed ghaṣb. Assuming that the matter is not settled for another six months, B will only be entitled to the value of the truck and not the profits he has lost during the six months. Whatever money is earned during the six months belong to A, because legally he is the owner, though he is liable for the value of the truck.

Working behind this decision is the Ḥanafite principle: al-ajr wa-al-damān lā yajtami‘ān (rent—or profits—cannot be combined). In other words, the rent for the truck during the six months of its use cannot be combined with the compensation of its value; B will only get the value as damān. Sanhūrī wrestled with this principle and thought he had come to a dead end. The solution to the problem lies in our examining background of the principle.

The entire principle according to the Ḥanafis is that “things compensated (madmūnāt) are owned
through prior liability (for loss) and ownership is retrospectively assigned in them from the time of compensation, when the property in question is one that is capable of being owned through mutual consent. According to al-Shāfī‘ī, things compensated are not owned through (prior) ḍamān (liability).” This means that the case arises later, but ownership is retrospectively assigned to the party who has breached the contract. Al-Shāfī‘ī does not agree about the retrospective assignment of liability. Thus, if his opinion is preferred, the concept of consequential damages is permitted in Islamic law. This will lead to the changing of several other rules, however.
Chapter 17

Delegated Authority

17.1. Guardianship (Wilāyah)

The word wilāyah is used in the meaning of help and cooperation as well as in the sense of authority. The meaning assigned to the word by the jurists is the same as the literal meaning, that is, “It is an authority granted to a person over the affairs of another by virtue of which acts undertaken on behalf of such other person, without his consent, are assigned legal effects.”

A person acting on behalf of another requires, in addition to legal capacity, permission or authorization for the act. The source of such authority is either the Lawgiver or an agreement between two persons. We are at present concerned with the former authority, the source of which is the sharī’ah. This authority is called wilāyah.

17.1.1. Types of Wilāyah

Wilāyah is of two kinds. The first is wilāyah over the property of another, while the second is wilāyah over the person himself. Wilāyah over the person of another implies the protection of the minor and the undertaking of his education and general bringing up. This kind of wilāyah includes marriage. The awliyā’ under this type have a determined order of precedence. In this section, we shall focus on wilāyah over the
property of another or *wilāyah ‘alā al-māl*. *Wilāyah* over property is confined to financial transactions and the acts of the *wali* are granted full legal effects and are binding on him.

17.1.2. Grades of the *awliyā’*

The *awliyā’* over property according to the Ḥanafīs and Shāfīʿīs are first the father, then the *waṣī* (executor) appointed by the father, the grandfather, the *waṣī* appointed by the grandfather followed by the *qāḍī* (court) and then the *waṣī* appointed by the court. The Ḥanbalīs and the Mālikīs do not acknowledge the *wilāyah* of the grandfather and hence that of the *waṣī* appointed by him. The reason for this is that they treat the brother and grandfather at the same level. As there is no *wilāyah* for the brother, it cannot be granted to the grandfather too. They argue that the grandfather does not have the same kind of affection for the grandchildren as is reflected by the father.

*Wilāyah* according to the Ḥanafīs is first for the father, because no other person can be treated as his equivalent with respect to affection and anxiety for the interest of the child. This is followed by the executor appointed by the father during his lifetime. The *waṣī* of the father is given priority over the grandfather as the father is expected to have selected a person in whom he has full faith and confidence and whom he chose after careful consideration. The *waṣī* of the father would, therefore, have the interest of the ward close at heart. If the father did not select a *waṣī* before his death or one whom he selected failed to meet one or more conditions of *wilāyah*, then, *wilāyah* shall pass to the paternal grandfather, who is expected to exercise natural care regarding the affairs of the child. If the grandfather is no longer living or fails to meet the required conditions, *wilāyah* shall pass to his *waṣī* in the same manner outlined for the *waṣī* of the father. In the absence of all the above, guardianship shall pass to the *qāḍī*, due to the tradition: “The sultān is the *wali* of one who has no *wali*. The *qāḍī* can delegate his authority to his *waṣī*, who then exercises it on his behalf.

The Shāfīʿīs oppose the Ḥanafīs in granting priority to the *waṣī* of the father over the grandfather, because they prefer him to a stranger who may be appointed as the *waṣī*. In the absence of both father and grandfather the *wilāyah* belongs to the *waṣī*. In the absence of both father and grandfather *wilāyah* belongs to the *waṣī* of one who died later and then passes on to the *qāḍī*.

The Mālikīs and the Ḥanbalīs maintain that *wilāyah* belongs to the father and thereafter to his *waṣī*.
and in their absence passes to the qāḍī or his representative.

The preceding discussion of the grades of the awlīyā’ applies to a the case of the minor or a minor who is mentally incompetent (insane or an idiot). With respect to the person who has attained puberty but suffers from safah, the majority maintain that wilāyah belongs to the person who was exercising it prior to safah, that is, prior to puberty. Abū Yūsuf, from amongst the Ḥanafis, argues that any interdiction placed over such a person shall be by order of the qāḍī.

If the minor who has attained puberty and is sane and also possesses the required discretion, is then attacked by insanity or idiocy, his guardianship belongs to the qāḍī or to his representative. This is the opinion of the Mālikīs and Ḥanbalis. The majority of the Ḥanafis and the Shāfī’is maintain that wilāyah in this case too belongs to one who was exercising it before puberty. Thereafter the order described above is to be observed.

The minor who attains puberty with a full capacity and later falls prey to safah, is interdicted and his wilāyah belongs to the qāḍī, by agreement of the jurists.

17.1.3. The extent of the wali’s authority

The wali enjoys extensive authority over the financial matters of his ward and the consent of the ward is not relevant. With the exception of marriage, the ward cannot revoke such transactions after attaining majority. The authority of the wali, however, is not absolute, and the Lawgiver has laid down certain conditions that regulate or restrict the exercise of such authority.

17.1.3.1. Conditions of appointment

The jurists identify three qualifications that the wali must possess.

a) He must be a major and sane.

b) He must be of the same din as his ward. Thus, Muslims have no wilāyah over a non-Muslims and vice-versa. This qualification is also used as an argument to prohibit the marriage of a Muslim woman to a Christian or Jewish man. It is argued, among other things, that such a male cannot be a guardian over the wealth of the woman or over her minor Muslim children.
c) The *walī* should be trustworthy and able to undertake transactions on behalf of his ward as demanded by the office of *wilāyah*.

17.2. **Agency (Wakālah)**

The contract of agency is perhaps the most important of all legal relationships in any legal system. It is used not only for itself, but also as a foundation for many other relationships. It is basically a relationship between two parties. One of the parties, called the agent of *wakīl*, agrees to act for or to represent the other party, who is called the principal or *muwakkal*. The first meaning of *wakālah* is derived from *hifz*, which means protection, while the second is derived from *tafwīd*, which means the delegation of a matter to another.

Technically, *wakālah* is the appointment of an agent (*wakīl*) in place of the principal (*muwakkal*) for the performance of an act authorized by the principal. The source of the contract of *wakālah*, as distinguished from *wilāyah*, is an agreement between two persons.

17.2.1. **The elements of wakalah**

The contract of *wakālah*, like most other contracts, has four elements: the parties to the contract, that is, the principal and the agent; the authorized act; and form (*ṣīghah*) with which the contract is to be concluded.

17.2.1.1. **Parties to the contract**

The parties to the contract are the principal or *muwakkal* also known as *asīl*, who grants permission or authority to another to act on his behalf, and the agent or *wakīl*, who performs the act on behalf of the principal. The permission or authority emerges from the contract of *wakālah*.

The principal must have the capacity to undertake the act himself for which he has authorized another, irrespective of whether such right arises from personal ownership or from *wilāyah*. Minors, mentally incompetent persons, or those who have been placed under interdiction lack such capacity. Those who...
deny women the right of contracting marriage on their own do not allow them to delegate such authority to others. A person who has not attained puberty, but who is able to discriminate is authorized by the Ḥanafis to enter into beneficial transactions like the acceptance of gifts and charity, may appoint an agent just for these acts. Further, a person may be permitted to act on behalf of others for contracts of necessaries. As regards transactions in which there is likelihood of both profit and loss, appointment of an agent depends on the prior permission of the wali or his subsequent ratification.

The agent must have the legal capacity to undertake the authorized act on his own behalf before he can be authorized by another. One who does not possess legal capacity is, therefore, ineligible for being appointed as agent, like a minor or a mentally incompetent person. A woman, therefore, cannot be appointed as agent for contracting marriage according to those who do not give her the right to contract her own marriage. As regards divorce some jurists grant her the right of appointment as agent. There are other jurists who maintain that she possesses the right only as an exception in certain cases for herself and, therefore, they deny such appointment for others. With respect to the sabi mumayyaz or the discriminating minor, the Ḥanafis permit appointment as agent with the condition that the huquq revert to the principal and not to the agent, contrary to the established principle of the school. The discussion about huquq is to follow.

17.2.1.2. The subject-matter of wakalah

The subject matter of wakalah or its mahall is the act for which authority has been granted through the contract of wakalah. The general rule is that wakalah is permitted in all legal transactions. Legal acts are those words and physical acts to which the Lawgiver has assigned legal effects.

The jurists allow agency in contracts of sale, pledge, ḥawalah (assignment), kafalah, partnership, agency (further), deposits, muḍārabah, musāqah, hire, loan, marriage and other similar contracts. Examples of the contracts depending on a unilateral consent, in which agency is allowed are: hibah (gift), waqf and wasiyah, and also in ji‘alah (general offers). Agency is also allowed in divorce, khul’, manumission, relinquishment of rights (isqāt and ibrā’) and admissions and acknowledgements (iqrār).

Agency is also allowed in taking or handing over of possession, in the exercise of retaliation (qisās) and in the implementation of the ḥadd of qadhf. Some jurists stipulate that the principal must be present on
such occasions for there is a likelihood that he may pardon the offender. *Wakālah bī‘l-khusūmah* or agency for purposes of litigation is also permitted, though the nature of such a permission may differ from the one current today.

17.2.2. **Types of agency**

The contract of *wakālah* is concluded by *ījāb* (offer) and *qabūl* (acceptance), like the rest of the contracts, except that it is not necessary that the acceptance be issued in the session (*majlis*) of the contract and the offer is valid even after that.

*Wakālah* is of two types depending on the *sīghah* used. It is general or *wakālah ʿāmmah* and it is special or *wakālah khāṣṣah*. The nature of the two types affects many business transactions and even the forms of business organization like partnerships and companies.

17.2.3. **The aḥkām of wakālah**

*Wakālah* is a *jā‘iz* contract, that is, it is revocable at the will of both parties, as long as the rights of a third party are not involved. As the agent is acting on behalf of the principal all his acts are valid as against the principal who is liable for them. This is so if the agent has not crossed the limits of the authority granted to him. An act undertaken by the agent without proper authority shall be considered as *bāṭil* (void), *mawqūf* (suspended) or even valid as against the agent himself.

17.2.4. **Hukm of the contract and its ḥuqūq**

The distinction between the *hukm* of the contract and its *ḥuqūq* drawn for purposes of agency are perhaps the most important feature of *wakālah* in Islamic law. By *hukm* is meant here the purpose for which the contract is concluded and the *ḥuqūq* are the means for achieving that end. For example, in a contract of sale the *hukm* of the contract is the transfer of ownership of the property to the buyer and the transfer of ownership in the price to the seller. The *ḥuqūq* are the delivery of the subject-matter, claiming the price, right to exercise options of defect and examination and meeting claims of third parties. In the contract of hire the *hukm* is transfer of ownership in the benefits *manfa‘ah* to the hirer and transfer of ownership in
the rental value to one letting it on hire. The ḥuqūq are delivery of the rented property and of the rental value.

The Ḥanafīs maintain that the ḥukm of the contract always reverts to the principal, while the ḥuqūq of the contract are to be exercised or met by the agent. Thus if the agent buys goods for his principal the ownership in these goods stands transferred to the principal immediately, while the right to demand delivery of the goods, obligation to pay the price, the right to reject the goods due to defects belong to the agent. He is the only one who shall be sued for the price and not the principal. In other words the agent has the sole liability for the payment of goods, and the principal is not to be sued for it. At the same time, he is the only person who can demand delivery of the goods and has the right to reject them.

The exceptions to this rule are the contracts which by necessity the agent has to attribute to the principal like marriage, divorce, settlement (sulh) for murder. In such contracts both the ḥukm and the ḥuqūq belong to the principal. They maintain that in these contracts the agent is merely an emissary carrying the consent of the principal to the other party. Thus if the agent makes a settlement of dower, the wife has a right to demand it from the principal.

The Shāfiʿīs though they do not differentiate between the ḥukm and ḥuqūq of a contract, agree to a great extent as to rights and duties of the agent. The Ḥanbali jurists consider the agent as a mere emissary of the principal and the principal can exercise the ḥuqūq and be liable for them.

17.2.5. Termination of agency

Agency is terminable at the will of the parties, however, knowledge of such termination must reach the other party before it can take effect. Agency cannot be terminated if the rights of a third party are involved. Thus if a mortgagor appoints the mortgagee as an agent for the sale of mortgaged property in order that the debt be cleared, then, such agency cannot be terminated or revoked till the sale is effected.

Agency is terminated automatically if either party ceases to possess legal capacity. If one of the parties becomes insane, agency is terminated and such termination does not depend on the knowledge of the other party but takes effect immediately.
17.3. Ratification and the Acts of the *Fuḍūlī*

In the previous section we stated that agency can be created by ratification. In Islamic law, the unauthorized person acting on behalf of another is called *fuḍūlī*. *Fuḍālah* means meddling or the undertaking by a person of affairs that are none of his concern. *Fuḍūlī* is, thus, a person who minds other people’s business. Muslim jurists use the term in its literal sense and mean by it a person who undertakes to act, or to conclude a contract, on behalf of another with out proper authority. The person who sells goods belonging to another, or purchases goods for him, when he is neither the *wālī* (guardian) of such person nor his duly appointed agent (*wakīl*), is acting as a *fuḍūlī*. Some Ḥanafī jurists distinguish between sale by a person who is under the impression that he owns the goods being sold, and sale by a person who knows that he is selling the goods of another. The former is not a *fuḍūlī* according to these jurists. There are others who consider the acts of both persons as the acts of a *fuḍūlī*.

17.3.1. The *ḥukm* of the acts of a *fuḍūlī*

There are two views on the acts of the *fuḍūlī*. The first view holds the acts of the *fuḍūlī* to be valid *ṣāhih*, but suspended (*mawqūf*) till the legal effects are ratified by the person on whose behalf they were undertaken. This view is held by the Ḥanafīs as well as the Mālikīs. The position taken by the Ḥanafīs is formulated into a principle and is stated by al-Karkhī as follows:

ان الإجازة اللائقة كالوكالة السابقة

Consequential ratification is like prior agency.

The second view is that of al-Shāfi‘ī, who considers the acts of the *fuḍūlī* to be void (*bāṭil*) having no legal effects. In other words, they do not permit ratification.

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17.3.2. Conditions for ratification

The Ḥanafī jurists lay down three conditions for the ratification of contracts undertaken by the fuḍūlī.

1. **The subject-matter of the contract must be in existence.** Ratification is futile if the subject-matter was destroyed before it was accorded. If the subject-matter is destroyed in the hands of the fuḍūlī, he is liable for its compensation (ḍamān). If it is destroyed in the hands of the buyer, then, the owner has an option to claim it from the fuḍūlī or from the buyer.

2. **The three parties involved in the contract must be alive at the time of ratification.** If ratification is accorded after the death of one of the parties it is of no legal consequence and shall have no legal effects.

3. **Legal capacity must be found in parties at the time of the contract.** If the fuḍūlī is acting on behalf of a minor, who accords ratification after attaining puberty, such ratification is without effect. The guardian of a minor, however, may ratify the contract, as stated earlier.
Chapter 18

Commercial Transactions

18.1. The Meaning of Bay‘ and its Types

The term bay‘ is usually translated as sale, however, it has a much wider meaning in Islamic law. This term covers all commutative or synmalagmatic contracts, that is, contracts in which there is an exchange of two counter-values. In other words, ownership in one counter-value is passed to the other party in lieu of another counter-value. In this wider sense, the term ijarah (hire), for example, is included in the meaning of bay‘, because it is the exchange of benefits arising from rented property for rent, or it is the exchange of wages for services rendered. Hire is often referred to by jurists as the sale of benefits arising periodically. Some go to the extent of considering the marriage contract as some kind of sale insofar as it amounts to handing over ownership in benefits (tamlik al-manafi’) in exchange for dower.1

18.1.1. The basic types of bay‘

Al-Kāsānī, the well known Ḥanafi jurist, describes the basic types as follows:

Sale with respect to the counter-values is divided into four types, the sale of an ascertained commodity (‘ayn) for an ascertained commodity (‘ayn), which is the sale of goods for goods and is called barter;

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1 Al-Sarakhsi has explained the similarities and distinctions between bay‘ and nikāh. See al-Mabsūt, vol. 13, 109.
the sale of an ascertained commodity (‘ayn) with a dayn, and this is the sale of goods for absolute prices [currencies], which are dirhams and dinârs, or their sale for copper coins or with a described measured commodity as a liability [debt] or a described weighed commodity or described identical counted items; the sale of a dayn with an ascertained commodity (‘ayn), which is salam; and the sale of a dayn with a dayn, which is the sale of an absolute price for an absolute price, and is called šarf.\(^2\)

According to this there are four basic types of sale:

1. ‘ayn (goods) for ‘ayn (goods)—(barter)
2. ‘ayn (goods) for dayn (currency)—(regular sale).
3. dayn (delayed payment in goods) for ‘ayn (goods)—(advance payment in goods)
4. dayn (currency) for dayn (currency)—(currency exchange and money loans)

The first two types, ie, barter and regular sale will also include other sales like murâbaḥah (sale at stated cost price), iqâlah (negotiated rescission), tawliyah (sale at less than cost price), muzâyadah (auction), sales involving ribâ (interest or excess), sales through usurious means, sale of food before possession and bay’ al-khiyâr (sale with an option). We will, however, not consider barter or the types resulting from it. Our major focus will be on the regular sale along with its different types. The last two, ie, salam and šarf will be considered separately. In addition to these types, ribâ may be considered a category of sales that are prohibited. It is easier to understand the issue of ribâ this way.

All these transactions do not reveal the complete meaning of bay‘ as is to be found in the terminology and usage of the jurists. The reason is that these transactions do not show the sale of benefits or of services. These have not been shown here because the fuqahâ’ treat them separately under the headings of ijârah and ji‘âlah.

18.2. General Conditions for Commercial Transactions

Most of the conditions specific to commercial transactions pertain to the consideration of the contract or the maḥall al-‘aqd. It is the thing for which an agreement has been made, and in which the effects of the

contract are visible. It is something having a legal value. The jurists usually lay down four conditions for the subject-matter and some add a fifth. The conditions, which have been stated earlier, are as follows:

1. The subject-matter must have legal value.
2. It must be in existence at the time of the contract.
3. It should be potentially capable of delivery at the time of the contract.
4. It should be something known to the parties.
5. It should be something that is clean (tāhīr) and is not filthy or affected by filth. This condition is laid down by the majority of the jurists and not by the Ḥanafīs. It can be easily merged with the first condition.

The first four conditions are examined below, considering the fifth to be part of the first condition.

18.2.1. **It must be māl**

This stipulation discusses the purely financial detriment to the promisee. Thus, what is not considered māl by the *shari‘ah* cannot form the subject-matter of the contract. The minimum value of māl is considered to be one fals by some, that is, one copper coin. This is further understood under the following heads.

1. **The subject-matter should not be human limbs or organs.** A free person cannot be sold nor can he be mortgaged nor can his limbs be sold. The sale of human blood today for purposes of transfusion can perhaps be justified through the principle of necessity (darūrah). The jurists, however, disagree about the sale of human hair and milk. Mālik and Shāfi‘ī allow the sale of human milk as they consider it similar to the milk of animals. The Ḥanafīs maintain that it is something that is permitted in case of necessity and its sale cannot be allowed like other things permissible in cases of necessity, for example *khamr* and swineflesh. It is obvious that today and actual need for the sale of human milk may not arise, but it is the principle that we are concerned with here. The Ḥanafīs, likewise, do not permit the sale of human hair, however, Zayla‘ī attributes one opinion to al-Shaybānī, which appears to be based upon a tradition that the Prophet (p.b.u.h.) distributed his
hair among the Companions (but that was not sale). The rule that human hair is not to be sold is based upon the honour and sanctity of the human being and his corpse. Modern instances like the donation of eyes and kidneys or other organs will again be covered by the principle of necessity, where the person may grant permission that if such necessity exists his organs may be used.

2. **It should not be najis or mutanajjas.** Najis are those things that are considered filthy under the law and have no legal value, like carrion, blood and other things. Mutanajjas are those things that have been affected by filth, like something dirty falling into milk. The Shafi’is do not allow even the sale of bones of dead animals nor their hair or skin. The Hanafis permit their sale as they do not consider them ritually impure, that is, *najis*. The rule is that whatever does not accept death or decay is pure, like hair and bones. Al-Shaybani, Abū Ḥanifah’s disciple, declares ivory to be filth for some reason, perhaps, on the basis of the use to which it is put. Malik applied a similar rule to the bristles of swine.

3. **The subject-matter must have some utility for human beings.** Thus, many insects, birds and animals are excluded from marketable items. In this context, Muslims should examine whether the sale of a falcon for $50,000 is justified just because it perches on a wealth forearm as a status symbol. The rule would go a long way in the protection of animal species, especially those that are extinct. On the same rule, a house or a piece of land having no access is not marketable. There are other things too, like musical instruments, that are not marketable according to the majority of the jurists. Abū Ḥanifah, on the other hand, considers such sale as *makruh*, but he does not prohibit it.

4. **The goods sold must be mutaqawwam, that is, have a legal value.** Things that are *ghayr mutaqawwam* are those that are *mal* for some and not for others. Thus, *khamr* (wine) is *mal* for non-Muslim subjects, but for the Muslims it cannot be the subject-matter of a contract. It is not clear whether a Muslim state can collect taxes from trade in such items, unless the taxes collected are spent on non-Muslims alone.

5. **The goods should be owned by someone.** Public property is excluded with this stipulation and cannot be the subject-matter of the contract, so also things that are free or are yet to be owned, like fish in the sea. It is difficult to apply this condition to public property today, because it is now oned
by the juristic person called the state, however, it may apply to other properties like *waqfs*, which have special rules to prevent sale.

6. **There should be no third party rights attached to the property.** This point is examined on the basis of the rights involved.

   - **The right of Allah:** The treasury (bayt al-māl) insofar as it holds the collections of zakāt or revenue through the undertaking of jihād as well as mosques cannot be sold. Since the Ḥanafīs consider offences against the human body to be a combination of the two kinds of rights, they associate all transactions intended to facilitate the destruction of life and limbs with this category. Likewise, prostitution is a direct attack on the interest of preserving progeny and the family system (ḥifz ‘alā al-nasl). Some scholars today consider the right of Allah to be the same thing as the right of the state, but a little reflection will show that the rights are independent.

   - **The right of the individual:** This is the category of all third party rights and they will be discussed later in a separate section under the title of *istihqāq*. One example that may be given here is that of pledged property (rahn). Some jurists say that a freeman cannot be sold because he has his own right attached to his own self.

From these stipulations we can easily see that this condition applies to things that invoke a financial detriment for the promisee. The condition cannot be generalized for all kinds of contracts. The question whether potential benefits of property and services are *māl* has a bearing on the question of damages. If this condition is extended to future benefits and profits arising from a property or service, then, it should also be compensated in case of breach of contract through the award of damages where these are applicable. The question whether a marriage contract involves the transfer of some kind of benefits that are to be compensated is also discussed by jurists. Those who consider dower a form of compensation do acknowledge marriage as a commutative contract.
18.2.2. **The subject-matter must be in existence at the time of the contract**

This rule is for pure sales and does not apply to hire and several other types of contracts whose subject-matter is yet to come into existence, and even in these the contracts of *salam* (advance payment) and *istiṣnā ’* are exemptions. Thus, for contracts like sale of goods, currency exchanges, and even barter, the condition is broken down into the following subrules:

1. **The subject-matter must be in existence:** In case the subject-matter is non-existent at the time of the contract, the contract is void. It is not sufficient that the goods can come into existence potentially. On the contrary, the goods must have come into actual existence. Thus, milk in the udder, or a foetus, or pearls in the shell, or the offspring of an offspring (*ḥabal al-hablāh*) cannot be sold through a valid contract. Here non-existence means actual non-existence as well as likelihood of non-existence.

2. **The subject-matter must be in actual existence and not in the fancy of the party:** This rule is illustrated by the case where the seller says to the buyer: “I sell you this diamond for so much,” and the diamond turns out to be glass.

3. **The subject-matter must be in a form that conforms with the description:** The existence of the subject-matter alone at the time of the contract is not sufficient; it must have reached a stage of development where it fits the description given in the contract. The rule is illustrated through the sale of crops before they have ripened and their sale after ripening. The first four cases given below apply to sale before ripening and the fifth to sale after ripening.

   1a) The sale of crops before the ripening process has begun is permitted with the condition that they shall be cut and not left standing on the field. As the subject-matter in this case is unripe crops that have come into existence, the sale is valid with the condition of cutting.

   1b) If the condition in the above case is that the crops shall be cut when they are ready for harvesting, the sale is void by agreement of the jurists. The proper description of such crops would be “those that are ready to be harvested,” and such a state has not yet been reached and the required goods have not come into existence at the time of the contract. The prohibition
is based upon a tradition from the Prophet (p.b.u.h.): “What do you think if Allah were to prevent the crops from ripening; for what then has one of you taken his brother’s wealth.”

1c) Another possibility would be when no condition is imposed, that is, neither of cutting as they stand nor one of waiting for the time of harvest. In such a case, the jurists are in disagreement and some of them hold that such a contract would be valid with cutting as an implied condition, that is, the crops would have to be cut in any case. Some jurists are of the opinion that what is implied here is that the crops would be left standing till they are ready for being harvested; thus, the contract is void.

1d) In the case where the contract with the express condition of cutting, but the buyer allowed the crops to stand, there are two opinions: First, the contract is void as it is being used as a means to evade the prohibition. Second, the contract is valid, according to the Hanafis, but the determination of the value added depends on whether or not the permission of the seller was taken.

2) The second category is that of the sale of crops after they have ripened. The contract in this case is valid.

18.2.3. The seller must have the capacity to deliver the subject-matter

This condition, again, applies to the contract of sale, and it also applies to mortgage/pledge. Thus, the ability to deliver the mabā‘, or the thing sold, at the time of the contract is an essential condition for the validity of the contract. If the capacity to deliver is absent at the time of the contract, the contract is void, and this legal position is not altered even if the seller had the ability to deliver after the conclusion of the contract.

This condition is dictated by the nature of the contract and the purpose it is to serve. Thus, in a contract of sale, the aim is to enable the buyer to exercise the authority and enjoy the benefits of an owner of the sold property. If such authority is lacking, the purpose fails. Some jurists have tried to distinguish between the types of inability to deliver:

1. Absolute inability to deliver: This type of inability exists for all times and not for a particular period. The sale of an animal whose whereabouts are not known, or that of fish in the sea, or a bird
in the air are, therefore, declared void.

2. Relative inability to deliver: Inability in such a case is not absolute and delivery is possible with the fulfilment of certain conditions. This is illustrated by the sale of property in the unlawful possession of another. Here sale is possible with the help of the authorities, but not otherwise. The *hukm* in such a case is the same as above according to some jurists, that is, the contract is void. There are others who maintain that the contract is valid, but is *mawqūf*, that is, it will remain suspended till the restitution of property; as soon as the property is restored to the seller the contract can be enforced.

Inability to deliver may be actual and real or it may legal inability, that is, declared so by the *shari‘ah*. The jurists explain actual inability through examples stated earlier, like the sale of fish in water or birds in the air. Legal inability is illustrated by the sale of a beam in one’s house, which is not demolished but in use. The Hanafis, however, maintain that in case of actual inability the contract is void (*bā‘til*), but in the case of legal inability the contract is irregular (*fāsid*). Thus, if the seller were to demolish the house and deliver the beam to the buyer the latter would be forced to perform the contract as the cause of inability stands removed.

The Mālikis distinguish between cases where delivery would mean a grave loss for the buyer and cases where the goods to be delivered themselves face a threat of being destroyed in the process of delivery. If delivery of the beam affixed in the roof means destroying part of the house at a loss to the seller then the contract though morally (diyanatan) unjustified would be valid legally. If the chances are that the beam itself would break during removal the contract is void. The distinction appears to be hypothetical and may raise problems in cases of dispute.

18.2.4. The parties must have knowledge of the subject-matter

The general rule in Islamic law is that the subject-matter must be ascertained at the time of the contract, otherwise the contract is void. The ascertaining (*ta‘yīn*) of the subject-matter depends on its nature. For example, in a purchase of wheat, the quantity bought is ascertained when it is weighed and put aside. In general, however, it means the acquisition of such knowledge about the thing bought that does away with uncertainty, which is likely to lead to a dispute. There are two broad methods for this:
1. **Examination of the subject-matter:** The subject-matter becomes known and specified when the parties to the contract see it and examine it at the time of the contract. If the subject-matter is present at the time of the contract, that is, during the *majlis*, the majority hold its examination to be necessary. If the buyer fails to examine it even when it was present, the contract is void. The Hanafi school permits sale by description when such examination becomes difficult or when the goods are not available during the *majlis*.

2. **Sale by description:** The second method of sale acknowledged by jurists is sale by description. The description should be detailed enough to do away with vagueness and uncertainty. If the property to be sold is already known, like a house or a horse, a description highlighting its specifications or characteristics would be deemed to be sufficient. If, however, it is the sale of fungible goods (*mithlí*), these goods must be described by species, kind, quality and quantity. The method is applicable when goods are not present in the *majlis*. The majority of the jurists allow sale by description, except the Shafi’ís and stipulate actual examination at the time of the contract.

Some jurists permit sale of goods even when the goods have not been examined or described with precision. This is achieved by granting the buyer the option of inspection (*khiyar al-ru’yah*). In this case the buyer can reject the goods on inspection. The option can also be exercised when the goods have been sold by description alone. As explained earlier some jurists grant, through this option, the unrestricted right to reject the goods even when they conform to the specifications, but others restrict the option to non-conforming goods.

From the foregoing we can conclude that the majority allow sale by description and it is only the Shafi’ís who insist on *ta’yín* at the time of the contract.

18.2.4.1. **Rules for fungible and non-fungible goods**

The jurists distinguish between fungible and non-fungible goods as explained above. Non-fungible goods are items like cows, goats, horses, water-melons, and dresses of different types and qualities. It is not permitted to buy, say, twenty head of cattle or ten dresses when each one of them has not been specified or identified. The reason is obvious, because each one of them can differ from the other of its kind in value.
Fungible goods, on the other hand, are sold by weight, measure or count, like flour, grain and eggs. In the sale of such things too some jurists have made distinctions:

- **When the total price and quantity are mentioned.** If the seller says to the buyer, “I sell you this bag of wheat containing 100 kilograms for $20,” the sale would be valid by agreement of the jurists. If the weight turns out to be less than 100kg, the buyer would have the option to return the entire bag or reduce the price proportionately. If it is in excess he is to take his 100kg, returning the rest to the seller.

- **When the total price is mentioned along with the rate per unit.** This contract is valid, because the total quantity can be worked out with ease.

- **When the total quantity and rate per unit are mentioned.** This is valid and similar to the previous case.

- **When the seller mentions a rate per unit and points to the bag.** The total quantity in the bag is not known. Simple arithmetic cannot lead to the total price. The bag, therefore, needs to be weighed.

### 18.3. Sale of Goods for Cash

Out of the four types of sale mentioned by al-Kāsānī, the most important and comprehensive form is the sale of goods for cash. It has many variations depending upon which counter-value is delayed or what is the method of charging profit. Accordingly, credit-sale, advance payment, manufacturing contracts, sale at cost price or less than cost price are all included in this type. In reality, the same types can also be included within the sale of goods for goods. Some of the important types are described below.

#### 18.3.1. The spot sale

This is the most common form of sale. It is sometimes called *musāwamah*. The seller and buyer enter into an agreement for selling and buying of goods. The goods are delivered at once and the price is also paid. Ownership in the counter-values stands transferred to the parties. According to the Ḥanafīs, if the delivery of the counter-values is delayed, the sale becomes vitiated (fāsid); if the delivery has to be delayed the form provided for should be adopted along with its conditions, ie, the credit-sale or advance payment.
18.3.2. Credit sale (bay‘ al-nasī‘ah)

The credit sale is called bay‘ al-nasī‘ah. It is also known as bay‘ mu‘ajjal or sale in which the ajal (period) for the payment of price is fixed. Thus, if A sells a pound of wheat to B on the agreement that B will pay the price after one month, the sale is bay‘ al-nasī‘ah. The ownership in the goods stands transferred to the buyer, while the ownership in the price stands transferred to the seller. The claim for the price is attached to the dhimmah or the buyer and becomes a dayn. It is in this sense that the word dayn is used in Islamic law; it is not to be confused with the word “loan” (qard).

Islamic law permits the seller to charge a higher price for the goods if he is selling on credit. Thus, if the seller would sell one pound of wheat for Rs. 100 cash, he may charge Rs. 120 when he sells on credit for six months. There is a disagreement as to whether the seller can give a discount to the buyer if the buyer makes an early payment. In the example, if the buyer wants to pay after three months, should the seller reduce the price and make it say Rs. 110? This is called “reduce and hasten” (ḥāṭṭ wa-ta‘ajjal) in Islamic law. A logical application of the rules should not prevent the seller from giving this trade discount.

18.3.3. Advance payment (salam)

Salam means making an advance payment for a commodity the delivery of which is delayed. The payment may be made in cash or in kind. Thus, Rs. 100 may be paid in advance for a bag of wheat to be delivered on a certain date in the coming season. Likewise, a bag of wheat may be paid in advance for two bags of barley to be delivered on a fixed date in the coming season.

The permission of this contract clashes with two rules that prevent such a sale. The first rule is that of the prohibition of the sale of a thing that does not exist as yet (bay‘ al-ma‘dūm). As the commodity to be delivered does not exist as yet the rule prevents its sale. The other rule is that of the prohibition of ribā. This rule prevents the sale of wheat for barley, unless they are exchanged at once. As the delivery of barley is being delayed in the above example, the contract would not be possible on the basis of this rule. It is for this reason that the jurists state that the contract of salam is permitted as an exemption (rukhsah). It should be noted here that if salam is not considered an exemption, but an initial primary rule, the rule for the prohibition of ribā would have to be considered its exemption, which is not the implication of the texts prohibiting ribā.
The contract of *salam* is concluded with the following six conditions:

1. The genus of payment must be specified, i.e., whether it is being made in dirhams or dinars or some other currency.
2. The amount of payment must be specified.
3. The goods to be delivered must be described in clear terms.
4. The quantity of the goods to be delivered must be clearly stated.
5. The period of delivery must be clearly specified.
6. The place where the goods will be delivered must be stated along with transportation expenses if any.

18.3.4. *Goods made to order (istiṣnā’)*

The contract of *istiṣnā’* is also permitted as an exemption in Islamic law. It requires the manufacturing of goods and their delivery at an agreed upon date. It is an exemption from the rule about the prohibition of the sale of non-existent goods. As the goods are still to be manufactured, the parties are buying and selling goods that do not exist. The contract is, therefore, quite similar to *salam*.

The difference between *salam* and *istiṣnā’* is that there does not have to be an advance payment for the goods. This is the Hanafi view; they permit it on the basis of *istiḥsān* and the need of the people for such a contract. They do not draw an analogy for it from *salam*, because it is permitted as an exemption and analogy cannot be constructed on exemptions. The majority of the jurists draw an analogy from *salam* and that implies that the payment would have to be made in advance. The Shafi‘is do not stipulate the fixing of a period of delivery in this contract. The conditions for the contract are more or less similar to those of *salam*, except what has been noted about advance payment.

18.3.5. *Sale with earnest money (‘urbūn)*

Sale with earnest money, called *‘urbūn* (also ‘arbūn), is not permitted by the majority of the jurists, unless the money deposited is returned. The contract is made between the buyer and seller where the
buyer deposits a certain sum with the seller with the promise that he will come and conclude the contract finally after a certain period. If the buyer does not show up the money belongs to the seller. The reason why it is not permitted is that it amounts to the sale of right to buy and not the sale of tangible property.

The Ḥanbalīs permit it on the basis of a single tradition, which is not acceptable to the majority. The Islamic Fiqh Academy has now accepted the Ḥanabali opinion and has recommended in its resolutions that sale with earnest money be permitted. The acceptance of this rule does not simply mean that payment of earnest money is valid, it also means that an option can be paid for under Islamic law. This may have far-reaching consequences for the development of options and derivatives both on the commodity and stock exchanges. The acceptance of this rule, however, disturbs the analytical consistency of the traditional law.

18.3.6. Contract for supplies (tawrīd)

This is a modern variation of the contract for supplies. It envisages an agreement where goods required by a customer are delivered periodically without there being a separate contract for each transaction. Modern writers rely on the contracts of salam and istiṣnā’ to justify this contract.

18.3.7. Sale with stated profit (murābahah)

This is sale at a stated profit in addition to the cost price. It is being referred to as sale with a mark-up. The original purpose of this sale appears to be the purchase of goods in a market on behalf of a principal, who has little skill or experience in trading. The difference is that the agent instead of charging a commission is selling at a profit. This type of arrangement provides an option to the the buyer to forgo the purchase, which is something that would not be possible when an agent is buying on commission.

Banks in Pakistan are using this form to finance projects. The bank pays for the machinery in cash and then sells with a mark-up to the client being financed. In this form it becomes a combination of murābahah and bay‘ al-nasī‘ah (the credit sale). This combination of the two transactions appears to be legal. The difference is that in this case the transaction is binding on a person applying for a loan.

Some banks, however, are also using this form to give cash loans. A cash loan is given to a client with a mark-up, as if the cash was bought from the market and then sold to the client. This is illegal and a gross violation of the rules of ribā and the contract of ṣarf.
18.3.8. Sale at cost price (tawliyah)

This is sale at the same price at which the goods were bought by the seller. The contract appears to be a form of a substitution contract where one party who has bought goods no longer needs them and is willing to assign the rights to a third party.

18.3.9. Sale at less than cost price (wadi’ah)

This form of contract appears to be useful for a seller who is getting rid of his inventories to improve his liquidity position. Perhaps, some stores announcing giant “sales” indulge in this type of sale for certain goods. It may serve as a sale gimmick to increase sales of other goods.

18.4. Loans and Exchange of Currencies (Ṣarf)

The word ṣarf literally means excess. It is for this reason that supererogatory worship (nafl) has been called ṣarf. Technically, it is the sale of a monetary value for another monetary value of the same genus or of another genus. The contract of ṣarf governs the following transactions:

1. The exchange of monetary values of the same genus or loan transactions. For example, giving dīnārs today to get dīnārs after a period, with or without excess. This is the same thing as giving a loan with or without interest.

2. The exchange of monetary values of different genera or exchange of currencies. For example, exchange of gold for silver or dīnārs for dirhams or dollars for rupees.

In the system prevailing during the time of the fuqahā’, there were four commodities that could be counter-values in a contract of ṣarf. Two were currencies and two were the ores or metals out of which these currencies were made. The four items were: dīnārs, dirhams, gold, and silver. A unique feature of this contract is that when a currency is exchanged for the metal that forms its substance both are treated as metals. Thus, if dīnārs are exchanged for gold, both would be treated as gold. If dīnārs are traded for...
dirhams this condition will not apply. The only condition would be that the counter-values be exchanged on the spot.

The main conditions of this contract are as follows:

1. The condition that is specific to the contract of šarf and distinguishes it from all the other contracts is that the counter-values must be delivered and taken possession of within the session of the contract. In other words, a condition for delay cannot be stipulated.

2. No option (khiyār) can be stipulated in this contract. The reason is that an option delays the transfer of ownership and this violates the first condition of spot delivery and possession.

3. Craftsmanship has no value in the contract of šarf. Thus, if a goblet of gold is exchanged for dīnārs both will have to be weighed and the weight of the gold will have to be identical to the weight of the goblet, however, the same goblet of gold can be sold for dirhams without weighing, but they still have to be exchanged at once. Some jurists have tried to relax this condition for facilitating sales by jewelers.

4. Good quality and bad quality have no relevance for this contract. Thus, darkened silver has the same value in weight as polished silver. Gold dust has the same value as a Krugerand by weight.

5. The sale of copper coins (fulūs) for dīnārs or dirhams is permitted when the payment is made but the seller does not have the copper coins in his possession, that is, he delays the delivery of copper coins. The reason for the permissibility of this sale is that this transaction is not considered as šarf, and copper coins are assigned the ḥukm of copper metal, which is not deemed to have currency-value like gold and silver, and even the methods of weighing them are different.

If we apply the provisions of this contract to a transaction for a loan with interest, or even to the deposit of money for return with interest, we find that these transactions are prohibited. If A (assuming its a bank) gives 100 dīnārs to B (the customer) on the condition that B return 100 + 10 dīnārs after one year, the transaction grossly violates the provisions of šarf. First, there is a delay of one year in the delivery of the counter-value by B. This is not permitted; the counter-values must be exchanged at once. Second, the two counter-values must be of the same weight. In this case, as dīnārs are of standard weight, the count must be the same on both sides.
What if A asks B to return 100 dinārs after a year and not 100 + 10. The provisions of the contract of ṣarf will not allow this. The counter-values have to be exchanged at once. This shows that there is no way that a loan transaction, with or without interest, can be undertaken by the two parties. In Islamic law, the giving of a qard (loan) is an act of charity and is not considered a commercial transaction; it has its own conditions. See the section on personal law.

18.5. The Prohibition of Ribā and Commercial Transactions

The prohibition of ribā is a general principle that governs the entire law of contract. It is a principle that is based on the text of the Qur’ān. The principle may be stated thus: all commercial transactions are permitted, except those bearing ribā.\(^3\) Each commercial transaction, all forms of business organization, and every financial instrument, therefore, must be free of ribā in order to be valid.

Ribā is of two types: ribā al-nasī’ah and ribā al-fadl. The literal meaning of ribā is excess and nasī’ah means delay, that is, delaying the delivery of a commodity in a contract. The term ribā al-nasī’ah, therefore, means the benefit or excess that arises from the delay of a commodity or a counter-value. It is what in terms of modern finance is called the time value of money, when it is money that is being delayed. Ribā al-fadl, on the other hand, is an excess that is measured in terms of weight, measure, or counting. It is the rent or excess that is paid for delaying the payment of money or the delivery of another commodity, when fungible commodities are being exchanged. In other words, it is what we call interest.

Thus, an ordinary loan transaction with interest involves both ribā al-nasī’ah and ribā al-fadl: ribā al-fadl is being paid for ribā al-nasī’ah in an ordinary loan transaction with interest. Ribā al-fadl, again, is what we call interest today (or the rate), while ribā al-nasī’ah is the benefit derived from the use of the funds or commodities borrowed during the stipulated period. Both are prohibited.

\(^3\) The words of the Qur’ān are: “That is because they said: exchange is like ribā and Allāh has permitted exchange and prohibited ribā.”
18.5.1. The four rules of ribā

An examination of the work of the earlier jurists reveals four basic rules or conditions for ribā. We may call them conditions, because all four must be met in a transaction before such a transaction can be called usurious.

1. **Rule 1: A usurious transaction involves the exchange of two counter-values.** Thus, in a loan there is an exchange of two counter-values and these are usually currencies or commodities having currency-value. If A gives 100 dollars to B, which B promptly returns after a few days, the transaction would be affected by this rule as it is an exchange of two counter-values. A gift, on the other hand, is not covered by this rule nor is a bequest.

2. **Rule 2: Ribā is found when ownership in the item exchanged is passed on to the other party.** If A gives his horse to B for use, and B returns the horse after a few days, the exchange is not affected by this rule (nor by the previous rule), because the ownership in the horse was not passed on to B. If A deposits 100 dinārs with B and B locks them up in a safe, returning the same dinārs to A on demand, the rule does not apply, because ownership in the dinārs still belongs to A. If, however, A gives 100 dinārs to B for his use and B uses them in his business or for his needs and then returns 100 dinārs to A, the transaction is hit by the rule, because ownership in the dinārs passed to B as soon as he used them.

This rule highlights the difference between rent and interest. When I rent my house, in which I invested a 100,000 dollars, to a tenant, ownership in the house does not pass to the tenant; he only gets the right to use the house. If, on the other hand, I rent out a 100,000 dollars as an investment to someone and ask him to pay rent on these dollars, it amounts to interest or ribā as ownership in the dollars passed on to the other person as soon as he used them.

3. **Rule 3: Ribā is found when the items exchanged are the same or are species of the same genus.** The first part is easy to understand, that is, when the items are the same. Thus, ribā may be found in a transaction where gold is exchanged for gold (the same precious metal), or when silver is exchanged for silver, or when dollars are exchanged for dollars. If there is delay in delivery from one side, these transactions would become loan transactions, but if there is delay from both sides, they would be considered futures transactions.
As for the second part about the genus and specie, the jurists of the Ḥanafi school identify all fungibles through weight or measure, that is, if a thing is sold by weight or measure it is a fungible (including gold and silver). These jurists divide all fungibles into two types on the basis of estimation. Thus, things weighed are one genus and things measured another. Food items are considered measured items for this purpose, because they were measured for sale in the days when the law was laid down. If gold or dīnārs (made of gold) are exchanged for wheat there is no ṭibā in the transaction; they belong to different genera. If wheat is exchanged for barley, ṭibā is found in case the delivery of one of the items is delayed: they are species of the same genus. Likewise, in the exchange of gold and silver if the delivery of, say, silver was delayed. The point about delay is explained under the next rule. The Ḥanafi jurists further subdivide the genus of things weighed into two types on the basis of the types of weight used. For precious metals there is a different set of weights as compared to base metals.

We, therefore, have three genera: two for things weighed and one for things measured. To clarify the rule, we may add that when the genera are different the delivery of one of the exchanged items may be delayed as in a credit sale or as in an advance payment for wheat.

Two types of contracts developed out of this division of fungibles. Things weighed, like precious metals or fungibles having a currency-value, were to be governed by the contract of șarf. In the case of fungibles sold by measure or things having a food value, an exemption was made by traditions from the Prophet. Thus, wheat could be used as advance payment for barley or dates and the delivery of barley or dates could be delayed. This developed into the well known contract of salam (advance payment).

4. Rule 4: An excess must be found and passed on to the other party either in one of the exchanged items or in both (this excess could be ṭibā al-faḍl or ṭibā al-nāṣī‘ah or both in a single transaction). Ṭibā is expressed in terms of excess. This excess is of two types. The first type of excess is estimated through weight or measure. Thus, if 100 grams of gold are exchanged for 110 grams of gold, the excess is 10 grams. The second type of excess is estimated on the basis of delay in the delivery of an item. It is the potential benefit that can be derived through the delayed item during the period of delay. This is what is called the time value of money in modern finance.
As indicated earlier, in Islamic law the first type of excess is called *ribā al-faḍl* and the second type is called *ribā al-nasī‘ah*. *Ribā al-nasī‘ah* is, therefore, the time value of money, which may be said to be prohibited under Islamic law, except as a mere calculation based on the general level of profit.

18.6. **Transactions Prohibited (or Vitiated) for Various Reasons**

There are some commercial transactions that are prohibited by Islamic law for one reason or another. The reason sometimes pertains to the form in which the contract is concluded and sometimes to the subject-matter or the conditions attached with the subject-matter. The details are given below.

1. Sale by an insane person.
2. Sale by a minor. It has already been stated that the Ḥanafīs permit certain transactions to the *sabī mumayyiz* (discriminating minor), while some are subject to ratification by his guardian.
3. Sale to a blind man. The majority permit this when the goods have been described to him, but the Shāfi‘īs do not.
4. Sale under duress. This sale is suspended and is subject to ratification by the person coerced.
5. Sale by an unauthorized person (*fuḍūli*). It is suspended subject to ratification as explained already.
6. Sale by a person placed under interdiction due to *safāh*. This transaction is suspended and is subject to ratification by the guardian according to the Ḥanafīs and Mālikīs, and is not valid according to the Shāfi‘īs and Ḥanbalīs.
7. Sale by a person placed under interdiction due to insolvency. This transaction is suspended and is subject to ratification by the guardian according to the Ḥanafīs and Mālikīs, and is not valid according to the Shāfi‘īs and Ḥanbalīs.
8. Sale by a person placed under interdiction due to terminal illness (*marāḍ al-mawt*). The jurists permit his transactions upto a third of his estate, while the remaining is subject to ratification by the heirs.
18.7. The Contract of Hire (ijārah)

Ijārah (hire) means the sale of benefits or services. Technically, it means the acquisition of benefits or services with a counter-value as compensation. The contract is lāzim (binding) on both parties, however, it is terminable on the basis of a valid excuse. This is the view of the Ḥanafīs, while the majority maintain that it is not a terminable contract and can be rescinded like all other binding contracts.

The contract of hire is somewhat different from other commercial transactions described so far. The distinction is based on the following two points:

1. The services or benefits being sold do not exist at the time of contract. They are generated after the contract has been concluded. This is against the general principle of Islamic law that prohibits the sale of things not in existence. If strict analogy is constructed from this principle, the contract would not be permitted. The Ḥanafī jurists permit a breach of such analogy on the basis of istihāsan relying on the necessity of people for this contract. This is done for showing the analytical consistency in the law, because the contract is permitted anyway on the basis of a Qur’ānic text that talks about the hiring of Jacob’s services by his father-in-law as well as the payment of wages to foster mothers. The Sunnah says that the wages of the person hired are to be paid before his perspiration dries up.

2. The second distinction is that unlike most other commercial transactions this contract is for a fixed period and sometimes there is no limitation at all on the time. It is for this reason that the Ḥanafī jurists state that the contract is concluded for a series of fixed periods being renewed automatically for each period.

The only element of hire according to the Ḥanafīs is offer and acceptance and this is possible with the use of words like hire, renting, letting out, wages and so on.

18.7.1. The conditions of ijārah

The conditions of this contract are as follows:

1. Consent of the parties. This condition is common with other contracts.
2. The subject-matter or consideration of the contract should be known and should not involve uncertainty that may lead to later dispute. Thus, the wages, the type of work and the period for which the contract is being made should not be uncertain.

3. The subject-matter of the contract should be something that can actually be delivered. Thus, the renting out of a lost camel is not permitted.

4. The subject-matter of the contract should be lawful. Thus, the hiring of premises for manufacturing wine is not permitted.

5. The performance of services hired should not be obligatory on the person anyway. Thus, a person cannot be hired for praying or performing ḥaḍr and so on.

6. The rent should not be paid in the same genus or species. Thus, a house cannot be rented in exchange for another house. The rent should be worked out in terms of money or other marketable vaule. In reality this condition is directed against transactions involving ribā. Thus, money cannot be rented in terms of money as this leads to loan transactions bearing interest.

18.7.2. Types of ijārah

It is primarily of two types: hiring of benefits (renting) and hiring of services. In addition to this, a distinction is made between an employee (ajīr khāṣṣ) and the independent contractor (ajīr mushtarak). The former works for a single employer while the latter works for wages on a job basis. Rules of liability have been framed for the latter in case of negligence.

18.8. General Offers (Jī‘ālah)

Jī‘ālah or ja‘l is the compensation given to a person on completion of work. Technically, it is a unilateral contract making an offer to anyone who will complete a designated work. In other words, it is a unilateral promise to pay anyone who will complete the work. As the promise is not directed toward a particular person, it is not a unilateral contract in the regular sense, but a general offer.
The Ḥanafīs are strict about permitting it insofar as there is uncertainty in it that may lead to dispute (gharar). Further, they resist it on the ground that no period is fixed for the performance of the task. They permit it for certain cases on the basis of istihlāṣ insofar as the period of performance is certain, like the return of a runaway slave within a period of three days. It appears that they would permit general offers if the period of performance and the compensation can be reduced to some kind of certainty.

The majority—Mālikīs, Ṣafī‘īs, Ḥanbalīs—permit it on the basis of the evidence in the Qurʾān where a camel load is promised for the performance of the task. They also rely on some cases from the Sunnah.

It is a unilateral contract that becomes binding by a general offer from one side and performance from the other; acceptance is not stipulated. Like a person saying that whoever brings back my lost camel will be paid so much. The person who brings it back is entitled to the promised amount. This, however, is a case of announcing a reward, but it can be extended to proper general offers.
Chapter 19

Security of Debts, Insolvency and Interdiction


The fuqahā’ use different terms while explaining the meaning of commercial transactions. One such term used is *dayn*. The term *dayn* is generally translated as debt, being something whose payment is delayed, and this is its literal meaning. Some modern writers think that it applies to a cash loan as well. In its literal meaning it can, but in its technical meaning it does not. The meaning of this term is understood in comparison with the term ‘*ayn*. ‘*Ayn* is any commodity that has been ascertained or determined at the time of the contract with respect to its quantity and valuation so that ownership in it can be passed on to the buyer. This process is carried out by weight or measure. Thus, if you are buying wheat, you will ask the seller to weigh the quantity you want, or to measure it if he is using a standard container for this purpose. Once the wheat you want has been weighed and is put aside for you, it is said to have been ascertained and is called an ‘*ayn*. Ownership in it will pass to you as soon as you make the payment. This process is known as *ta’yīn* in the terminology of the jurists.

There may be things that are subjected to counting instead of *ta’yīn* by weight or measure, like eggs or water-melons, but these may be subjected to weight or measure if you or the seller so choose.
things that are subjected to the process of \( \text{\textasciitilde t} \)\( \text{\textasciitilde y} \text{\textacutesc} \)\( \text{\textasciitilde n} \) are designated by the term ‘\( \text{\textasciitilde a} \text{\textasciitilde n} \)’, that is, ascertained or determined. The process of \( \text{\textasciitilde t} \)\( \text{\textasciitilde y} \text{\textacutesc} \)\( \text{\textasciitilde n} \) is applied to gold and silver too, because these need to be weighed before they are sold, even if the scale used for weighing is different as compared to other commodities that are weighed.

When gold is converted into standardized \( \text{\textasciitilde d} \text{\textasciitilde n} \text{\textacutesc} \text{\textasciitilde n} \text{\textasciitilde r} \text{\textasciitilde a} \text{\textasciitilde s} \) or silver is converted into standardized \( \text{\textasciitilde d} \text{\textasciitilde i} \text{\textasciitilde r} \text{\textasciitilde h} \text{\textasciitilde m} \text{\textasciitilde s} \), the process of \( \text{\textasciitilde t} \)\( \text{\textasciitilde y} \text{\textacutesc} \)\( \text{\textasciitilde n} \) is no longer applicable, because these have been pre-ascertained, so to say, at the mint. \( \text{\textasciitilde d} \text{\textasciitilde n} \text{\textacutesc} \text{\textasciitilde n} \text{\textasciitilde r} \text{\textasciitilde a} \text{\textasciitilde s} \) and \( \text{\textasciitilde d} \text{\textasciitilde i} \text{\textasciitilde r} \text{\textasciitilde h} \text{\textasciitilde m} \text{\textasciitilde s} \) are referred to as \( \text{\textasciitilde d} \text{\textasciitilde a} \text{\textasciitilde y} \text{\textasciitilde n} \text{\textasciitilde m} \text{\textasciitilde s} \), that is, something that is not subjected to the process of \( \text{\textasciitilde t} \)\( \text{\textasciitilde y} \text{\textacutesc} \)\( \text{\textasciitilde n} \) through weight or measure at the time of the contract. Thus, when you pay for the wheat that you bought with \( \text{\textasciitilde d} \text{\textasciitilde i} \text{\textasciitilde r} \text{\textasciitilde h} \text{\textasciitilde m} \text{\textasciitilde s} \), the seller will not ask you to weigh them, but he will count them and put them into his pocket after counting. If it is a credit sale, the currency will just be mentioned and it will become a liability attached to the \( \text{\textasciitilde d} \text{\textasciitilde h} \text{\textasciitilde i} \text{\textasciitilde m} \text{\textasciitilde m} \text{\textasciitilde h} \text{\textasciitilde a} \text{\textasciitilde m} \) of the party as a liability, a \( \text{\textasciitilde d} \text{\textasciitilde a} \text{\textasciitilde y} \text{\textasciitilde n} \).

If \( \text{\textasciitilde d} \text{\textasciitilde n} \text{\textacutesc} \text{\textasciitilde n} \text{\textasciitilde r} \text{\textasciitilde a} \text{\textasciitilde s} \) and \( \text{\textasciitilde d} \text{\textasciitilde i} \text{\textasciitilde r} \text{\textasciitilde h} \text{\textasciitilde m} \text{\textasciitilde s} \) are considered \( \text{\textasciitilde d} \text{\textasciitilde a} \text{\textasciitilde y} \text{\textasciitilde n} \), then, what is a price? The word used for price is \( \text{\textasciitilde t} \text{\textasciitilde h} \text{\textasciitilde a} \text{\textasciitilde m} \text{\textasciitilde a} \text{\textasciitilde n} \). According to al-Sarakhsi, “\( \text{\textasciitilde T} \text{\textasciitilde h} \text{\textasciitilde a} \text{\textasciitilde m} \text{\textasciitilde a} \text{\textasciitilde n} \text{\textasciitilde a} \text{\textasciitilde n} \text{\textasciitilde t} \text{\textasciitilde r} \text{\textasciitilde n} \) is anything that is established as a \( \text{\textasciitilde d} \text{\textasciitilde a} \text{\textasciitilde y} \text{\textasciitilde n} \) associated with the \( \text{\textasciitilde d} \text{\textasciitilde h} \text{\textasciitilde i} \text{\textasciitilde m} \text{\textasciitilde m} \text{\textasciitilde h} \text{\textasciitilde a} \text{\textasciitilde m} \).” Now currencies, that is, \( \text{\textasciitilde d} \text{\textasciitilde n} \text{\textacutesc} \text{\textasciitilde n} \text{\textasciitilde r} \text{\textasciitilde a} \text{\textasciitilde s} \) and \( \text{\textasciitilde d} \text{\textasciitilde i} \text{\textasciitilde r} \text{\textasciitilde h} \text{\textasciitilde m} \text{\textasciitilde s} \), are always established as a \( \text{\textasciitilde d} \text{\textasciitilde a} \text{\textasciitilde y} \text{\textasciitilde n} \) associated with the \( \text{\textasciitilde d} \text{\textasciitilde h} \text{\textasciitilde i} \text{\textasciitilde m} \text{\textasciitilde m} \text{\textasciitilde h} \text{\textasciitilde a} \text{\textasciitilde m} \) as a liability. In a system involving barter, other commodities can also become a \( \text{\textasciitilde d} \text{\textasciitilde a} \text{\textasciitilde y} \text{\textasciitilde n} \). The word price (\( \text{\textasciitilde t} \text{\textasciitilde h} \text{\textasciitilde a} \text{\textasciitilde m} \text{\textasciitilde a} \text{\textasciitilde n} \text{\textasciitilde a} \text{\textasciitilde n} \text{\textasciitilde t} \)) includes both. In the case where purchase is made with another commodity, this commodity will be described by weight or measure and quality. The description ensures that a substitute will be provided later. Such commodities are termed as \( \text{\textasciitilde m} \text{\textasciitilde i} \text{\textasciitilde t} \text{\textasciitilde h} \text{\textasciitilde l} \text{\textasciitilde i} \text{\textasciitilde s} \), that is, those having similars.

What is significant here is that whether the price is to be paid in currency or in a commodity, the word \( \text{\textasciitilde d} \text{\textasciitilde a} \text{\textasciitilde y} \text{\textasciitilde n} \) in commercial transactions arises out of a credit sale or even in \( \text{\textasciitilde s} \text{\textasciitilde a} \text{\textasciitilde l} \text{\textasciitilde a} \text{\textasciitilde m} \text{\textasciitilde r} \text{\textasciitilde a} \text{\textasciitilde m} \)\. It does not apply to a cash loan. Why is this so?

This brings us to two further terms \( \text{\textasciitilde q} \text{\textasciitilde a} \text{\textasciitilde r} \text{\textasciitilde d} \) and \( \text{\textasciitilde i} \text{\textasciitilde s} \text{\textasciitilde t} \text{\textasciitilde i} \text{\textasciitilde q} \text{\textasciitilde r} \text{\textasciitilde d} \text{\textasciitilde \textasciitilde d} \text{\textasciitilde a} \text{\textasciitilde n} \). The first means a cash loan, while the second means raising of a cash loan. Cash loans in Islamic law are of two types: 1) a loan taken for business or other purposes and 2) a loan raised for consumption purposes called \( \text{\textasciitilde q} \text{\textasciitilde a} \text{\textasciitilde r} \text{\textasciitilde d} \text{\textasciitilde \textasciitilde h} \text{\textasciitilde a} \text{\textasciitilde n} \text{\textasciitilde a} \text{\textasciitilde s} \). The first type is a business transaction, while the second type belongs to the category of charity; it is not a business transaction. The loan that is for charity is permitted, in fact it is recommended, while the first type for business purposes is void. The permitted type does not accept agency as it is akin to begging for charity and one cannot appoint an agent for begging. Some details have been provided later about the \( \text{\textasciitilde q} \text{\textasciitilde a} \text{\textasciitilde r} \text{\textasciitilde d} \text{\textasciitilde \textasciitilde h} \text{\textasciitilde a} \text{\textasciitilde n} \text{\textasciitilde a} \text{\textasciitilde s} \), but here we are concerned with the illegality of the business cash loan. The reason why it is not permitted is that it...
violates the rules of riba and those of sarf. A condition for the contract of sarf is that a debt (dayn) cannot be created through it. This point has caused considerable confusion even in earlier writings. Al-Sarakhsi, the great Hanafi jurist, clarifies this confusion in the following words, while talking of raising loans for a business (istiqrâd).

(Suppose) he orders him to raise debts through istidânah against the wealth (of the mudâraba) or against the credit of the rabb al-mâl, and he does so purchasing a slave girl for the mudâraba. Thereafter, he raises a loan (qard) of a thousand dirhams against the mudâraba and purchases another slave girl with it. This second purchase is deemed to be for his personal account, and he is personally liable for the qard. Among the jurists are those who say that istidânah pertains to purchase on credit, and raising of loans (qard) is something different. It (raising of cash loans), therefore, is not included in an unqualified authority of istidânah. The correct view is to say that granting the authority to raise loans is bâtil (void).

Do you not see that if he had ordered a person to raise a loan of one thousand for him from a certain person, and the person did so the one thousand would be for the person raising the loan and not for the one who ordered him. The reason is that qard is compensated with a similar (mithl) fungible and is a liability of the borrower. If the counter-value is his liability, the borrower becomes the owner of the qard, and he is in no need of the command of another for doing this. Giving an order for raising a loan is identical to giving an order for begging, which is bâtil. Whatever is obtained through begging belongs to the beggar and not to another. Once this is established, we may say that whatever the mudârib raises as a loan goes into his personal ownership.”

This shows that if a person raises a loan for his business, he may do so if he is a sole proprietor not when he is a partner. In a partnership, he is the agent of other partners and he cannot beg for them. Any loans that he raises will be for his own personal business not that of a partnership. On the other hand, can a limited company, which is a person in the eyes of law, raise a loan. On reflection, one would say that it can, but the income from that loan cannot be passed on to the shareholders as dividend. Some people who have not reflected on these issues think that the banking business can be run on loans given

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by the depositors to the banks. The question is, is the bank in the charity business? There are many other
complications involved, but they cannot be discussed here.

It is because of these problems, that the Ḥanafī jurists had to invent the contract called bay‘ al-wafā‘. The
reason is that a cash loan for business may not be raised through a pledge or mortagage (rahn). This
is explained below.

19.2. Assignment and Negotiation

In modern law there is a distinction between the assignment of rights under a contract and negotiation.
Under assignment the rights belonging to one party may be assigned to another person, but a better title
cannot be established for the assignee. In negotiation, a better title may be established for the assignee
and such a person is usually referred to as a holder in due course. This term is used in the law of negotiable
instruments and sometimes in company law.

In Islamic law, the distinction based on a better title may be found, but the general term used for both
assignment and negotiation is ḥawālah. Another term used is muqāṣṣah, which in reality is debt-swapping,
that is, the exchange of two equivalent debts. These are discussed below.

19.3. Ḥawālah and Muqāṣṣah (Assignment, Transfer of Debt)

The word ḥawālah means transfer, assignment. It moved from Islamic law to French law where it was
called aval, which means a negotiable instrument. Technically, it means the transfer of the liability of
performance of contract to another person, or the transfer of liability from one dhimmah to another
dhimmah. The transaction is permitted on the basis of Sunnah as well as ijmā‘ along with the limitations
of the exchange of a debt for a debt.

As indicated earlier, a debt under Islamic law cannot arise from a business cash loan, because it is
only the charitable loan that is permitted; it can only arise from a commercial transaction of some other
type, like a credit sale or salam. It cannot arise from a ṣurf transaction either. Once a debt has arisen
from permissible transactions, it can be transferred to another person. Thus, ḥawālah can be based on
what is called a trade acceptance in modern law. A trade acceptance is a bill of exchange/draft drawn by
the seller of goods on the purchaser and accepted by the purchaser’s written promise on the draft. Once accepted, the purchaser becomes primarily liable to pay the draft.

19.3.1. *Hawālah* and negotiable instrument

The above explanation shows that there is a fundamental difference between the Islamic *hawālah* and the modern negotiable instrument. The modern negotiable instrument can be issued in return for a new cash loan, while the *hawālah* must be issued for a pre-existing claim based on a trade transaction.

19.3.2. *Muqāssah* (Claim-swapping)

The word *muqāssah* is the exchange of a debt for a debt when both debts have arisen from separate trade transactions. Thus, if A sells cotton to B for Rs. 3000 on credit and in a separate transaction B sells wheat to A for Rs. 3000 on credit, they can agree to balance the two claims. In a way, the payment of cotton has not been made with money, but with wheat. This is permitted on the basis of a tradition from Ibn ‘Umar. Today, interest based debts are swapped on a daily basis by corporations in the attempt to improve their financial commitments and positions.

19.4. *Kafālah* (Surety)

The word *kafālah* means merging, joining. The word conforms with the word “surety” in the law. Technically, it means the merging of one *dhimmah* (liability) with another *dhimmah* when demanding the performance of an act. Thus, the liability of the debtor is merged with that of the surety (*kafīl*) when a demand is made for bail or a claim.

*Kafālah* is of two types: *kafālah bi-al-nafs* (bail) and *kafālah bi-al-māl* (surety). In the former, the *kafīl* undertakes to produce the body of the accused at a determined location and time failing which he forfeits a sum. Here we are concerned with the second type. The legal validity of *kafālah* is shown by the jurists on the basis of the Qur’ān, the *Sunnah* and *ijmā‘*.

The contract is concluded with offer and acceptance, that is, an offer by the surety and acceptance by the creditor. According to Abū Yūsuf, the single element is offer, which means that he considers it to be

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an undertaking. The provision of surety does not absolve the person for whom surety is given of liability for the debt. The creditor has an option to sue any of them or both. In other words, their liability becomes joint and several. The majority, however, maintain that the debtor may be absolved if this is stipulated in the undertaking. The Shafi‘is do not permit such a stipulation.

19.5. **Rahn (Pledge, Mortgage, Collateral)**

The word *rahn* means pledge, mortgage, collateral. Technically, it means the custody of something in place of a right from which the right can be secured. In other words, it means retaining a thing in place of a debt so that if the debt is not paid the thing may be sold to satisfy it. The legal validity of *rahn* is proved from the Qur‘an, the Sunnah and *ijma‘*. The words of the Exalted, “If ye be on a journey and cannot find a scribe, then a pledge in hand (shall suffice),” [Qur‘an 2 : 283] are the evidence for its legality.

It has four elements: the pledgor, the pledgee, the pledged property and the debt itself. It is concluded with offer and acceptance like all other contracts, but becomes binding only with the delivery of possession to the pledgee. It can be entered into at the time of a credit sale, after it and sometimes even before the existence of a claim, especially when it accompanies *kafālah*.

The general rule is that it is permitted to accept collateral in return for all those things that can serve as a price (*thaman*) in all kinds of sales, except (when the exchange would amount to) *ṣarf*. This is so, as a condition of *ṣarf* is (immediate) mutual possession. It is permitted to accept a pledge in the case of *salam*, charitable loan, claim after usurpation, compensation for destroyed property, damages in torts against property, and in (damages for) intentional injuries in which there is no retaliation (*qawad*), like the (injuries called) *mā‘mūmah* and *jā‘ifah*. Regarding intentional murder and bodily injuries it is possible after compounding with certain conditions. It is also permitted to accept a pledge in the case of manslaughter (*qatl al-khāṭa‘*) from a member of the the ‘āqilah after a year. It is permitted in ‘āriyah (commodate loan), for which there is liability for compensation, but is not valid in those with no liability. It is permitted in hire, and in *ju‘l* after the completion of work, but not before it. It is permitted in the case of *mahr* (dower).

The following are some of the important conditions:

1. It is valid for a claim that is established and has accrued. Thus, it is not valid in the case of a debt
that is yet to be created. Thus, it cannot be used for raising a cash loan.

2. It is possible to satisfy the claim from the pledged property. In other words, it should be of sufficient value to cover the debt and it should also be possible to sell the pledged property. The pledge should be marketable.

3. The pledged property should fall under the legal meaning of *māl*. This also means that benefits arising from a property cannot be pledged as these are not considered property by some jurists.

4. Possession of the pledge should be delivered to the pledgee to complete the contract.

It is evident from the above description and conditions that it is not possible in Islamic law to raise a commercial loan and by mortgaging property. It was for this reason that the later Ḥanafīs invented the contract called *bay‘ al-wafā‘*. As money loans, other than the *qard ḥasan*, could not be raised, the *bay‘ al-wafā‘* was invented.


*Bay‘ al-wafā‘* is a transaction in which a person in need of money sells a commodity to the lender on the condition that when he wishes the lender would return it to him upon the return of the price. The reason for its designation as *wafā‘* is obvious from the name, that is, a promise to abide by the condition of returning the subject-matter to the seller if he returns the price to him.

The majority of the jurists disapprove of this transaction, because they consider it a legal fiction for charging *ribā*; the buyer utilizes the sold commodity for the period during which it stays in his possession. This is *ribā* arising from the benefits of delay, that is, *ribā al-nasī‘ah*.

To the modern reader this transaction may appear perfectly legal. The transaction is the same as a person offering a collateral for securing a loan. As no excess is paid, no interest is involved. It has already been pointed out that it is not permitted to raise a loan through the contract of *rahn*. The reason is that Islamic law does not recognize the concept of a loan other than a *qard ḥasan*. The transaction of *rahn*, therefore, cannot be used for raising a loan against collateral. In Islamic law *rahn* is used for a pre-existing loan, that is, a loan arising from another transaction. Let us suppose that a person buys on credit. When the payment is due the buyer is unable to make the payment. In order to satisfy the seller/creditor he
offers a security in the shape of a camel, say, to be returned to him as soon as he makes the payment. A mortgage, on the other hand, is the offering of a security in return for a loan. This subtle difference must be understood to understand the view of those jurists who look down upon the transaction called *bay‘ al-wafā’*.

It may be mentioned here that the Ḥanafī jurists permitted this transaction in Būkhāra due to necessity. Modern planners who wish to use it within banks for financing corporations should study it carefully before doing so.

19.7. **Extinction of Rights (Ibrā’)**

*Ibrā’* means being absolved of some liability. It has already been discussed under the topic of discharge of contracts by agreement. Technically, it means the relinquishment by a person of a claim against another person. For example, a creditor foregoing a claim against a debtor. If the claim is not enforceable against another person, it is merely the extinction of a right and is called *isqa‘*.

According to the Ḥanafīs, the relinquishment of ownership of things is not valid and is not enforced. If a thing is usurped, the relinquishment will not do away with ownership, it will only have the effect of waiving the compensation. *Ibrā’* is valid in the case of debts. According to the Mālikīs, relinquishment amounts to a gift and therefore requires acceptance.

The effect of *ibrā’* is that a person is voluntary giving up a claim and is restricting his ownership or claim.

19.8. **Taflūs (Insolvency, Bankruptcy)**

The word *muflīs* is derived from the word *fals*, which means a copper coin. The *muflīs* is, therefore, a person whose financial net worth can be measured in copper coins. *Iflās* means insolvency. The term *iflās* is applied in two meanings. First, when the debts completely cover the assets of the debtor, and his wealth does not suffice to pay his debts. Second, when he does not have any known wealth at all. In both cases of *iflās*, the jurists have differed about the *aḥkām*.

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2 For details see *Ḥāshiyat Ibn ‘Abidīn*, vol. 5, 272 and *Rasā’il Ibn ‘Abidīn*, vol. 2, 120.
In the first case, when his insolvency is brought to the notice of the judge, the jurists differ as to whether the judge has the right to interdict him from disposing of his wealth, till he sells it for him and divides it among the creditors in proportion to their debts; or whether he is to imprison him, till he pays them proportionately. The majority maintain that the judge is to sell his property for him and from it (the sale proceeds) he is to satisfy his creditors or creditor, in case he is well off, or he issues the verdict of insolvency against him, if his wealth does not equal the debts, and interdicts him with respect to transactions in it.

In case of interdiction, there are two kinds of status for the insolvent (muflis): his status at the time of insolvency, before interdiction; and his status after interdiction. With respect to his status before interdiction, he is not permitted to do away with anything without (a corresponding) compensation, if it is not something that is binding upon him or is an act common in practice. The exemption in the case of things not binding upon him is made because he is to do that which is binding upon him by law, even if there is no compensation, like the maintenance of his needy parents and of his children. And the stipulation of not being customary was added as he is entitled to a reasonable consumption of his property without compensation, like sacrifice and expenditure on the ‘īd (celebration) and payment of small charity. Similarly, practice permits his expenditure in cases where there is (a kind of) compensation, like marriage and his expenditure on his wife. His sale and purchase are also permitted as long as it does not involve the making of favours. Those, among the majority, who upheld interdiction said that before the verdict of interdiction, he is just like ordinary people. The majority upheld this opinion as in principle all acts are valid till the imposition of interdiction.

The jurists disagreed under this topic as to whether the debts of the insolvent with different (repayment) periods become immediate? Mālik maintained that insolvency, in this case, resembles death (and, therefore, such debts become immediate), while the others held a contrary opinion.

The property of the insolvent to which the creditors have recourse depends on the species and quantity. If the corpus of the thing itself, because of which the creditor has a claim against the insolvent, has expired, the debt exists as a liability of the insolvent. If, however, the thing exists and has not expired, but the creditor did not take possession of the price (thaman), the jurists differ. The first is that the owner of the goods has a prior right to it, unless he relinquishes it and participates in the liquidation. This was the opinion of al-Shāfi‘ī, Aḥmad, and Abū Thawr. The second opinion takes into account the value of
the goods as it was on the day of the verdict of insolvency. If it was less than the price, the owner is given a choice between taking them and participating with the creditors in liquidation. If it is more than or equal to the price, he takes the goods. This was Mālik’s opinion and that of his disciples. The third opinion considers the average of the value of the goods in both kinds of insolvency (before and after the verdict); if the value equals the price or is less than it, they are delivered to him, that is, the seller, but if it is more, he is paid the price and the remaining is to be included in the liquidation. This opinion was held by a group of traditionists. The fourth opinion is that he shares it along with the creditors under all circumstances. This was Abū Ḥanīfa’s opinion.

There are detailed rules and opinions about the distribution of the property of the insolvent, and it is not possible to record them here.

19.9. Interdiction (Hajr)

Hajr in its literal meaning signifies prevention and restriction. Technically, it is the prevention of a person from exercising the right of disposal in his own property. The term used for this in the law is interdiction.

The legal validity of interdiction is derived from the Qur’ān where it is stated that spendthrifts are not to be given their wealth unless they develop discretion. Further, the orphans have to be tested for mental maturity and discretion before their wealth can be handed over to them. The purpose of interdiction is the interest and welfare of the person on whom it is imposed and it his welfare that is the guiding principle before the judge.

19.9.1. Types of ḥajr

Interdiction is divided into three types on the basis of welfare:

1. Welfare of the person interdicted. The insane, the idiot or mentally retarded, the minor, the prodigal and the spendthrift are all placed under interdiction for their own welfare lest they waste their wealth and are reduced to poverty.

2. Welfare of the creditors. The insolvent (muflis) is placed under interdiction for the welfare of the creditors who may be unjustly deprived of their wealth if the law does not intervene.
3. **Welfare of the heirs.** The person who is terminally ill, that is, one suffering from *marad al-mawt*, is placed under interdiction for the welfare of the heirs so that he may not squander his wealth under undue influence or because of his disturbed mental state.

In the case of the minor and the spendthrift the interdiction is temporary and is removed as soon as majority and mental discretion are attained. The majority of the jurists maintain that interdiction is to be continued until mental maturity is affirmed. Abū Ḥānīfah maintained that interdiction is to continue up to the age of 25 if necessary and is to be removed after that as the personal rights of the individual, like freedom of action, are then to be preferred over proprietary rights.
Chapter 20

Acquisition of Property and Liens

20.1. Acquisition and Disposal of Property

Ownership of property is acquired in a number of ways. Most of these ways also provide the means of disposal of property, because one person disposing of property is usually transferring its ownership to someone else. The modes of acquisition, however, are greater in number and some of these are mentioned below:

1. **Acquisition of property not owned by any person.** The shari'ah acknowledges the right to ownership of things that are not owned by anyone. Ownership is such things is acquired by merely gathering them. Thus, gathering of firewood, or catching fish from a stream transfers them to the ownership of the person who has made the effort. This type of activity does not accept agency. Four ways are acknowledged for acquiring property in this way:

   (a) **Iḥyā’ al-mawāt.** Mawāt is the name of land that is not owned by anyone and is not being utilized by anyone in any way. It is land that lies outside the limits of cities. Whoever revives such land becomes its owner on the basis of a tradition: “If someone revives barren land he owns it.” According to Abū Ḥanīfah and Mālik, the permission of the ruler is necessary for doing so.
(b) *Iṣṭiyād*. The word *ṣayd* is used for hunting and trapping. It is permitted, except during *ḥajj* and ‘*umrah*.

(c) *Cutting grass or gathering firewood*. The condition is that these should not be owned by anyone.

(d) *Minerals, treasure troves and found property*. There are a number of opinions about minerals as well as found treasures. Minerals found in land not owned by anyone belong to the state. The Ḥanafīs say that minerals are owned by ownership of the land in which they are found. As for treasure troves a fifth is owed to the state according to some, while the Shāfīʿīs say that the entire treasure belongs to the finder. There is a distinction between treasures from the time before Islam and those left after Islam.

It is to be noted that most of these rules have changed in the present times, because the state as a legal person owns everything not owned by anyone. All minerals and forests belong to the state and even fishing is licensed. Thus, the land that is given to the Haris belongs to the state and cannot be revived by these persons on their own.

2. **Contracts and acts of transfer of ownership.** Property is acquired through sales, gifts, and bequests.

3. **Succession.** The mode of transfer under this is inheritance.

4. **Rights leading to ownership.** These are rights like pre-emption (*ṣuṭf*), claiming ownership as a third party (*istiḥqāq*), and compensation as damages (*damān*).

5. **Generation of wealth through labour and industry.** This is a universally approved method, but Islam places a restriction on it in the shape of *ribā* and some other provisions like hoarding.
20.2. **Modes of acquisition of property**

20.2.1. **Contracts and declarations**

Contracts as a mode of acquisition and transfer of property have already been discussed at some length. Gifts, bequests and charitable trusts (ownership of benefits) will be discussed in the third chapter of the next part dealing with the law of persons. Here we shall deal with those rights that may lead to ownership.

20.2.2. **Claim as a third party (Istiḥqāq) and restitution**

*Istiḥqāq* is a claim of ownership of the subject-matter of a contract by a third party. This is also called restitution of property. Thus, if a seller and buyer a entering into a contract of sale for a thing, a third person may move the court claiming ownership of the property being sold. If his claim is established, the ownership is restored to him. It is for this reason that *istiḥqāq* is defined as the extinction of existing ownership on proof of prior ownership.

There are detailed rules about the status of the contract through which the ownership was being transferred if a third party claim is established. In most cases, the contract is void, however, some complications arise where the possession has already been delivered to the buyer and he has consumed part of it. In such a case, compensation is usually the answer with the buyer being given a choice to retain the remaining part of the property.

*Istiḥqāq* should not be confused with third-party rights with respect to privity of contract in the law. In these contracts, the third party is a beneficiary.

20.2.3. **Preemption (Shuf‘ah)**

The word *shuf‘ah* means merging, adding, strengthening. Technically, it is the right to compell the buyer of immovable property to transfer the the ownership to the claimant on the terms and conditions on which he bought it. This right belongs to the co-owner as well as the neighbour according to the Ḥanafīs. The majority of the jurists maintain that the right belongs to the co-owner alone and not to the neighbour. The four Ṣūnmī schools maintain that such a right may be exercised in immovable property alone, but the Ẓāhirīs said that it operates in moveable property as well. The major purpose of acknowledging the right
of pre-emption is to prevent any harm that may be caused to the co-owner or neighbour by the entry of an outsider into the property. As many things are shared in common by co-owners as well as neighbours, like the right of way and water, they have been given the first right to buy the property if it is sold.

The right comes into operation only when the owner has sold the property, i.e., the basic contract has been concluded. The Ḥanafīs maintain that the sole ingredient of pre-emption is the right to acquire the property from either of the contracting parties when the cause and conditions of the right are complete. The cause is the connection of the ownership of the *shafī* with the property of the vendor. This may arise from being a co-owner or a next door neighbour. When there is more than one pre-emptor, the right is determined by the closeness of the connection between the properties. The right would be equal in the case of co-owners and in this case they are co-owners in the right as well. The condition is that the sold property be immoveable, whether it is the upper portion or the lower portion. The Ḥanafīs say that when the cause is established the right may be exercised even after a number of years and the act of acquisition will be a new contract.

The majority of the jurists agreed that the right of pre-emption exists in immoveable property like land, houses, orchards, wells and things attached to them (trees and structures on them). They differed about other things. The majority maintained that the right does not exist in moveables like animals, goods, and dresses. The law as applied in Pakistan (Punjab) has restricted the right to agricultural land alone.

The right is considered a weak right and must be claimed as soon as the pre-emptor has knowledge of it. This is called *talab al-muwāthabah*. The right is not lost if the pre-emptor has been induced in some way to not exercise his right or when he is prevented through misrepresentation.

Today, the right of pre-emption is exercised under the partnership act and even the company law for private companies, where one shareholder in a private company cannot sell his shares to an outsider and has to offer his holding to the existing shareholders first.

20.2.4. Revival of Barren Land (*Iḥyā’ al-Mawāt*)

The word *iḥyā’* means to give life to something, i.e., to make it respond to growth. The word *mawāt* means land that has no building on it nor water and that is owned by no one and no one benefits from it. Revival
means to bring about the cause that leads to the cultivation and fertility of barren land. Technically, it is
the revival of barren land by means of building, plantation, cultivation or other means. The source for its
legality are a number of traditions, the most well known of which is: “He who revives barren land comes
to own it.” Another tradition implies that whoever reaches a land first and revives it comes to own it.

Land that has been revived and then given up so that it reverts to its earlier state may be revived
by another according to the Ḥanafīs and Mālikīs, while the Shāfi‘īs and Ḥanbalīs retain the right of the
original reviver.

Today, none of these rules can be applied, because all land not owned by anyone is owned by the state,
a juristic person. The condition that the land should not be owned by anyone does not apply. The solution
is what the governments do today in terms of the distribution of land among landless Haris and tenants
in various provinces of Pakistan. (See also ḫīṭā‘ below).

20.2.5. Ḥimā and ḫīṭā‘ (Estates)

The word ḥimā means a thing within the custody and protection of someone. In pre-Islamic days, a
powerful person would go to an elevated area of land and shout at the top of his voice. The point upto
which his voice carried came into his protective custody and became out of bounds for others. Only his
animals could graze on this pasture land. The Prophet (p.b.u.h.) forbade this practice by saying: “There
is no ḥimā except for Allah and His Messenger.” This has been interpreted to mean that the ruler or the
state can set aside common grazing land for the interest of the community, and even for the pasturing
animals belonging to the treasury or used for jihād.

The word ḫīṭā‘ means granting land to some specific individual or individuals irrespective of whether
it was used for mining or for cultivation. The condition was that it should not include barren land revived
by someone else. The legality of these concessions is derived from precedents from the time of the Prophet
(p.b.u.h.) in the case of land at Ḥaḍar Mawt and other places. The concessions may have different objective
including ownership, extraction and use, and as rights and easements.
20.2.6. **Ma‘ādin (Minerals)**

The word *ma‘ādin* is used for minerals and other natural wealth found in the soil or under it. These are to be distinguished from *rikāz* and *kanz*, which is wealth buried under the land either by the owner or due to some natural calamity like earthquakes. These are treasure-troves. Minerals are part of the soil while these things are not. Land with minerals cannot be the object of *ihya‘ al-mawāt*, nor may it be given out as *iqṭa‘*. Land with minerals—like salt, iron, copper and oil—cannot belong to individuals and belongs to the Muslim nation as a whole. There are detailed rules for minerals, but in general ownership by the community here means that they belong to the person who found them with a fifth being paid into the treasury. Today, all minerals belong to the state and cannot be claimed by individuals.

20.2.7. **Found Property (*Luqṭa*)**

The word *luqṭa* means found property. The jurists have detailed rules for property found during *hajj* and in other cases. The act of finding property and taking into custody has three elements: *iltiqāt* (taking into custody), *multaqīt* (the finder), and *luqṭa* (found property). *Luqṭa*, in general terms is the property of any Muslim that is exposed to loss, whether it is in inhabited or in a waste area; inanimate objects and animals are the same for this purpose, by agreement (of the jurists), except camels.

The basis for found property is the tradition, which is agreed upon for authenticity, of Yazīd ibn Khālid al-Juhanī, who said, “A man came to the Messenger of Allāh (p.b.u.h.) and asked him about found property. He said, ‘Make known its tying ropes and strings and continue to do so for one year, either the owner comes or you may do what you like with it.’ Yazīd asked, ‘If it should be stray sheep O, Messenger of Allāh?’ He replied, ‘They are either for you or your brother or for the wolves.’ He said, ‘Stray camels?’ He replied, ‘What have you to do with them? They have their own water skins and their shoes! (Leave them alone) to go around drinking from pools and eating tree-leaves till their owner meets with them.” This tradition includes the identification of what is to be taken into custody and what is not, and the identification of the way of dealing with what is taken into custody for a year and after it, and how the claimant is to establish a right to it? Accordingly, the jurists agreed that camels are not to be taken into custody, and they agreed about sheep (*ghanām*) that they are taken into custody. They wavered about cows. The textual report from al-Shafī‘ī is that they are like camels, while that from Mālik is that they...
are like sheep, though there is disagreement (reported) from him.

The jurists disagreed whether taking into custody was to be preferred over relinquishment? Abū Ḥanīfah said that it is better to possess it, as it is obligatory on a Muslim to preserve the property of his brother Muslim. This was also the opinion of al-Shāfī‘ī. Mālik and a group of jurists maintained the abomination of taking into custody, which is attributed to Ibn ‘Umar and Ibn ‘Abbās and is also Aḥmad’s opinion. This is based on two factors. First, on the report that the Prophet (p.b.u.h.) said, “(Taking the) stray animals of a believer is (to lead to) burning in fire.” Second, the fear of failure to announce it and declare publicly that it is in his keeping, as well as the fear of transgression. Those who preferred taking into custody interpreted the tradition saying, “He meant the intention to benefit from it, and not for purposes of public notification.” A group of jurists said that, on the contrary, taking (such things) into custody is obligatory.

20.2.7.1. The Laqīṭ (Foundling)

The laqīṭ (foundling) is a minor child, who has not attained puberty. When the child is a discriminating minor (mumayyīz), there is vacillation about it in al-Shāfī‘ī’s school. The multaqīṭ in this case may be any free, reliable, and sane person, who is not a slave or a mukātab. A non-believer may only take charge of a non-believer to the exclusion of a Muslim, as he cannot be a guardian over him, but a Muslim can take charge of a non-believer. A foundling is to be retrieved from the custody of a fūsiq and a spendthrift. Wealth is not a required condition for taking custody, nor is the (proper) maintenance by the custodian binding on him, if he has spent there is no recourse for him. Some of the rules under this heading may be useful for foster children and those in orphanages.

20.2.8. Prizes or Prize Money (Sabq)

Prize money is an exception from the general rule of prohibition of gambling and games of chance. The jurists, however, are strict about the awarding of prizes. Most of them permit the awarding of prizes when these are to encourage training of human beings and animals for war.

It is to be questioned whether the awarding of cars, television sets, air-tickets and other rewards in return for deposits in banks, buying cigarette and other prizes are valid. §94-B of the Pakistan Penal
Code has something to say about this issue as well.

20.2.9. Property of the mafqūd (missing person)

The mafqūd is a person who has been missing for some time and it is not known whether he is dead or alive. The Ḥanafīs have a strict view about such a person and they do not allow his property to be inherited nor is his bequest given effect. They do not permit the annulment of his marriage and his wife cannot remarry till his death is confirmed. The Shāfīʿīs agree with them as far as the faskh of his marriage is concerned. Mālik and ʿĀdhān ibn Ḥanbal maintain that if a person has been missing for four or more years, the judge is to annul his marriage and permit his wife to remarry.

According to the Ḥanafīs, the judge is to appoint a trustee for his property who is to meet all the obligations of the person. He can sell the property if there is a danger of loss, but he cannot sell it otherwise even to meet ordinary obligations like maintenance. This can be done, however, with the permission of the judge.

20.3. Liens

20.3.1. Leaseholds (ijārah, Kirāʾ)

Leaseholds and renting of property are permitted by Islamic law. The usual contracts for agricultural land are those of muzāraʾah and musāqāh. (See section 21.6). The details of this type of contract have already been discussed under the contract of hire (ijārah). (See section 18.7)

20.3.2. Wadīʿah (deposit, bailment)

Wadīʿah means something that has been left with another person for safe-custody. Technically, the term is used for the act of deposit as well as the thing deposited. The Ḥanafīs define it to mean “the authority given to another over the preservation of property whether expressly or by implication.” The contract of wadīʿah is considered a contract of āmānah (trust), which means that in general it is not subject to liability. Liability arises when the custodian is guilty of negligence or tort. The stipulation of ʿdamān
(compensation in case of loss) in the contract of deposit is void according to the jurists. The deposited property is returnable on demand.

The person responsible for safe-custody becomes liable for compensation if he is negligent in its safe-keeping, he gives it to someone else who is not legally eligible, he travels with it without authority, or mixes up the deposit with other things. If he uses the deposit for his own business, he becomes liable immediately for its return, and any profit or loss occurring belongs to him, ie, the custodian or bailee.

20.3.3. Rights in the property of others: easements and servitudes (irtifāq)

The word irtifāq means easement. In its literal sense it means deriving benefit from something. In the technical sense it means deficient (nāqis) ownership as compared to milk raqabah, which is ownership of a thing and milk manfa‘ah, which ownership of benefits or the usufruct. It is confined to immovable property owned by someone else. This right is not considered property (māl) according to the Ḥanafis. This means that it cannot be sold independent of the property from which it arises, nor can it be gifted away or be considered part of a woman’s dower.

The right is to be enjoyed with two conditions:

1. It is to be enjoyed without causing injury to another acting on the principle lā ḍarar wa lā ḍirār (no injury is to be caused and none is to be borne).

2. The right to public property, like rivers, streams, roads, bridges, is established without permission, but the right arising from private property must used with the permission of the owner of private property.

Some of these rights are: haqq al-shirb (right to water for pasturing and irrigation—there are numerous details for this); haqq al-majrā (the right of way for bringing water, that is, the right to dig a canal); haqq al-marūr (right of way for humans and animals); the right of owners of lower and upper storeys in houses; and haqq al-jiwār (rights of neighbours). Some jurists would include preemption (shuf‘ah) within the last right.
20.4. **Partitioning of Property (Qismah)**

The source for this law are the words of the Exalted, “And when kinsfolk and orphans and the needy are present at the division (of the heritage) bestow on them therefrom and speak kindly unto them,” [Qur’ān 4:8] and “Whether it be little or much—a legal share.” [Qur’ān 4:7] Its source are also the words of the Messenger of Allāh (p.b.u.h.), “Any house that was partitioned in the days of jāhilīyah is to be retained on that division and any house established after Islam that has not been partitioned will be partitioned according to Islam.”

Partitioning is of two types: division of inherited wealth; and the benefits of such wealth. The division of property that is neither weighed or measured is classified, on the whole, into three types: division through lots after valuation and equalization of (shares); division by consent after valuation and equalization; and division by consent without valuation and equalization. With respect to those that are measured and weighed, their division is by measure and weight. Property, on the other hand, is divisible into three types. First is that which is fixed and immovable, that is, houses and real estate. The second is moveable (property) and is divided into two kinds: that which is not measured or weighed, and consists of animals and some types of goods; and that which is measured and weighed.

The division of landed property is permissible through consent and (partition into) lots on the basis of value. The jurists are all in general agreement over this, though they differed about the subject-matter and the conditions. Partition can either be of one property alone or of many. There is no disagreement about its division, and when there is one property it can be partitioned into sections with similar attributes with no decrease in the utility of each section due to partition. The sharers are to be forced to accept this. When the property can be divided only into sections having no utility, the jurists differ.

If the properties are more than one, then, they can either be homogeneous or be different. When they are homogeneous, the jurists differ about them. Mālik said that if they are homogeneous, they are to be divided by valuation, equalization, and by drawing lots. Abū Ḥanīfa and al-Shāfīʿī said that each property is to be partitioned separately. The reliance of Mālik is on the belief that it involves the least amount of harm for the co-owners in the partition. The reliance of the other jurists is on the fact that each property is to be identified separately as it may later involve shufʿah (preemption).

The method of partition by lots is that the inheritance be divided, verified, and adjusted to whole
numbers if there is a fraction in the shares, so that the shares are reduced to wholes, then, each location and each kind of plantation should be valued, and thereafter adjusted on the basis of the smallest share with respect to value. It is possible that a section in one location is equal to three in another on the basis of the value of the land and the location. Once they are divided and adjusted in this way, the names of the co-owners be written on slips along with the different sections. The person whose name comes out matching a section takes it. It is suggested that names be dropped into the various sides, and the person whose name is found in a section takes it. If his share exceeds this, it is done again for him till his entitlement is completed.

This is the position on drawing lots in inherited property. The jurists introduced the drawing of lots in partition for the satisfaction of the persons participating in the partition, and it is present in the shar‘ in different contexts. Among them are the words of the Exalted, “And then [he] drew lots and was of those rejected,” [Qur‘ān 37:141] and “Thou wast not present with them when they threw their pens (to know) which of them should be the guardian of Mary.” [Qur‘ān 3:44]. Related to this is also the established tradition in which it is reported “that a man, close to his death, freed six un-named slaves and the Messenger of Allāh (p.b.u.h.), drew lots among them, thus freeing a third of the slaves.”

Division through agreement, irrespective of whether it is after valuation and adjustment or without it, is permitted in similar and differing properties as it is a kind of sale, but whatever is prohibited in sale is prohibited here.

The jurists agreed about animals and goods that division is allowed in none of them due to the fasād (corruption) involved. They differed, however, when the co-owners covet one particular thing and are not willing to utilize it jointly, with one of them proposing to sell it out. Mālik and his disciples said that he is to be compelled to agree. If one of them wishes to acquire it on the basis of the value assigned to it he may do so. The Zāhirites said that he is not to be compelled, as the principles require that none is to be dispossessed of his property except on the basis of an evidence from the Qur‘ān, sunnah, or ijmā‘. Mālik’s argument is that with no compulsion the other party may be harmed.
Chapter 21

Enterprise Organization

Enterprise organization in Islam is based on sharikāt (partnerships). Corporations are not discussed in Islamic law and their legality has to be judged in the light of general principles.

21.1. Definition of Partnership

The word for partnership in Islamic law is sharikah. Some jurists prefer to use the word shirkah, because of which the word in Urdu is shirkat. In the literal sense, the word sharikah is used in two meanings: mixing or ikhtilāt and the contract of partnership. The technical meaning assigned to the word by the jurists does not go beyond these meanings, because partnership arises either through a contract or through the mixing of wealth.

21.2. Types of Partnerships

The jurists divide partnerships in a general way into: sharikat al-ibāḥah (or common sharing of things); sharikat al-milk (co-ownership); and sharikat al-‘aqd (partnership through contract).

Sharikat al-ibāḥah is defined as the “common right of the people in ownership by acquisition or gather-
ing of things that are *mubah* (permissible for such acquisition) and are not originally owned by anyone.”

Co-ownership or *sharikat al-milk* is defined by Ibn ‘Abidîn as the joint ownership of a number of persons in an *‘ayn* (ascertained thing) or in a *dayn* (debt). *Sharikat al-‘aqd* or partnership through contract is the same thing as “partnership” in law. It is defined as:

A contract between two or more people for participation in capital and its profits, or participation in transactions in someone else’s capital and its profits, or participation in profit without participation in capital or transactions.

This definition is designed to indicate all types of partnerships in Islamic law, but it is not true for all the four schools. It applies to the views of the Ḥanafî school alone, and with slight modification to the Ḥanbalî school as well.

21.2.1. Types of partnership according to the majority

The contract partnership, according to the majority, is divided into five types:

1. *sharikat al-‘inân*;
2. *sharikat al-mufâwaḍah*;
3. *sharikat al-abdân* (or *a‘mâl*);
4. *sharikat al-wujûh*; and
5. *muḍârabah*.

This classification is not very useful for analyzing partnership contracts as it ignores the underlying legal relationships. It is, however, used by many modern scholars.

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1 *Majallah*, §1045.
21.2.2. Types of partnership according to the Ḥanafīs

Contract of partnership is classified by the Ḥanafīs into two broad types depending on whether there is work from both sides or from one side alone. The first category, in which there is work from both sides, is divided on the basis of the nature of the governing contracts into two types: ‘inān or mufāwādah. Insofar as the ‘inān contract may incorporate the contract of agency alone or agency plus surety, ‘inān is divided into two further types. The second category, in which there is work from one side alone, has three types: muḍārabah, muzāra‘ah and musāqāh. In all, we have the following classification for contract partnership in Islamic law:

A. The First Category of Partnerships (Work From Both Sides)

(a) ‘Inān Ordinary based on wakālah alone
   a. With wealth as its subject-matter
   b. With work as its subject-matter
   c. With credit-worthiness as its subject-matter

(b) ‘Inān with the contract of wakālah as well as kafālah
   a. With wealth as its subject-matter
   b. With work as its subject-matter
   c. With credit-worthiness as its subject-matter

(c) Mufāwādah based on wakālah and kafālah
   a. With wealth as its subject-matter
   b. With work as its subject-matter
   c. With credit-worthiness as its subject-matter

B. The Second Category of Partnerships (Work From One Side)

(a) Muḍārabah
(b) Muzāra‘ah
(c) Musāqāh
The second type of ‘inān mentioned above, that is, ‘inān with kafālah has not been discussed in great detail by the Ḥanāfī jurists, but they declare it valid. It is also to be noted that the term mufāwaḍah used by the three schools that permit it—that is, the Ḥanāfīs, the Mālikīs and the Ḥanbalīs—is applied to three different forms of partnership. We shall use the term in the sense it is used by the Ḥanāfīs.

21.3. The ‘Inān Partnership

The word ‘inān is used for reins of a riding animal. This portrays the rider holding on to the reins with one hand, while doing something with the other. The ‘inān partnership is defined as “a contract, based either on wakālah or on wakālah as well as kafālah, that permits participation from both sides with wealth, work, or credit-worthiness and the sharing of profits, all in an agreed upon ratio.” When the parties conclude a partnership without mentioning which type of partnership it will be, the partnership formed will be ‘inān.

The contract of partnership can be restricted to a period of time according to the Ḥanāfīs, because it is based on wakālah, and wakālah accepts tawqīt. The ‘inān partnership is also formed by default, so to say, by the conversion of mufāwaḍah. This takes place when some of the conditions of mufāwaḍah are found lacking. The minimum that an ‘inān contract implies are the following three things:

1. Each partner in a sharikat al-‘inān is the agent of the other partner.

2. A partner in a simple ‘inān contract is not a kafīl (surety) for the other partner. If this is needed it has to be mentioned specifically.

3. The undivided share of a partner (mushā‘) is like a wadī‘ah in the possession of the other partner and is governed by the rules of amānah (trust). Thus, the partners are co-owners of the property of the partnership.

21.4. The Mufāwaḍah Partnership

Al-Sarakhsī gives three meanings from which the term mufāwaḍah could possibly have been derived. The first is the term tafwīḍ, which means delegation. As each partner, in this partnership, makes a complete
delegation of all acts to his partner in the entire stock of marketable goods, the meaning of *tafwiḍ* is realized. The second meaning is in the term *intishār* in the sense of spreading, which is similar to *fawāḍ*. As the contract spreads to all transactions, this meaning too is realized in *mufāwaḍah*. The third meaning is that of equality. As this contract is based upon equality of wealth and profit, the meaning of *masāwāh* is realized as well.

The technical meaning of *mufāwaḍah* based upon *māl* (wealth) is as follows:

It is a contract of participation between two or more persons, with the stipulation of complete equality with respect to capital, profit and status, for working with their own wealth, or with their labour in another’s wealth, or on the basis of their credit-worthiness, so that each partner is a surety for the other.²

The absolute term *mufāwaḍah* requires the following as a minimum:

1. Equality in wealth (capital), profit, and work. This equality is also required in contractual capacity and religion.
2. Each partner operates according to his opinion. This implies that the *mufāwaḍah* is general for all types of trade.
3. The contract of *wakālah* between the partners.
4. The contract of *kafālah*.

The crucial point in understanding the nature and meaning of *mufāwaḍah* is that it may be general for all types of trade or it may be general for a specific type of trade. The contract that is general for all types of trade would require equality in all assets of the partners as well as participation in the work of the partnership to the exclusion of all types of personal business ventures. This, it is true, would be a highly cumbersome form of partnership to conclude as well as to maintain, because any inequality in the wealth of one would lead to the vitiation of the partnership or its conversion to the a general *‘inān*.

²See also §1331 of the *Majallah*. 
The second form of *mfawadah* that requires equality of capitals and other things in one particular trade would be a highly useful type of partnership. For example, there may be two persons, who are both traders in wheat and who wish to participate in a contract of *mfawadah* in a specific type of trade, that is, trading in wheat alone. All they have to do, to form this partnership, is to make their stocks of wheat equal by buying if one has less or selling if the other has more. When equality of stocks is achieved they form the partnership. They can easily maintain the partnership too by converting anything one of them receives (by gift or inheritance) in the form of wheat to another asset. The main purpose would be not to hold business stocks in wheat that do not belong to the partnership.

21.5. *Muḍarabah*

The term *muḍarabah* been derived from *darb fi al-ard*, which means journeying through the land seeking the bounty of Allah. As a result of his work and travel, the *muḍārib* becomes entitled to part of the profits of the venture. According to the terminology used by the jurists of Madinah, *muḍarabah* is also called *muqāradah* or *qirād*. Abraham L. Udovitch, trying to find an equivalent in Western law for *muḍarabah*, has used the word *commenda* to convey the meaning. In our view, this is not an appropriate term for *muḍarabah* insofar as it is used for exactly the opposite concept. In a *commenda*, it is usually the investor who has limited liability, and losses in excess of the investment are to be borne by the worker. In this meaning the term *commenda* may be considered the prototype for a limited liability partnership found in modern law—but not in the Pakistani law.

The *Majallat al-Aḥkām al-ʿAdlīyah* defines *muḍarabah* as follows: “*Muḍarabah* is a type of *sharikah* in which wealth is contributed from one side and labour from the other side.” To this we may add that liability for all lawful losses is placed on the investor, and the worker does not bear losses, but he does lose his labour.

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3 See generally Abraham L. Udovitch, *Partnership and Profit in Medieval Islam*, and especially the chapter on *Qirād*. 
21.5.1. The Conditions of *Muḍārabah*

1. The *rabb al-māl* must have the legal capacity for becoming a principal in a contract of agency, while the *muḍārib* must have the capacity for being an agent.

2. All such capital with which other partnerships are valid is acceptable for the *muḍārabah*. It is, however, preferred that the capital be offered in absolute currencies and not in *ʿurūḍ* (tangible property) or debts. The capital must be delivered to the *muḍārib*, who cannot commence his work prior to this.

3. The amount of capital should be known to the parties at the time of the contract. If the amount is uncertain or unknown, the *muḍārabah* is not valid.

4. The profit must be expressed as a ratio or as a part of the total profit. The profit cannot be expressed as a percentage of the capital invested. Any condition that leads to uncertainty in this or does not correspond with this will render the contract unenforceable.\(^4\)

5. The general rule in the sharing of profits is equality;\(^5\) thus, if the ratio of sharing is not mentioned the profit will be shared equally. A percentage expressed by one party is deemed sufficient.

6. The worker possesses the authority to buy and sell, because this is the means through which the *muḍārabah* achieves its primary purpose of earning a profit.

7. The *muḍārib* possesses the authority to appoint agents for the trade.

8. He can hire services and may also let them out on hire.

9. The *muḍārib* is authorized to travel with the wealth of the *muḍārabah*.

10. The right to deposit the goods as well as bailment also belongs to the *muḍārib*, because this too is the usual commercial practice.

11. The *muḍārib* has the right to give the goods of the *muḍārabah* to another by way of *bidāʾah*. In its literal meaning *bidāʾah* is the giving of one’s goods to another for trading when the person accepting them is not going to share the profits derived.

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\(^4\) Ibid. p. 3601.

\(^5\) Al-Kāšānī, *Badāʾi’ al-Sanāʾi’*, vol. 8, p. 3606.
12. The *muḍārib* has the right to assign claims and debts on the basis of ḥawālah as it is an essential part of trade.

13. The *muḍārib* has the right to pledge property in lieu of the debts of the *muḍārabah*. He may also accept such pledges or mortgages for the debts owed to the *muḍārabah*.

14. He does not have the authority to sell or purchase on credit beyond the limits imposed by the capital. In other words, he does not have wilāyat al-istidānah.

15. He does not have the right to make gifts and donations, unless he takes specific permission from the *rabb al-māl*. He does not even possess the right to give something away as a gift or charity as each is a donation.

16. Likewise, he cannot give a loan to another or assign claims to another where they are not offset by other claims, because each is a kind of charitable donation.

17. If authorised, the *muḍārib* may undertake conclude contracts of *muḍārabah*, sharikah and khalṭ. He also has the right to mingle the wealth of the *muḍārabah* with his own wealth when the *rabb al-māl* tells him to act on his considered opinion. He does not have the right to do any of the above things if he has not made this statement.

All partnerships are *jāʿiz* or terminable contracts. A partnership may, therefore, be terminated at the will of the parties. Partnerships for a fixed duration are also permitted and come to an end on completion of the purpose or period.

21.6. *Muzāra’ah* (Share-cropping)

Technically, it means a contract for cultivation of land in return for part of the produce in accordance with the conditions stipulated by law. The *Majallah*, in section 1413, defines it as follows: “*Muzāra’ah* is a type of partnership with land contributed by one party and work by another—that is, the land is cultivated and yield is shared by them.”

The Ḥanafi jurists disagreed about the contract of *muzāra’ah* with Abū Ḥanīfah maintaining that it is not legally justifiable. Abū Yūsuf and Muḥammad al-Shaybānī held that it is legally maintainable. The
fatwā, however, was given on the basis of the opinions of Abū Yūsuf and al-Shaybānī. The main reason advanced was necessity and the practice of the people.

Ibn Rushd says that the Mālikī opinion permits the renting of land for everything except food. For this opinion he relies upon the same tradition about mukhābarah that is relied upon by Abū Ḥanīfah. The tradition proscribes the renting of land with its yield. The Mālikī jurists go into the details of the different types of kirā’ (renting, leasing) of land. Most of these are partnerships in tools, implements and land. The muzāra‘ah proper that is permitted by the Ḥanafī school is not allowed by the Mālikīs.

The Shāfī‘īs maintain that mukhābarah is not permitted. This, in their view, is a contract in which the seed is provided by the worker. They maintain that all the four schools consider it void. In such an arrangement, the landowner would be participating on the basis of land alone, which is not a basis for entitlement to revenue or profit. The Shāfī‘īs permit muzāra‘ah only when it is subservient to musāqāh. In this case, there must be some fruit bearing trees on the land or the land should be between two groves that are part of the contract of musāqāh. They justify this on the basis of the arrangement with the people of Khaybar. The views of the Ḥanbalī school are similar to those of Abū Yūsuf and al-Shaybānī. They give identical arguments and even reproduce the arguments of necessity.

The conclusion we draw from this discussion is that muzāra‘ah proper is permitted by Abū Yūsuf and Muḥammad al-Shaybānī on the basis of necessity anchored in istihlās. The Ḥanbalī school follows these views without explaining the basis of their reliance. Abū Ḥanīfah, Mālik and al-Shāfī‘ī consider muzāra‘ah to be unlawful.

21.7. Musāqāh or Mu‘āmalah

Technically, “it is a contract of work for part of the produce along with the conditions of validity,” or “it is a contract (mu‘āmalah) for the caring of trees for part of their fruit.” The Majallah calls it “a type of sharikah so that the trees are contributed by one party and their care is undertaken by the other, with their fruit being divided between them.”

The Ḥanafīs disagreed about its validity on the same lines as in muzāra‘ah with the same evidences and arguments. Abū Ḥanīfah did not consider it valid, while his two disciples did. Likewise, the Ḥanbalīs permitted it in agreement with Abū Yūsuf and al-Shaybānī. As for the Shāfī‘īs, al-Ramlī says that “the
source for it is the *muʿāmalah* of the Messenger of Allah (p.b.u.h.) with the Jews of Khaybar with respect to their date palms and their land for what would be produced by them.” According to the Mālikīs, *musāqāh* is permitted as an exemption from the following rules:

1. *Ijārah* with unknown wages;
2. Renting of land with what it produces;
3. Sale of fruit prior to the process of ripening, in fact, prior to its existence; and
4. *Gharar*, because the worker does not know what the quantity will be.

Al-Khirashī says that the basis for this is the transaction by the Prophet (peace be upon him) with the Jews of Khaybar, and the cause is the need for it.

21.8. Corporations and Islamic Law

Corporations were not known to Islamic law; they were born in Italy in the 15th century. There are three primary issues that arise when companies limited by shares or corporations are accepted within the fold of Islamic law. These are as follows:

1. Whether the concept of a juristic person is acceptable to Islamic law? This topic was discussed earlier under the concept of legal capacity. Islamic law was aware of the concept of fictitious legal personality, but did not accept it as the performance of worship cannot be demanded of a fictitious person. Today, if this concept is to be accepted, the imposition of religious duties like payment of *zakāt* cannot be imposed on such institutions.

2. Even if the concept of juristic person is accepted, it does not mean that the financial structure upon which the corporations are erected is declared legal automatically. Thus, each and every type of security issued by the corporation will have to be analyzed for legality. For example, even the ordinary share issued by the company should not be accepted as legal without analysis.\(^6\)

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3. The most important question is that of limited liability. In the most common form of corporations
the liability of the members is limited to the extent of their shares. The solution to this issue depends
upon the type of securities designed by Muslim jurists for a corporation. If the capital needs of the
company are met through equity, then the importance of limited liability will be reduced if not
eliminated entirely.
Part V

The Islamic Law of Persons
Chapter 22

Marriage

The topic of marriage is taught as part of the personal law in universities in Pakistan. The usual material is, thus, available in many places. In this section, therefore, the views of the jurists have been presented on some of the important issues. A comprehensive treatment of the topic incorporating the Anglo-Muhammadan law prevalent in Pakistan would require a separate volume, and these are available. The purpose here is to mention opinions from other schools and jurists as well. In this section most of the opinions have been transmitted from Ibn Rushd.

22.1. The ḥukm of marriage

The majority of the jurists maintain that the ḥukm of marriage conveys recommendation. The Zāhirites said that marriage is obligatory. The later Mālikites held that for some it is obligatory, for others recommended, and for the rest it is permitted. This depends on the extent to which an individual fears falling into evil. The reason for their disagreement lies in whether the form of the command—in the verse: “[M]arry of the women who seem good to you,” \(^1\) and in the tradition, “Marry, for through you I wish to outnumber the nations,”—implies obligation, recommendation, or permissibility.

\(^1\) Qur’an 4 : 3
22.2. Looking at the Would be Spouse Before Proposal

Glancing at a woman prior to proposal was permitted by Mālik up to the face and hands only, while others permitted it for the whole body except the private parts. Some have prohibited this absolutely. Abū Ḥanīfah permitted glancing at the feet along with the face and the hands. The reason for their disagreement is that the command permits glancing at women in general terms and the proscription also prohibits it in general terms. The jurists, however, relied more on the verse of the Qur’ān that permits it in qualified terms, that is, glancing at the face and the hands: “[Women] are not to display their adornment save that which is apparent.” [Qur’ān 24:31] This verse, they say, permits glancing at the face and the hands.

22.3. The Formation of the Contract

The formation of the contract of marriage covers four things: the nature of the permission with which the contract is concluded; the person whose permission is acknowledged for the validity of this contract; whether the contract of marriage is permitted with an option; and whether the contract is binding with a delay from one of the parties, or is immediate acceptance a condition?

22.3.1. Consent in marriage (legal capacity)

Permission in marriage is of two types. It takes place for men and deflowered women by means of words and for consulted virgin women through their silence, that is, their consent; rejection, however, is by words. There is no dispute about this, as a whole, except what is narrated from the followers of al-Shāfi‘ī that the permission of the virgin is by words, when the person giving her away in marriage (her guardian) is other than the father or the grandfather. The majority inclined towards permission through silence because of what is established from the Prophet (p.b.u.h.) that “the deflowered woman has a greater right over herself than her guardian (wali‘), but the virgin is to be asked and her silence is her permission.”

The jurists agreed that in order to be valid, the marriage contract of a person whose permission is by words has to be concluded by the use of the word “nikāh” or “tazwīj.” They differed about its conclusion through the word “gift” or the word “sale” or “sacrifice.” Some jurists, like Mālik and Abū Ḥanīfah,
permitted this. Al-Shafīʿī said it cannot be concluded except by the word “nikāḥ” or “tazwīj.” A similar disagreement exists in other contracts as well.

22.3.2. Whose consent? Guardian’s?

A valid offer and acceptance in the contract of marriage is elaborated in the following categories of cases:

1. Cases in which the consent of the parties themselves, the groom and the bride, is to be taken into account:

   (a) either with the consent of the guardian, or

   (b) without his consent (according to the opinion of those who do not stipulate a guardian in the case of consent by a woman who possesses the right herself).

2. Cases in which the consent of the guardians alone is taken into account.

Under the first case (1(b)), the jurists agree that men who have attained puberty, are free, and are in charge of their own affairs (not interdicted) are to give independent consent. Some of them maintained that the executor (waṣī) would be consulted in the case of his bālīgh interdicted protegee. The reason for their disagreement in this case, according to Ibn Rushd, lies in whether marriage is one of the interests (maṣlahah) secured for such a person, or is not an interest but a means for pleasure. On the basis of the opinion that marriage is obligatory, he says, there should be no hesitation in this.

The jurists agreed that the divorced major woman is to consent herself, because of the saying of the Prophet (p.b.u.h.), “The deflowered woman expresses her own consent.” A contrary opinion is narrated from al-Ḥasan al-Baṣrī.

The rest of the women fall under case 1(a) or under case as follows. The first category is that of the bālīgh virgin and the minor divorced girl. About the bālīgh virgin, Mālik, al-Shafīʿī, and Ibn Abī Laylā said that the father can force her to marry. Abū Ḥanīfah, al-Thawrī, al-Awzaʻī, Abū Thawr, and a group of jurists said that it is necessary to take her consent into consideration. Thus, she cannot be married away if she is not willing. Mālik agreed with them about the virgin spinster in one of his opinions. The saying
of the Prophet in the well-known tradition of Ibn ʿAbbās, “The virgin is to be asked (for permission),” makes the seeking of permission from each virgin obligatory through its generality.

Mālik and Abū Ḥanīfah said about the minor divorced girl that the father can force her to marry, while al-Shāfīʿī said that he is not to force her.

The jurists disagreed about the underlying cause of forced consent whether it is virginity or minority (ṣīghar)? Those who said it is minority maintained that the bāligh virgin is not to be forced, while those who considered it to be virginity said that the bāligh virgin is forced, but not the deflowered minor girl.

About the marriage of the minor girl undertaken by someone other than the father, Al-Shāfīʿī said that only the paternal grandfather can give her away in marriage. Mālik said that no one can give her away in marriage except the father, or one to whom the father has delegated this task, unless she is likely to fall into corruption and loss. Abū Ḥanīfah said that the minor can be married away by anyone who enjoys guardianship over her, including the father, relatives, and others, but when she attains puberty she has the option (khiyār) of revocation. Those who restricted the right to the father said that what the father possesses by law is not proper for anyone else, either because the law has singled him out for this or because the sympathy and kindness exhibited by the father are not found to the same degree in anyone else.

The Ḥanafites argued for the permissibility of contracting the marriage of minors by persons other than the father on the basis of the words of the Exalted: “And if ye fear that ye will not deal fairly by the orphans, marry of the women, who seem good to you.” [Qurʾān 4:3]. They say that the word “orphan” (yatīm) is not applied to any one except the non-bāligh girl. Others have said that the name orphan is applied to the bāligh girl because of the evidence in the Prophet’s saying, “Seek permission from the orphan girl,” and the girl whose permission is sought is one who is capable of consent, and she is the bāligh girl.

22.3.3. Is Guardianship a Condition for the Validity of the Contract of Marriage?

The jurists disagreed whether guardianship is one of the conditions for the validity of marriage. The following opinions have been recorded by Ibn Rushd:

1. Mālik, in Ashhab’s narration from him, said that there is no marriage without a guardian and that
it (guardianship) is a condition of validity.

2. Al-Shāfi‘ī held the same opinion.

3. Abū Hanīfah, Zufar, al-Sha‘bī, and al-Zuhrī said that if a woman contracts her marriage without a guardian, and with someone of equivalent status (kuf’), it is permitted.

4. Dāwūd al-Zāhirī distinguished between a virgin and a deflowered woman and stipulated the existence of a guardian as a condition in the case of a virgin, but did not stipulate it in the case of a deflowered woman.

5. The fourth opinion is Mālik’s, as derived from Ibn al-Qāsim’s narration, that its stipulation as a demand is recommended (sunnah), but not obligatory.

Ibn Rushd commenting on Mālik’s opinion (fifth) says that guardianship for Mālik is one of the complementary demands and not a condition for validity of marriage. As against this Mālik’s disciples from Baghdad consider it a condition of validity and not that of perfection. He then proceeds to list the most prominent sources from among those cited for support by both parties and explains the aspects of probability in them. He upholds the view that guardianship is not a condition for marriage, but a stipulation for perfection in the contract. He concludes as follows:

Had there been a known law practiced on this issue it would have come down through a collective communal transmission or through a transmission close to it as this was a point of general need and it is known that there were those in Madinah who had no guardians. In addition, it has not been related from the Prophet (p.b.u.h.) that he used to administer their marriage contracts or that he appointed someone who performed this function. Further, the purpose of the verse is not to expound the hukm of wilāyah, but the (purpose is) to prohibit marriage with the polytheists, men and women. This is evident—Allāh knows best.

...The apparent meaning of the verse, then, Allāh knows best, is that a woman has the right to contract her own marriage and the guardians have a right to revoke it if it is not in conformity with her status. This is the manifest requirement of the law, but none of the jurists has expressed it.
Arguing on the basis of a part of a verse and not arguing on the basis of the remaining part exhibits weakness (of method). There is no evidence of exclusivity in the verse in attributing the contract of marriage to them (the women), but the principle is that it is exclusive, unless an evidence to the contrary is adduced to contradict this.

22.3.4. **Stipulating an option (khiyār)**

The third aspect is whether the contract of marriage is permitted with an option (khiyār)? The majority are of the view that it is not permitted. Abū Thawr said it is. The reason for their disagreement is the vacillation of the contract of marriage between sales (buyūʿ) in which an option is not permitted and those sales in which it is. Ibn Rushd says that the principle in sales is that there is no option except when there is a text supporting it, and the burden of proof is upon one who wishes to establish it. Further, he says, the principle is the prohibition of option in sales and that its basis is hazard (gharar). In marriages there is no hazard because their object is quality and not measure, and because the need for option and examination in marriage is more than that in sales.

With respect to delay in acceptance on the part of one of the parties to the contract, Mālik permitted a slight delay, while some prohibited it. Others permitted it in a manner that the guardian contracts a woman’s marriage without her consent, but when the information reaches her she permits it. From among those who prohibited it absolutely is al-Shāfiʿī and from those who permitted it absolutely are Abū Hanīfah and his disciples, while Mālik distinguished between an extended and a short delay. The reason for disagreement is whether the existence of acceptance by both parties simultaneously is a condition for the validity of the contract. A similar disagreement is presented in sales.

22.4. **Witnesses (Shahādah)**

Abū Ḥanīfah, al-Shāfiʿī, and Mālik agreed that attestation by witnesses is a condition of marriage. They disagreed whether it was a condition of completion required over an extended period as to the time of consummation or a condition of validity required at the time of contract. They agreed that a secret marriage was not valid. They disagreed about the witnesses who attest the marriage contract, but are instructed to keep it secret, whether it amounts to a secret marriage. Mālik said that it is a secret marriage and is
to be rescinded, while Abū Ḥanīfah and al-Shāfī‘ī said that it is not secret. The reason for disagreement is whether attestation is a ḥukm shar‘ī or it serves the purpose of eliminating disputes or denial. Those who held it to be a prescribed ḥukm said that it is a condition of validity, but those who considered it as attestation of the contract said that it is a condition of completion.

The source for this is what has been related from Ibn ‘Abbās: “There is no marriage without two ‘adl witnesses and a supervising guardian.” None of the Companions opposed this, and many jurists considered this to have constituted ḩijmā‘, which according to Ibn Rushd is a weak claim. This tradition has been related as marfū‘ and is recorded by al-Dār Qutnī, who mentioned that among its transmitters are unknown persons.

The contract can be concluded, according to Abū Ḥanīfah, even through the attestation of fāsiqs, as the purpose in his view is only its publicity. Al-Shāfī‘ī is of the view that attestation includes both meanings, that is, proclamation and acceptance, therefore, he stipulates ‘adālah as a condition. For Mālik, however, it does not comprise proclamation when the witnesses have been instructed to maintain silence. The reason for their disagreement is whether the act attested by the witnesses can be designated as secret.

The source for the legality of proclamation is the saying of the Prophet (p.b.u.h.), “Proclaim this marriage and beat the drums.” It is recorded by Abū Dāwūd. ʿUmar is reported to have said, “This is a secret marriage, and had they gone ahead with it I would have awarded rajm.” Abū Thawr and a group of jurists said that attestation by witnesses is not a condition for the validity of a marriage, neither a condition of validity nor that of completion.

22.5. Dower (Ṣadāq)

Dower is one of the conditions of validity (of marriage), and an agreement to forgo it is not permitted, because of the words of the Exalted, “And give unto the women, (whom ye marry) free gift of their marriage portions,” [Qur’ān 4:4] and His words, “[S]o wed them by permission of their folk, and give unto them their portions in kindness.” [Qur’ān 4:25]
22.5.1. Dower amount

The jurists agreed about its amount that it has no maximum limit, but disagreed about its minimum limit. Al-Shāfi‘ī, Aḥmad, Iṣḥāq, Abū Thawr, and the jurists of Madinah, among the Tābi‘ūn, said that there is no minimum limit for it, and anything that can be a price or value for a thing may be the dower. This was also the opinion of Ibn Wahb, from among the disciples of Mālik. A group of jurists upheld the obligation of fixing the minimum amount of dower, but they differed about its extent. Two opinions are well known in this. First is Mālik’s opinion and that of his disciples, while the second is that of Abū Ḥanīfah and his disciples. Mālik said that the minimum dower is one-fourth dinār of gold, or three measured dirhams of silver, or what is equivalent to three dirhams, according to the well known opinion; while it is said that whatever is equivalent to any of them (the amounts in gold or silver). Abū Ḥanīfah said that ten dirhams is the minimum; it is said five dirhams, and it is said forty dirhams.

There are two reasons for disagreement over the amount. First is its vacillation between being a compensation—like other counter-values, in which mutual consent is taken into account for small or large amounts, as is the case in sales—and an act of worship, in which it has to have a fixed time. This is so, as from the point of view that the husband comes to own her benefits perpetually, dower resembles compensation, but from the other aspect of the prohibition of consenting to forgo it by mutual agreement it resembles an act of worship.

22.5.2. Species and void dowers

With respect to its species, it is anything that may be lawfully owned and can be a compensation. For the specification of dower, the jurists agreed about the conclusion of marriage for a determined and specified counter-value, that is, determined as to species and amount by description. They disagreed about dower that is unspecified and undetermined, like one saying, “I have married you for a slave or a servant,” without a specification that determines his price or value. Mālik and Abū Ḥanīfah said that this is permitted, while al-Shāfi‘ī said that it is not.

Dower is void either in itself or because of an attribute traceable to gharār or to an impediment. The dower that is void in itself may be in the form of wine (khamr), swine (khinzīr), or a thing that cannot be lawfully owned. The dower that is void because of gharār or an impediment derives its principles from...
sales.

22.5.3. Deferred and prompt dower

A group of jurists did not permit deferment of dower at all, while some did recommending that he advance part of it, at or before consummation, which is Mālik’s opinion. Some of the jurists who permitted deferment did so for a limited period and for an amount in proportion to it, which is also Mālik’s opinion. Among them were those who permitted deferring it till separation by death or divorce when it becomes due, which is al-Awzā’ī’s opinion. The reason for the disagreement is whether marriage resembles sale in deferment? Those who said that it does, did not permit deferment till death or divorce, but those who said that it does not resemble it permitted such deferment. Those who disallowed deferment considered marriage as an act of worship.

The jurists agreed that the entire "sadāq" becomes due by consummation or death. The basis for its becoming due in the entire amount, following consummation, are the words of the Exalted, “And if ye wish to exchange one wife for another and ye have given unto one of them a sum of money (however great), take nothing from it.” [Qur’ān 4:20] About its obligation upon death before consummation, some claim that there is ijmā‘ over it.

The jurists disagreed whether consummation for this purpose implies copulation or it merely means being in seclusion with her, which they call drawing of the curtains. The term “seclusion” implies a situation after marriage (nikāh) in which the married couple has the opportunity for sexual intercourse, but it may not actually take place. The term “consummation” is used to denote actual sexual intercourse. The distinction is important for understanding the opinions of the jurists, some of whom maintain that mere seclusion, without sexual intercourse, gives rise to the entitlement to dower, while others say that sexual intercourse must have taken place for such entitlement. “Seclusion” usually occurs after the wedding ceremony, however, wedding may not necessarily lead to sexual intercourse or even to “seclusion.”

Mālik, al-Shāfī‘ī, and Dāwūd said that only one-half dower becomes due with mere seclusion, unless there is intercourse. Abū Ḥanīfah said that full dower becomes due with seclusion itself, unless he was in a state of iḥrām, ill, fasting in Ramaḍān, or she was menstruating. Ibn Abī Laylā said that full dower becomes due with seclusion, and added no other stipulation.
22.5.4. Dower and divorce prior to consummation

The jurists agreed generally on the issue where a man divorces his wife prior to consummation after fixing dower. In this case she has recourse to him for one-half dower, because of the words of the Exalted “If ye divorce them before ye have touched them and ye have appointed unto them a portion, then (pay the) half of that which ye appointed.” [Qur’ān 2:237]

Under this topic the jurists differed about a well-known case that relates to transmitted (texts), whether the father has the right to forgo one-half dower of his virgin daughter, if she is divorced prior to seclusion? Mālik said that he has the right, while Abū Ḥanīfah and al-Shāfī‘ī said that he does not. The reason for their disagreement is the equivocality in the words of the Exalted, “Unless they (the women) agree to forgo it, or he agreeth to forgo it in whose hand is the marriage tie.” [Qur’ān 2:237] The word “forgo” (ya‘fū), it is said, may mean, in the usage of the Arabs, “to forgo” or “to gift.” Also, the pronoun in the words of the Exalted, “in whose hands is the marriage tie,” may refer to the guardian or the bridegroom. Those who maintained that it is the bridegroom, deemed the meaning to be “gift,” while those who said that it is the guardian, considered it to mean “forgo.”

The jurists disagreed about the verse, “It is no sin for you if ye divorce women while yet ye have not touched them, nor appointed to them a portion.” [Qur’ān 2:236] on two points. First, when the wife demands the fixation of dower, with no agreement about the amount. Second, when the husband dies without fixing it. Does she get the dower in either case? A group of jurists said that an amount equivalent to her status is to be awarded to her, and the husband has no option in this. If he divorces her after the verdict, some of these jurists said that she is entitled to one-half dower, while some of them said that she is not entitled to anything, as fixation did not take place in the contract itself, which is the opinion of Abū Ḥanīfah and his disciples. Mālik and his disciples said that the husband has three choices: he may divorce her without fixation, he may fix the amount demanded by the woman, or he may fix ṣadāq al-mithl, which becomes binding upon her.

22.6. Impediments to Marriage

According to traditional Islamic law, a woman becomes permissible to a man in two ways: by marriage, or by milk yamīn.. The second category is no longer valid today as slavery has been abolished by law. The
legal impediments to such permission are first divided, generally, into two kinds: perpetual impediments and temporary impediments. The perpetual impediments are divided into those agreed upon and those disputed. Impediments agreed upon are three: descent, relationship by marriage, and fosterage. Those disputed are *zinā* and *li‘ān*. Temporary impediments are divided into nine types: 1) impediment of number; 2) impediment of combination; 3) impediment of bondage; 4) impediment of disbelief; 5) impediment of *ihrām*; 6) impediment of illness; 7) impediment of the waiting period (*‘iddah*), with the accompanying disagreement about its perpetuity; 8) impediment of pronouncing divorce thrice for the person divorcing; and 9) impediment of an existing marriage. Legal impediments, on the whole, are thus fourteen.

22.6.1. Lineage

The jurists agreed that women prohibited because of descent are the seven categories in the Qur’ān: mothers, daughters, sisters, paternal aunts, maternal aunts, brother’s daughters, and sister’s daughters. They agreed that “mother” here is the term for each female related to you as a cause of your birth from the mother’s side or the father’s side. “Daughter” is the term for each female in whose birth you are the cause through a son or a daughter or directly. “Sister” is the name of each female who shares one parent with you or both, that is, a father or a mother or both of them. “Paternal aunt” is the name of each female who is a sister to your father or to any male who is a cause in your birth. “Maternal aunt” is the term for each female who is a sister to your mother or to the female who is a cause in your birth. “Brother’s daughter” is a term for each female in whose birth your brother is a cause from her mother’s side or her father’s side or directly. “Sister’s daughter” is the term for each female in whose birth your sister is a cause directly or from her mother’s side or father’s side.

There is no disagreement about these seven prohibited categories. The source for these prohibitions are the words of the Exalted, “Forbidden unto you are your mothers, and your daughters, and your sisters, and your father’s sisters, and your mother’s sisters, and your brother’s daughters and your sister’s daughters, and your foster-mothers, and your foster-sisters, and your mothers-in-law, and your step daughters who are under your protection (born) of your women unto whom ye have gone in—but if ye have not gone in unto them, then it is no sin for you (to marry their daughters) — and the wives of your sons who (spring) from your loins. And (it is forbidden unto you) that ye should have two sisters together, except what hath
already happened (of that nature) in the past. Lo! Allāh is ever Forgiving, Merciful.” [Qur’ān 4:23]

22.6.2. Relationship Through Marriage

Women prohibited through a relationship of marriage are four. First are the wives of fathers. The source for this are the words of the Exalted, “And marry not those women whom your fathers married, except what hath already happened (of that nature) in the past. Lo! it was ever lewdness and abomination, and an evil way.” [Qur’ān 4:22] Second are wives of sons. The source for this are the words of the Exalted, “[A]nd the wives of your sons who (spring) from your loins.” [Qur’ān 4:23] Third are mothers of wives. The source for this are the words of the Exalted, “[A]nd your mothers-in-law.” [Qur’ān 4:23] Fourth are the daughters of wives. The source for this are the words of the Exalted, “[A]nd your step daughters who are under your protection (born) of your women unto whom ye have gone in—but if ye have not gone in unto them, then it is no sin for you (to marry their daughters).” [Qur’ān 4:23]

Out of these four categories, the Muslim jurists agreed upon the prohibition of two by virtue of the contract itself, namely, the prohibition of the wives of fathers and sons, and upon a third category because of consummation, namely, the wife’s daughter. They disagreed in the latter case on two points. First, whether it is a condition that she be in the protection of the husband. Second, whether she becomes prohibited by mere fondling of the mother or through intercourse? They disputed about the wife’s mother, whether she becomes prohibited through intercourse with the daughter or through the contract with her alone? They also disagreed in this subject on a fourth issue, whether zinā gives rise to the same prohibition as is imposed through a valid or irregular nikāḥ.

22.6.3. Fosterage (Suckling; Wet-nursing)

The jurists agreed that fosterage, as a whole, prohibits what is prohibited because of the impediment of descent, that is, the foster mother acquires the status of the mother, and becomes prohibited herself for the foster child along with all those who are prohibited to the son because of the true mother.
22.6.4. **Unlawful Intercourse (Zinā)**

The jurists disagreed about the marriage of a zāniyah, i.e., a woman who has indulged in unlawful sexual intercourse, by way of fornication or adultery. The majority permitted this, while a group of jurists disallowed it. The reason for their disagreement is their dispute about the meaning of the words of the Exalted, “[A]nd the zāniyah none shall marry save the zānī or an idolater. All this is forbidden unto believers,” [Qur’ān 24:3] whether it implies blame or prohibition, and whether the reference in the words, “All this is forbidden unto believers,” is to zinā or to marriage? The majority decided to construe the verse to mean blame and not prohibition because of what is laid down in the tradition “that a man said to the Prophet (p.b.u.h.) about his (the man’s) wife that she does not turn away the hand of anyone who touches her. The Prophet (p.b.u.h.) said, ‘Divorce her.’ The man replied, ‘I love her.’ The Prophet said, ‘Then hold on to her.’” A group of jurists went to the extent of saying that unlawful intercourse annuls marriage on the basis of this principle, i.e., if the meaning is construed as prohibition and not blame.

22.6.5. **Number of Marriages**

The Muslim jurists agreed about the permissibility of (a man) marrying four women at the same time. This is for freemen. They disagreed about a number beyond four. The majority maintain that a fifth wife is not permitted, because of the words of the Exalted, “[M]arry of the women who seem good to you, two or three or four.” [Qur’ān 4:3] and also because of a tradition related from the Prophet (p.b.u.h.) that he said to Ghaylān when he converted to Islam and had ten wives, “Hold on to four and let go the rest.” Some say that nine are permitted. It appears that those who permitted nine held that opinion on the basis of addition of numbers occurring in the preceding verse, that is, addition of the numbers in the words of the Exalted, “two and three and four.”

22.6.6. **Combination**

The jurists agreed that two sisters are not be combined (married together) through marriage contracts, because of the words of the Exalted, “And (it is forbidden unto you) that ye should have two sisters together, except what hath already happened (of that nature) in the past.” They also agreed about the
prohibition of combining a woman with her paternal aunt, and a woman with her maternal aunt, as this has been established from the Prophet (p.b.u.h.) in the *mutawātir* tradition of Abū Hurayrah in which the Prophet is reported to have said, “A woman is not to be married together with her paternal aunt nor with her maternal aunt.”

22.6.7. Disbelief (*Kufr*)

The jurists agreed that it is not permitted to a Muslim male to marry an idolatress due to the words of the Exalted, “And hold not to the ties of disbelieving women.” The majority upheld the permissibility of marriage with the *kitābiyyāt* who are free through a contract, as the principle is to construe by exemption the particular from the general. The words of the Exalted, “[A]nd the virtuous women of those who received the Scripture,” is particular, while His words, “Wed not idolatresses till they believe,” [Qur’ān 2:221] is general; the majority, thus, exempted the particular from the general. Those who inclined toward its prohibition, which is the opinion of some of the *fuqahā’*, considered the general meaning to have abrogated the particular.

The jurists disagreed about a married woman whether imprisonment in war demolishes her marriage, and if it is demolished then at what time? A group said that the marriage of couple imprisoned together is not annulled, but the imprisonment of one prior to the other annuls their marriage. This was Abū Ḥanīfah’s opinion. Another group of jurists said that imprisonment annuls the marriage whether they are imprisoned together or one before the other, which was al-Shāfī’ī’s opinion. There are two opinions from Mālik. First, that imprisonment does not annul marriage at all. Second, that it annuls it absolutely, as in al-Shāfī’ī’s opinion.

22.6.8. The Ritual State of *Iḥrām*

The jurists disagreed about the marriage of the *muhrim* (person in the ritual state of *iḥrām*). Mālik, al-Shāfī’ī, al-Layth, al-Awzā’ī, and Aḥmad said that a *muhrim* does not marry and cannot be married. If he should go through a marriage contract, the marriage is void. Abū Ḥanīfah said that there is no harm in this.
22.6.9. Illness

The jurists disagreed about the marriage of the marīd (sick person). Abū Ḥanīfah and al-Shāfīʿī said that it is permitted. Mālik in a well-known opinion of his said that it is not permitted. The reason for their disagreement is the vacillation of marriage between sale and a gift, because the gift of a marīd is not permitted except to the extent of a third of his estate, but his sale is permitted. There is another reason for their disagreement, which is the fear that he (the marīd) may be accused of intending to harm the heirs by introducing an additional heir?

22.6.10. ‘Īddah (Waiting Period)

The jurists agreed that marriage is not permitted during the woman’s waiting period, whether it is the waiting period of menstruation, of pregnancy, or of months. The jurists have disagreed about the person who marries a woman during her waiting period and consummates it. Mālik, al-Awzāʿī, and al-Layth said that they are to be separated and she is not to be permissible for him, ever. Abū Ḥanīfah, al-Shāfīʿī, and al-Thawrī said that they are to be separated and when her ‘īddah is over there is no harm in his marrying her a second time.

22.7. The Requisites of Option in Marriage

The causes for an option are four: defects; inability to pay the dower, maintenance, and clothing; absence, that is, absence of the husband; and manumission of a married slave woman. In Anglo-Muhammadan law, some of these causes are considered grounds for the dissolution of marriage by the court, but the jurists view them as options available to the parties.

22.7.1. The Option of Defects

The jurists disagreed about the causes of the option of defects for each one of the spouses. This they did on two points. First, is marriage revoked because of defects? If it is to be revoked, then, by whom is it revoked, and what is its hukm? They also disagreed about the defects that can entail revocation, and those
that did not, and also about the *hukm* of revocation. Mālik and al-Shāfīī agreed that revocation is on the basis of four defects: insanity, leprosy, *baras* (skin disease like leprosy), and disease of the sex organ that prevents intercourse — *qarn* or *ratq* (birth defect in which the vulva is blocked, or the sides of the vulva are joined together) in a woman, and impotence or castration in a man. It is said that marriage can be revoked because of them, and it is said that it cannot. Abū Ḥanīfah, his disciples, and al-Thawrī said that a woman cannot be rejected in a marriage except for two defects: *qarn* and *ratq*.

### 22.7.2. Option on Inability to Pay Dower and Maintenance

The jurists disagreed about inability to pay dower. Al-Shāfīī used to say that the wife is to be given a choice if the husband has not consummated the marriage with her. This was also Mālik’s opinion, but his disciples differed about the extent of delay permitted to him. It is said that there is no limit on this for him, while it is said it is a year, and it is also said that it is two years. Abū Ḥanīfah said that he is a debtor like all other debtors and there is to be no separation between them, but he is to be taken to task for maintenance; and she has the right to refuse access to herself till he pays her the dower.

About the inability to pay maintenance, Mālik, al-Shāfīī, Aḥmad, Abū Thawr, and Abū ʿUbayd said that they are to be separated, which is also related from Abū Hurayrah and Saʿīd ibn al-Musayyib. Abū Ḥanīfah and al-Thawrī said that they are not to be separated, which was also the opinion of the Žāhirites.

### 22.7.3. Option Upon Absence

The jurists disagreed over the missing person about whose life or death nothing is known in the land of Islam. Mālik said that his wife is to be given a period of four years from the day her case is brought before the judge. If search for information about his life and death terminates and his whereabouts become unknown, the judge will determine a period for her; upon the termination of the period she will begin to observe the waiting period of four months and ten days, after which she will be free. About his wealth, he said that it is not to be distributed among his heirs till such a time has passed after which he is not likely to survive. It is said that this is seventy years, or eighty, or ninety, and it is said a hundred years, if he disappeared before reaching this age. This opinion was upheld by al-Layth. Al-Shāfīī, Abū Ḥanīfah,
and al-Thawrī said that the wife of a missing person is not to be released from the marriage contract till his death is verified.

The reason for their disagreement is the conflict of ḵistisḥāb al-hāl with analogy, as ḵistisḥāb al-hāl requires that the bond should not be severed except through death or divorce, unless an evidence indicates the contrary. The analogy here is the similarity of harm caused to her because of absence with the harm in al-īlā and impotence; she thus has an option, as she has in these two cases.

22.8. Marital Rights and the Restitution of Conjugal Rights

22.8.1. Maintenance

Among the wife’s rights over her husband are maintenance and clothing, because of the words of the Exalted, “The duty of feeding and clothing nursing mothers in a seemly manner is upon the father of the child, and no one should be charged beyond his capacity,” [Qur’ān 2:233] and the words of the Prophet (p.b.u.h.), “They have a right over you for food and clothing in a reasonable manner,” and his directive to Hind, “Take what is reasonably sufficient for you and your child.”

The jurists agreed about the obligation of maintenance, but they differed on four points: the time of the obligation, amount, for whom is it obligatory, and upon whom. With respect to the time of its obligation, Mālik said that maintenance is not obligatory upon the husband unless he has consummated the marriage with her, or he has been asked to consummate the marriage when she is legally capable for intercourse and he has attained puberty. Abū Ḥanīfah and al-Shāfī‘ī said that maintenance is obligatory on one who has not attained majority if she has attained it, but when he has attained majority and she is a minor, there are two views about it from al-Shāfī‘ī. One is the same as Mālik’s, while the other holds that she is entitled to maintenance without qualification.

The reason for their disagreement is whether maintenance is a counter-value for (sexual) utilization, or is compensation for the fact that she is confined because of her husband, as in the case of one absent or sick.

Abū Ḥanīfah said about the amount of maintenance that it is not determined by the law and refers to the requirements of the status of the husband and the status of the wife, and that this varies in accordance with a change in location, time, and status. This was upheld by Mālik. Al-Shāfī‘ī maintained that it is
determined, and for the person in financial ease it is two mudds (a dry measure), for one with average circumstances it is one and one-half mudd, and for a person in difficult straits it is one mudd. The reason for their disagreement is the vacillation of the interpretation of maintenance for this subject between feeding in expiation and that in clothing. This is so as they agreed that there is no limit for clothing, while for feeding there is. The jurists maintain that a servant or servants as well as residence has to be provided to the wife if her status requires servants. There is no legal source for the obligation of maintenance of a servant except its similarity with the provision of service with residence. They agreed that residence is to be provided by the husband, because of a text laid down for its obligation in the case of a wife whose divorce is retractable.

The jurists agreed regarding the wife for whom maintenance is necessary that it is obligatory for the free woman, who is not recalcitrant. They disagreed about the recalcitrant woman. The majority agreed that maintenance is not due to her, but a group of jurists deviated from this and said that it is due. The reason for their disagreement is the conflict of the generality with the implication of the text, as the generality of the words of the Prophet (p.b.u.h.), “They have a right over you for food and clothing in a reasonable manner,” equally include the recalcitrant woman and others besides her, while the implication is that maintenance is in lieu of (sexual) utilization, which conveys that there is no maintenance for the recalcitrant.

22.8.2. Polygamous marriage

The jurists agreed that among the wife’s basic marital rights, in case of a polygamous marriage, is justice between the wives in sharing of the husband’s favours, because of the established practice of the Prophet (p.b.u.h.) who distributed his favours fairly between his wives, and also because of his words, “When a person has two wives and he feels inclined toward one of them, he will appear on the day of judgment with one of his sides inclined.” It is also established that the Prophet (p.b.u.h.), when he wished to go on a journey, used to draw lots between them.
22.8.3. Nursing and taking care of the house

The rights of the husband over the wife with respect to nursing and taking care of the house are structured upon the disagreement of the jurists over this issue. This is so as one group of jurists made nursing absolutely obligatory for her, while another group did not make it obligatory at all. One group of jurists made it obligatory for a woman of lower status and not for one with a higher status, unless the infant will not feed except at her breast, which is Mālik’s well-known opinion. The reason for their disagreement is the difference as to whether the verse of suckling conveys the *hukm* of suckling, that is, its obligation, or that it merely contains the command of suckling (but not as an obligation)? Those who held that it contains only the command said that it is not obligatory upon her as there is no evidence for its interpretation as obligation. Those who held that it implies the command of suckling as well as its obligation, because it is a report meant to be a command said that suckling is obligatory upon her. Those who made a distinction between a woman of lower status and one of a higher status based it upon custom and practice. There is no obligation of suckling upon the divorced woman, unless the infant will not feed at another woman’s breast, in which case suckling is binding upon her and the child’s father is liable for the wages of suckling. This is a point of consensus, because of the words of the Exalted, “Then, if they give suck for you, give them their due payment and consult together in kindness.” [Qur’an 65:6]

Suits for the restitution of conjugal rights are permitted in India and Pakistan, but the courts have developed a number of defences.

22.9. Ḥadānah (Ḥazānat in Urdu)

The majority maintain that custody (*ḥadānah*) belongs to the mother if she is divorced by the husband and the child is still in a tender age, because of the words of the Prophet (p.b.u.h.), “He who causes a separation between a mother and her child, Allāh will cause a separation a between him and his loved ones on the day of judgment,” and insofar as enslaved and captive women cannot be separated from their child, the case of the free woman becomes stronger. They disagreed when the child has reached the age of discrimination. One group, and among them is al-Shāfi‘ī, said that he is to be given an option (to remain with his mother or to go to the father). They argued on the basis of a tradition that is relevant to this, while the others held on to the general principle, as this tradition was not proved authentic according
to them. The majority maintain that her marriage to someone other than the (child’s) father terminates custody, because of the report that the Messenger of Allāh (p.b.u.h.) said, “You have a prior right to him as long as you do not marry.” Those for whom this tradition was not authentic pursued the general principle. There is no basis for it, that can be relied upon, about the transfer of custody from the mother to someone other than the father. It is to be noted that the distinction drawn between a male child and a female child is not mentioned in these traditions.

22.10. Marriages Prohibited by Law and Void marriages

The marriages about which an express proscription has been laid down are four: nikāḥ al-shighār, nikāḥ al-mut’āh, proposal during another’s proposal, and nikāḥ al-muhallil or ḥālālah. The jurists agreed about nikāḥ al-shighār that it takes the form of a man giving his female ward in marriage to another on the condition that he will give his ward in marriage to the first, without there being any dower except the body of one woman in exchange for that of the other. They agreed that it is a marriage that is not permitted, because of an established proscription from the Prophet. They disagreed when it did take place, whether it would entail mahr al-mithl. Mālik said that it is not valid and is annulled for ever, before consummation and after it. This was also al-Shāfi‘ī’s opinion, except he added that if a dower is announced for one of them or for both simultaneously, then, the marriage is established on the basis of mahr al-mithl, and the dower announced is void. Abū Ḥanīfah said that nikāḥ al-shighār is valid on the fixation of mahr al-mithl. This was also the opinion of al-Layth, Aḥmad, Ishāq, Abū Thawr, and al-Ṭabarī.

In the marriage of mut’āh, though the reports from the Messenger of Allāh (p.b.u.h.) about its prohibition have reached the level of tawātur, they have differed about the time of the occurrence of the prohibition. In some narrations it is stated that he prohibited it on the day of Khaybar, in some it is the day of the conquest of Makkah, in some the day of Tabūk, in some the day of the Farewell Pilgrimage, in some it is during the umrat al-qadā’, and in some it is the day of Awtās. Most of the Companions and all the jurists upheld its prohibition. Its permission by Ibn ‘Abbās became well-known, and he was followed in his opinion by his disciples in Makkah and in Yemen.

There are three opinions about a marriage in which a proposal was made during the proposal of another. One opinion requiring rescission, another not imposing rescission, and the third making a distinction on
the basis of the degree of maturity of the first proposal, which is Mālik’s opinion.

About nikāḥ al-muḥallil, that is, a marriage through which the permissibility for re-marriage of a woman divorced by three pronouncements to her divorcing ex-husband is sought, Mālik said that it is a marriage that is rescinded, while Abū Ḥanīfah and al-Shāfi’ī said that it is a valid marriage. The reason for their disagreement is their dispute about the meaning of the words of the Prophet, “The curse of Allāh is upon the muḥallil.” Those who understood the word “curse” to mean sin alone said that the contract is valid, but those who understood sin to imply the invalidity of the contract, comparing it to the proscription that implies the nullity of the thing proscribed, said that the marriage is void. These are the marriages that are declared void because of a proscription.

Marriages declared void by implication of the law are invalidated either by dropping a condition of validity of marriage, or by the alteration of a hukm that has been made obligatory by commands from Allāh Almighty, or by making an addition that leads to the nullification of one of the conditions of validity of marriage. Other additions besides these do not invalidate marriage, by agreement of the jurists, rather the jurists disagreed about the binding effect of conditions imposed in this way, for example, when a condition is stipulated for the husband that he will not marry another wife during her marriage, or will not take a slave-girl as a concubine, or move her from her place of domicile. Mālik said that if such conditions are imposed they are not binding upon him, unless they incorporate an oath to manumit or divorce, for these are binding upon him, except when they consist of a condition to manumit or divorce one for whom the oath is taken, in which case the former condition would not be binding either. The same view was expressed by al-Shāfi’ī and Abū Ḥanīfah. Al-Awzāʾī and Ibn Shubramah said that she is entitled to enforce her condition and compliance is binding upon him. Ibn Shihāb said that some of the jurists he came across used to issue such a ruling.

The Ḥanafīs, unlike the majority, consider certain marriages to be fāsid (irregular) and not bāṭil (void). These are: marriage without witnesses; marriage with a woman undergoing ‘iddah; marriage prohibited due to religion; and marriage with a fifth wife. The usual legal effect is separation, ordered by the court. There are detailed rules as to dower and ‘iddah if there was consummation.
Chapter 23

Divorce and Separation

23.1. The Kinds of Divorce (Talāq)

23.1.1. Bā’īn and Raj‘ī Divorces

Divorce is of two types: bā’īn (irrevocable) and raj‘ī (revocable). In the raj‘ī divorce the husband possesses the right over the wife’s return, without there being a choice for her in the matter. The condition for doing this is that he should have consummated the marriage with her. The jurists agreed about this because of the words of the Exalted, “O Prophet! When ye (men wish to) divorce women, divorce them when they can begin their waiting period, and reckon the period, and keep your duty to Allāh, your Lord. Expel them not from their houses nor let them go forth unless they commit open immorality. Such are the limits (imposed by) Allāh; and whoso transgresseth Allāh’s limits, he verily wrongeth his soul. Thou knowest not: it may be that Allāh will afterward bring some new thing to pass,” [Qur’ān 65:1] Another text is the established tradition related by Ibn ‘Umar that the Prophet (p.b.u.h.) ordered him to take his wife back, when he had divorced her during her menstruation. There is no dispute about this.

The bā’īn divorce is irrevocable due to the absence of consummation, or due to the number of pronouncements of divorce, or due to the existence of a counter-value for khul‘, despite the disagreement whether khul‘ is a divorce or rescission. The number giving rise to an irrevocable divorce in a repudiation by a freeman is three, when made separately, because of the words of the Exalted, “Divorce must be pro-
nounced twice, and then (a woman) must be retained in honour or released in kindness.” [Qur’ān 2:229] The jurists disagreed when it occurs three times through words, but not thrice in three separate acts.

The majority of the jurists maintained that a triple divorce pronounced once has the effect of the third repudiation. The Zāhirites and another group maintained that it takes the hukm of a single pronouncement and the stated number has no effect. The proof for these jurists is in the apparent meaning of the words of the Exalted, “Divorce may be pronounced twice (and retracted) . . . . And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she hath wedded another husband.” [Qur’ān 2:229, 230] They also argued on the basis of what has been recorded by al-Bukhārī and Muslim from Ibn ‘Abbās, who said, “Divorce in the period of the Messenger of Allāh (p.b.u.h.), Abū Bakr, and in (the first) two years of the khilāfah of ‘Umar, if pronounced thrice (at once) was counted as one, but ‘Umar gave it effect against them.” They also argued on the basis of what is related by Ibn Isḥāq from ‘Ikrimah from Ibn ‘Abbās, who said, “Rukānah divorced his wife thrice in a single session, and was greatly saddened in his longing for her. The Messenger of Allāh asked him, ‘How did you divorce her?’ He said, ‘I divorced her thrice in a single session.’ He (the Prophet) said, ‘That is a single divorce, bring her back by revocation.’”

Those who lent support to the majority opinion argued that the tradition of Ibn ‘Abbās that has occurred in the Sahīḥayn has been related from him by one of his disciples, Tāwūs, while the great majority of his disciples have related from him the binding nature of a divorce pronounced thrice—among them are Sa‘īd ibn Jubayr, Mujāḥid, ‘Aţā, ‘Amr ibn Dmār, and several others—and that the tradition of Ibn Isḥāq is imaginary, for Rukānah, in fact, did not divorce his wife thrice.

23.1.2. **Sunnah and Bid‘ah Forms of Divorce**

The jurists agreed that the person divorcing his wife, with whom he has consummated the marriage, through ṭalāq al-sunnah is one who divorces her through a single pronouncement during a period of her purity from menstruation in which he has not had intercourse with her. The person divorcing in a period of menstruation or in a period of purity during which he has had intercourse with her is not abiding by the sunnah form of divorce. The jurists agreed unanimously about this, because of the established tradition of Ibn ‘Umar “that he divorced his wife during her menstruation in the lifetime of the Messenger of Allāh (p.b.u.h.). He (the Prophet) sent him a message saying, “Command him to restore her status until such
time she is in the period of purity, and thereafter menstruates and then reaches the next period of purity. If then you like hold on to her or if you like divorce her before you have had intercourse with her. This is the (beginning of) time-frame (‘iddah) in which Allāh has permitted you to divorce women.”

The jurists disagreed on a number of points about the case of the person who repudiates during the menstrual period. The majority held that his repudiation takes effect, while another group said that it is not to be implemented or reckoned. Those who maintained that it is implemented said that he is to be asked to take her back, but then they became divided into two groups. One of these groups held the view that this is obligatory and he is to be forced to do so. It was upheld by Mālik and his disciples. The other group said that it is recommended to him to do so, but he is not to be forced. This was upheld by al-Shāfi‘ī, Abū Ḥanīfah, al-Thawrī, and Ahmad.

All those who stipulated for ṭalāq al-sunnah that he divorce her in a period of purity during which he has not cohabited with her, did not require him to take her back if he had divorced her in a period of purity in which he had cohabited with her. In summary, there are four issues. First, whether this divorce is valid? Second, if it is so, is he to be forced to take her back or is merely required to do so? Third, when does the divorce come into effect after such compulsion or recommendation? Fourth, when is he to be compelled?

The majority held that if the divorce occurs during the period of menstruation, it is to be deemed a legitimate divorce, because of the words of the Prophet (p.b.u.h.) in the tradition of Ibn ‘Umar, “Order him to take her back.” They maintained that raj‘ah (return) does not take place, except after divorce. Those who did not consider such a divorce to have taken legal effect, relied upon the general implication of the words of the Prophet (p.b.u.h.), “Every act and deed not based upon our practice is rejected.” They said that its rejection by the Messenger of Allāh (p.b.u.h.) implies its non-implementation and invalidity.

23.1.3. **Khul’ (Redemption)**

The terms khul‘, fidyah, sulh, and mubāra’ah all refer to the same meaning, which is “(a transaction in which) compensation is paid by the wife for obtaining her divorce.” The term khul‘, however, in the opinion of the jurists is confined to her paying him all that he spent on her, the term sulh to paying a part of it, fidyah to paying more than it, and mubāra’ah to her writing off a claim that she had against him.
The meaning of *mubāra‘ah* current in Pakistan and India is where the parties have a mutual revulsion for each other and would be happy to dissolve the marriage. The discussion of the principles of this mode of separation is split into four points. First, the permissibility of its occurrence (legal effectiveness). Second, the conditions for its proper occurrence, that is, its valid occurrence. Third, about its nature, whether it is divorce or rescission. Fourth, about the *ahkām* related to it.

Most of the *fuqahā‘* uphold its permissibility. Its sources are to be found in the Book and *sunnah*. In the Book it is the words of the Exalted, “[I]t is no sin for any of them if the woman ransom herself.” [Qur’ān 2:229] The *sunnah* is the tradition of Ibn ‘Abbās “that the wife of Thābit ibn Qays came up to the Prophet (p.b.u.h.) and said, ‘O Messenger of Allāh, I do not find anything wrong with him from the religious and moral points of view, but I detest disbelief after entering the fold of Islam.’ The Messenger of Allāh (p.b.u.h.) said, ‘Will you return to him his orchard (that he had given to you).’ She said, ‘Yes.’ The Messenger of Allāh said to (Thābit), ‘Accept the orchard and divorce her through a single repudiation.’” It is recorded, in these words, by al-Bukhārī, Abū Dāwūd, Al-Nasa‘ī, and is a tradition agreed upon for its soundness.

Abū Bakr ibn ‘Abd Allāh al-Mazīnī deviated from the majority opinion and said that it is not permitted to the husband to take anything from his wife. He argued for this on the basis of his understanding that the words of the Exalted, “[I]t is no sin for any of them if the woman ransom herself,” [Qur’ān 2:229] have been abrogated by the words of the Exalted, “And if ye wish to exchange one wife for another and ye have given unto one of them a sum of money (however great), take nothing from it. Would ye take it by way of calumny and open wrong?” [Qur’ān 4:20] The majority, however, maintain that this prohibition applies when it is taken without her consent, but it is permitted with her consent.

23.2. *Tafwūd, takhyīr and tamlīk*

Procedures that are counted among the categories of divorce, and which are considered to have specific *ahkām*, are *tafwūd* (delegation), *takhyīr* (granting a choice) and *tamlīk* (granting possession of the right). The first term is preferred by the Ḥanafīs, while the remaining two are used by the majority. *Tafwūd* means delegation, i.e., delegation of the right to divorce. According to Mālik there is a difference between *tamlīk* and *takhyīr* (in this context). *Tamlīk*, in his view, is the granting of a right to a woman to pronounce (her
own) divorce. This may be interpreted as one repudiation or more, thus, the man is entitled to deny her
the right to more than one repudiation. *Khiyār* is different from this, as far as it implies the execution
of divorce leading to the termination of the nuptial tie, unless it is a restricted form of *takhyīr*, like his
saying to her: “choose for yourself, a single repudiation, or two repudiations.” In the case of unrestricted
choice, according to Mālik, she only has the choice to choose her husband or opt for irrevocable separation
from him through the pronouncement of three repudiations, but she is not entitled to choose a single
repudiation.

The right under *tamlīk*, according to him (Mālik) in one narration, is not annulled even if it is not
exercised by the authorized woman for a long period of time, or till they part from the session. According
to a second narration from him, the right under *tamlīk* stays with her till she revokes it or exercises it
through repudiation. The difference, in Mālik’s view, between *tamlīk* and granting of a power of attorney
(*tawkil*) to her to exercise repudiation is that in an agency he can revoke the power of attorney before she
exercises such power, but in *tamlīk* he does not have that right.

It is said that *tamlīk* has no legal force, as it is not permitted that the authority placed in the hands
of a man be passed on to the authority of a woman by the act of the assignor. Similarly in the case of
*takhyīr*, which is the opinion of Abū Muhammad ibn Ḥazm. Mālik’s opinion about the woman authorized
under *tamlīk* is that she has a choice between divorce and holding fast to the nuptial tie as long as she is
in the session (of assignment), which is also the opinion of al-Shāfi’ī, Abū Ḥanīfah, al-Awzā’ī, and a group
of other jurists of the provinces. According to al-Shāfi’ī, *tamlīk* is like agency *wakalah*, when he intends
divorce, and he has the right to retract it whenever he likes, as long as divorce has not come into effect.

23.3. Retraction after Divorce

The husband possesses the right to have recourse to his wife after a *talāq raj‘ī*, as long as she is in her
waiting period, even without her consent, on the basis of the words of the Exalted, “And their husbands
would have a greater right to take them back in that case if they desire a reconciliation.” [Qur’ān 2:228].
It is a condition for this kind of divorce that the wife must have been wed to the husband, that is, their
marriage must have been consummated before divorce.

Recourse (*rujū‘*) is by words and by witnessing. The jurists disagreed whether witnessing was a con-
dition for this. Similarly, they disagreed whether recourse is valid through intercourse. As to witnessing, Mālik held that it is recommended, while al-Shāfi’ī said that it is obligatory. The reason for disagreement is the conflict of analogy with the apparent meaning of the text. The apparent meaning is found in the words of the Exalted, “Then, when they have reached their term, take them back in kindness or part from them in kindness, and call to witness two just men from among you, and keep your testimony upright for Allāh,”¹ which imply an obligation. A comparison of this right with all other rights that a human being possesses indicates that there be no obligatory witnesses. The reconciliation between analogy and the verse leads to construing the meaning of the verse as a recommendation.

23.4. Waiting Period (‘Irādah)

There is no waiting period, by consensus, for a divorced wife whose marriage has not been consummated, because of the words of the Exalted, “O ye who believe! If ye wed believing women and divorce them before ye have touched them, then there is no period that ye should reckon. But content them and release them handsomely.” [Qur’ān 33:49]

The divorced woman whose marriage stands consummated may or may not be one who menstruates. If she does not menstruate, she may be a minor or beyond the age of menstruation. Those who menstruate may be pregnant or they may be undergoing their usual periods of menstruation. In the latter case their menstruation may have ceased recently or it may be continuing. Those who menstruate, but their menstruation has ceased, may have conceived, or they may not have conceived. Those who have not conceived may be know the reason for the cessation of blood such as suckling or illness, or they may not be know the reason.

The waiting period of free women, who menstruate according to their usual cycles, is three periods (qurū’), but those among them who are pregnant, their waiting period is up to the time of delivery. The waiting period for those among them who are beyond the age of menstruation is three months. There is no dispute about this as it is explicitly stated in the words of the Exalted, “Women who are divorced shall wait, keeping themselves apart, three (monthly) courses,” [Qur’ān 2:228] and His words, “And for such

¹ Qur’ān 65: 2
of your women as despair of menstruation, if ye doubt, their period (of waiting) shall be three months, along with those who have it not. And for those with child, their period shall be till they bring forth their burden. And whosoever keepeth his duty to Allâh, He maketh his course easy for him.” [Qur’ân 65:4]

In these verses, they differed about the meaning of the term ‘periods’ (sing. *qur’*). Some jurists said that these are the periods of purity, that is, the periods between two menses. Some said that these are the periods of menstruation. Among the jurists who said that the periods are those of purity, are Mâlik, al-Shâfî‘î, most of the jurists of Madinah, Abû Thawr, and a group of jurists; and among the Companions are Ibn ‘Umar, Zayd ibn Thâbit, and ‘Â’ishah. Among the jurists who said that the periods are those of menstruation, are Abû Ḥanîfah, al-Thawrî, al-Awzâ‘î, Ibn Abî Laylâ, along with a group of other jurists; and among the Companions are ‘Alî, ‘Umar ibn al-Khaṭṭâb, Ibn Mas‘ûd, and Abû Mûsâ al-Ash‘arî.

The divorced menstruating woman whose periods have ceased, but she is in the age group where menstruation is likely, and there is no suspicion about the cessation of menstruation due to suckling or illness, waits in Mâlik’s opinion for nine months. Abû Ḥanîfah, al-Shâfî‘î, and the majority said about the woman whose menstruation has ceased, and she has not recently undergone a menopause, that she continues to await menstruation till she enters the age when she would despair of menstruation. It is then that she undergoes the ‘iddah for three months, unless she menstruates prior to this.

A woman undergoing a waiting period after a revocable divorce is entitled to maintenance and residence, similarly, the pregnant woman (separated by divorce or death), because of the words of the Exalted, “Lodge them where ye dwell, according to your wealth, and harass them not so as to straiten life for them,” and His words, “And if they are with child, then spend for them till they bring forth their burden.” [Qur’ân 65:6]

The jurists disagreed about providing residence to the woman divorced irrevocably, and also about her maintenance when she was not pregnant, into three opinions. First, that she has maintenance and residence, which is the opinion of the Hanafis. Second, that there is neither residence nor maintenance for her, which is the opinion of Aḥmad, Dawûd, Abû Thawr, Ishaq, and a group of jurists. Third, that she is entitled to residence, but not maintenance, which is the opinion of Mâlik, al-Shâfî‘î, and a group of jurists.

The jurists agreed that the waiting period for a free woman, because of (the death of) her husband who is a freeman, is four months and ten days, on the basis of the words of the Exalted, “Such of you as die and leave behind them wives, they (the wives) shall wait, keeping themselves apart, four months
and ten days.” [Qur’ān 2:234] They disagreed about the waiting period of the pregnant woman as to what is her ḥukm when she did not receive her menses during the four months and ten days. Mālik said that a condition for the completion of her waiting period is that she have one menstrual course during this period, if she does not she is considered to be under the doubt of conception and has to undergo the entire waiting period of a pregnant woman. It is also related from him that she may neither be menstruating nor be under a doubt of conception. This is the case when her usual menstrual cycle exceeds the duration of the ‘iddah. This either does not occur or it is rare. This is in case her menstrual course exceeds the period of four or more than four months. The narrations from him differ about a woman who actually finds herself in this situation. It is said that she waits for the next menstrual course, but Ibn al-Qāsim has narrated from him that she is to marry if after the ‘iddah of death she does not find herself to be pregnant. This is the opinion of the majority of the jurists of the provinces, Abū Ḥanīfah, al-Shāfi‘ī, and al-Thawrī.

The majority of the jurists said that the waiting period of the pregnant woman whose husband has died extends up to the time she delivers her burden, on the basis of the words of the Exalted, “And as for the conceiving women, their term shall be the delivery of their burden,” [Qur’ān 65:4] though the verse is related to divorce. They also relied on the tradition of Umm Salamah, “that Subay‘ah al-Aslamiyah gave birth one-half month after the death of her husband.” This tradition states that “She came to the Messenger of Allāh (p.b.u.h.) who said to her: ‘You are now free so marry whom you like.’”

Mālik has related from Ibn ‘Abbās that her ‘iddah extends to the end of the two periods (the time of delivery and the end of the four months and ten days), intending thereby that it extends to the greater of the two periods (whichever is later), either the (termination of) pregnancy or the termination of ‘iddah after death.

23.5. Gift of Consolation Paid to a Divorced Woman (Mut‘ah)

The majority of the jurists maintain that a gift of consolation is not obligatory for each woman divorced, while a group of the Zāhirites said that it is obligatory. Another group said that it is recommended, but not obligatory, which was upheld by Mālik. Those who considered it obligatory in the case of some categories of divorced women differed about this. Thus, Abū Ḥanīfah said that it is obligatory in the case
of the woman divorced prior to consummation, when no dower was fixed for her. Al-Shāfi‘ī said that it is obligatory for each woman divorced, when the separation is initiated by him, except for the case of the woman whose dower was fixed, but she was divorced prior to consummation. This is also the opinion of the majority.

The Zāhirites interpreted the command in its general meaning, while the majority maintain that there is no compensation (mut‘ah) for a woman separated through redemption (khul‘), as she is the payer, and her case is like that of the woman divorced prior to consummation and after the fixation of dower. The Zāhirites maintain that it is the general law, she may take and give at the same time.

Mālik interpreted the command for compensation to mean recommendation, because of the words of the Exalted at the end of the verse, “(This is) a bounden duty for those who do good,” [Qur‘ān 2:236] that is, the generous and the gracious, and whatever falls under the category of generosity is not obligatory.

23.6. Appointment of Arbitrators

The jurists agreed about the permissibility of appointing arbitrators in case of discord between the spouses, when their positions are not known, as to which one of the couple is right and who is wrong, because of the words of the Exalted, “And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allāh will make them of one mind. Lo! Allāh is ever Knower, Aware.” [Qur‘ān 4:35] They agreed that the arbiters could only be from the families of the spouses, one representing the husband and the other the wife, except when no one in their families is to be found who can negotiate a settlement between them, in which case someone else is to be appointed.

The jurists said that if the arbiters were not unanimous in their decision it would not be implemented. They further said that the decision of the arbitrators to maintain the marriage tie is to be executed without there being a specific delegation of powers to them by the spouses. They disputed the agreed decision of the arbiters to separate them, whether it would require the consent of the husband? Mālik and his disciples said that their decision about separation and union is valid without specific delegation by the spouses and without their consent. Al-Shāfi‘ī, Abū Ḥanīfah, and their disciples said that they have no right to separate them, except when the husband delegates such authority to them.
23.7. Mourning (Iḥdād)

The word *ihdād* means mourning, but also carries the idea of not dressing up and using facial makeup and appearing before men. The jurists say that mourning is obligatory for free Muslim women during the waiting period following death (of their husbands). They disagreed in the cases of the other wives, and also regarding the kinds of ‘iddah other than the ‘iddah following death, and also about what the mourning woman is required to abstain from. Abū Ḥanīfah said that there is no mourning for a minor or for a *kitābiyyah*.

In their disagreement about the categories of ‘iddah that involve mourning, Mālik said that there is no mourning, except in the waiting period following death. Abū Ḥanīfah and al-Thawrī said that mourning is obligatory in the waiting period of an irrevocable divorce. Al-Shāfi‘ī preferred it for a divorced woman, but did not make it obligatory.

The mourning woman is disallowed all kinds of adornment that is meant to attract men to women, like wearing jewelry or darkening of the eyes, unless this is not meant as an adornment. She is also not allowed to wear colourful clothes. All of them made an exemption for using kohl (*kuhl*) in the case of necessity, though some of them stipulated that it be in a way that does not amount to an adornment, while others did not make such a stipulation, and yet others permitted its use during the night and not during the day.

On the whole, the opinions of the jurists in things avoided by the mourning woman are quite similar, and they amount to saying that it is anything that draws the attention of men toward them.

Those who made mourning obligatory for the widow, but not a divorced woman, relied upon the literal construction of the case stated in the text, while those who extend the *hukm* to the divorced women did so through reasoning. The reason is that it becomes obvious from the underlying cause of mourning that the purpose is to prevent the attraction of men toward them during the waiting period, nor should they be attracted to them.

23.8. Vow of Continence (Īlā’)

The basis for this subject are the words of the Exalted, “For those who foreswear their wives, there is a period of waiting of four months; then if they change their mind, lo! Allāh is Forgiving, Merciful.” [Qur‘ān
2:226] Ḥala‘ is the swearing of an oath by a man that he will not have intercourse with his wife, either for a period in excess of four months, or for a period of four months, or for an unlimited period, over which there is juristic dispute.

The jurists differed about Ḥala‘ on a number of points. One of these is whether a woman is to be considered as divorced by the person taking the oath after the completion of the period of four months laid down in the text, or whether she is divorced if he abstains from it even after the period of four months—after which he may return to her or divorce her. Another point is whether Ḥala‘ comes into effect with any oath, or only through oaths that are considered permissible by the law (shar‘). If he exercises continence without taking the oath, will he be considered to have taken the oath? Is the person swearing considered to be covered by Ḥala‘ if he specifies the period of four months, or is the period to be in excess of that? And what if he has not specified a period at all? Is the divorce resulting from al-Ḥala‘ revocable or irrevocable? If he refuses to divorce or to return, is the qāḍi to divorce on his behalf? Does Ḥala‘ recur if he divorces her and then takes her back without a new vow of continence in the renewed marriage tie? Is it a condition for retraction by the person taking the vow of continence that he have intercourse with her during the waiting period? If he divorces her after the completion of the period of Ḥala‘, is it binding on her to undergo a waiting period?

23.9. Injurious Assimilation (Zihār)

The sources for (the ahkām of) Zihār are the Book and the sunna. In the Book, it is the words of the Exalted, “Those who put away their wives (by saying they are as their mothers) and afterward would go back on that which they have said, (the penalty) in that case (is) the freeing of a slave before they touch one another. Unto this they are exhorted; and Allāh is informed of what ye do.” [Qur’ān 58:3]

The jurists agreed that if the man says to his wife, ‘You are for me like my mother’s back,’ it amounts to Zihār. They disagreed when he mentions another part of the body, or when he mentions the back of women, other than the mother, who are perpetually prohibited for him. Mālik said it is Zihār, while a group of jurists said that it does not amount to Zihār, except by the employment of the words “back” and “mother.” Abū Hanifah said that it amounts to Zihār by naming any part of the body, which it is prohibited to look at.
The remedy for this statement is expiation. The jurists agreed that the kinds of expiation are three: setting free a slave; fasting for two months; and the feeding of sixty needy persons, in this order of priority. First comes the manumission of a slave; if he cannot afford it then fasting (is obligatory), and if he cannot sustain it then the feeding of needy persons.

23.10. Imprecation (Li‘ān)

The source for the legitimacy of li‘ān in the Book are the words of the Exalted, “As for those who accuse their wives but have no witnesses except themselves; let the testimony of one of them be four testimonies (swearing) by Allāh that he is of those who speak the truth; and yet a fifth, invoking the curse of Allāh on him of those who lie. And it shall avert the punishment from her if she bear witness before Allāh four times that the thing he saith is indeed false, and a fifth (time) that the wrath of Allāh be upon her if he speaketh the truth.” [Qur‘ān 24:6–9]

The complaints that can give rise to li‘ān are of two types: first is the complaint of zinā, and second, the denial of paternity of the foetus. The complaint of zinā may be based upon testimony, that is, he (the husband) alleges that he saw her committing zinā, or it may be a general complaint. If he denies the (paternity of) the foetus, he may also be denying it absolutely or may allege that he did not approach her after she was free of menstruation. These are four simple cases, and all the other complaints are structured upon them.

The descriptions of li‘ān, given by the majority, are almost similar, and there is not much difference, because of the obvious implications of the verse. The husband takes an oath swearing four times by Allāh that he saw her committing unlawful intercourse and the child that she carries is not because of him. In the fifth oath he says that may the curse of Allāh be upon him if he is lying. The woman then swears four times rebutting him (to evade the ḥadd) and swears the fifth invoking the wrath of Allāh (in case she is lying). All this is agreed upon.

If the husband refuses to take the oath, the majority maintain that he is to be subjected to ḥadd. Abū Ḥanīfah said that he is not to be subjected to ḥadd, but is to be confined (imprisoned).

The jurists differed about the consequences of li‘ān on a number of issues. Among these are whether separation becomes obligatory? If it does, when? Does it become obligatory due to li‘ān itself, or through
the decree of the judge? If separation does occur, is it divorce or rescission?

The majority held that separation occurs because of *liʿān*. About the time of separation, Mālik, al-Layth, and a group of jurists said that it comes into effect when both are done with imprecation. Al-Shāfiʿī said that as the husband finishes his imprecation separation comes into effect. Abū Ḥanīfah said that it does not come into effect, except by the decree of the judge, which was also upheld by al-Thawrī and Ahmad. The fourth issue, which arises if we say that separation does arise through *liʿān*, relates to the question whether such separation amounts to a rescission or a divorce? Those who uphold separation (through *liʿān*) differed about this. Mālik and al-Shāfiʿī said that it is rescission, while Abū Ḥanīfah said that it is an irrevocable divorce.

In Pakistan, the procedure for *liʿān* is prescribed in the Zina (Enforcement of Hudood) Ordinance, 1979. This procedure conforms with what is described above.
Chapter 24

Inheritance, Bequests and Trusts

24.1. **Inheritance**

There are seven classes of heirs according to the Sunni Hanafi law. Three of these are the primary classes, while the remaining four are the secondary classes. The primary classes are:

1. The *ašhāb al-farā‘īd* whose shares have been specified in the Qur’an. The term was translated by William Jones (the translator of the *Sirājīyah*) as “sharers” and the term has since persisted.

2. The *aṣabāt* or agnates. They are called residuaries, because they take what is left of the property after the other heirs have been allocated their share.

3. *Dhawū al-arḥām* or the uterine heirs also called distant kindred.

The property of the deceased is first divided among the sharers with fixed shares or the *ašhāb al-farā‘īd*. What is left is then distributed among among the residuaries. If there are no heirs in the first two classes, the property is distributed among the *dhawū‘l-arḥām*.

The secondary classes who inherit by way of exception are:

1. Successor by contract. This pertains to the master inheriting from the slave who has been emancipated by him.
2. The *mawlā* or client.
3. The sole legatee.
4. The treasury (*bayt al-māl*).

24.1.1. The *aṣḥāb al-farāʾīd* or sharers

The sharers are twelve in number; four males and eight females. The males are: father, father’s father howsoever high, half brother by the mother, the husband. The females are: the wife, the daughter, mother, the true grandmother, son’s daughter howsoever low, full sister, consanguine sister, uterine sister. Some of these sharers get a share in any case, while others do not in certain cases. This depends on who else is there to claim a share from the first two classes of the primary category. Under certain circumstances, some of the sharers become residuaries or take both as sharers and residuaries. The shares are given as follows:

1. The husband has one-fourth (1/4) when there is a child or son’s child howsoever low, but he gets one-half (1/2) when there is no child or son’s child.
2. The wife has one-eighths (1/8) when there is a child or son’s child, but she gets one-fourth (1/4) when there is no such child.
3. The mother gets (1/6) when there is a child or son’s child or two or more brothers or sisters. She gets (1/3) when these heirs do not exist. Her share is calculated out of what remains after the wife’s share and or the husband’s share has been allocated.
4. The true grandmother gets one-sixth (1/6) if she is not excluded under ḥajb.
5. The father takes one-sixth (1/6).
6. The grandfather’s share is one-sixth if he is not excluded.
7. The daughter’s share is one-half (1/2) when she is the only child. When there are two or more daughters they share two-thirds (2/3) of the property. Likewise, the son’s daughter takes one-half (1/2) if there are no children and she has no brothers and sisters. She shares two-thirds (2/3) with other sisters if there is no child or son’s son. Her share is one-sixth (1/6) if there is a higher son’s daughter and no son.
8. The sister takes one-half (1/2) when only one and there is no son or son’s son howsoever low, no father, no daughter, son’s daughter or brother. In this situation, if there is another sister or sisters they will share two-thirds (2/3).

9. The consanguine sister takes takes one-half (1/2) when she is only one, their is no son, no consanguine brother or sister. If there are two or more consanguine sisters in the same situation they will equally share two thirds. The consanguine sister will take one-sixth (1/6) when there is one full sister but no son or consanguine brother and so on.

10. The uterine brother (or sister) gets one-sixth when only one and there is no child or son’s son, father or true grandfather. He (or she) will share two-thirds when there is another brother.

24.1.2. The aşabāt or residuaries

Residuaries are classified as follows:

1. **Residuaries in their own right:** These are all the male relations in the chain of whose relationship no female enters. They are of four types:
   
   (a) Parts of the deceased: his son and grandson howsoever low.
   (b) Roots of the deceased: his father and grandfather howsoever high.
   (c) Parts of the father of the deceased: brothers and brother’s sons howsoever low.
   (d) Parts of the grandfather of the deceased: paternal uncles and their sons howsoever low.

2. **Residuaries through another:** Those females who as sharers (described above) are entitled either to one-half (1/2) or share in two-thirds (2/3). They become residuaries through their brothers, i.e., when they share with their brothers. As residuaries they get one share for every two shares of the male with whom they are sharing.

3. **Residuary by joining another:** A female sharer who becomes a residuary because of the existing of another female heir. For example, when there is a sister of the deceased along with his daughter.
24.1.3. The dhawā ’l-arḥām or distant kindred

The dhawā ’l-arḥām (distant kindred) are the disputed class of heirs in Islamic law. No share has been mentioned for them in the Book of Allāh and they are not the residuaries. These, generally, are the sons of daughters, daughters of brothers, sons of sisters, daughters of uncles, and the father’s mother’s son, sons of mother’s brother, father’s sisters, mother’s sisters, and maternal uncles.

Mālik, al-Shāfi‘ī, most of the jurists of different regions, and Zayd ibn al-Thābit from among the Companions maintained that they have no part in the inheritance. All the other Companions, the jurists of Iraq, Kūfah, and Basrāh, and a group of the jurists from the rest of the regions upheld their inheritance. Those who maintained their inheritance, differed about its nature. Abū Ḥanīfah and his disciples maintained their inheritance in the order of the residuaries, while all the others who grant them inheritance do so through the doctrine of substitution tanzīl, that is, to put him in the position of the person through whom he is related to the deceased.

The reliance of Mālik, and of those who adopted his opinion, is on the fact that as analogy has no operation in inheritance, the principle is that nothing should be established in it unless it is found in the Book or the established sunnah, and these sources are absent in this issue. The other group believed that their evidence is in the Book, the sunnah, and analogy. In the Book it is the words of the Exalted, “And those who are akin (ālā l-arḥām) are nearer one to another in the ordinance of Allāh,” [Qur’ān 33:6] and “Unto the men (of a family) belongeth a share of that which parents and near kindred leave, and unto the women a share of that which parents and near kindred leave, whether it be little or much—a legal share.” [Qur’ān 4:7] The term al-qarābah, they say, applies to dhawā ’l-arḥām. The opponents are of the view that these verses are limited by the verses of inheritance.

24.1.4. The doctrine of ḥajb or exclusion

As stated above, some heirs mentioned above are excluded from inheritance when other heirs are present. This does not apply to the son, the father, the husband, the daughter, the mother and the wife, ie, they cannot be totally excluded. The existence of children, however, does reduce the prescribed share some of them are entitled to. In other words, partial exclusion may apply to them. The doctrine of exclusion is based on the following rules:
1. An heir related to the deceased through a third person is excluded when the third person is himself present. Thus, the father excludes the grandfather.

2. The nearer in blood excludes the rest. A germane brother excludes the consanguine brother or sister.

24.2. **Wāṣiyyah (Bequest)**

*Wāṣiyyah* generally, is the gift by a man to another or to several, after his death, or is manumission of a slave. It is *ja‘iz* (revocable) by agreement of the jurists, i.e., the testator has the right to retract what he has bequeathed, except in the case of the *mudabbar* (slave declared to be free at his master’s death). It does not become due to the legatee, except after the death of the testator. The acceptance by the legatee is not a condition according to most, except Mālik, who compared it to *hiba* (gift).

*Wāṣiyyah* or bequest has four elements: *mūṣī* (testator), *mūṣa lahu* (legatee), *mūṣa bihi* (bequeathed property), and *wāṣiyyah* (testament or will).

The jurists agreed that the testator could be any owner with a legally valid ownership. According to Mālik the bequest of a *safīh* (prodigal) or of a minor approaching majority is valid. Abū Ḥanīfah said that the bequest of a minor (*ṣābī*), who has not attained puberty, is not allowed. Both opinions are related from al-Shāfi‘ī.

In the case of the legatee, they agreed that a bequest is not valid for an heir, due to the words of the Prophet (p.b.u.h.), “No bequest for an heir.” They differed whether it is valid for other than the close relations (*qarābāh*)? The majority of the jurists said that it is valid for other than the close relatives, but is considered reprehensible.

They agreed that a bequest is not permitted for an heir, if the other heirs do not give their consent. They disagreed as we have said when the heirs agreed. The majority said it is permitted, while the Ahl al-Ẓāhir and al-Muṭanāṣr said it is not permitted. The reason for the disagreement is whether the prohibition relates to the underlying cause of (the right of) heirs or of non-rational (revealed) guidance? Those who maintained that it is revealed guidance said that it is not permitted even if the heirs permit it. Those who prohibited it due to the right of the heirs said that it is permitted when the heirs grant permission. The wavering on this issue refers to the vacillation about the meaning of the words of the Prophet (p.b.u.h.), “No bequest for an heir,” whether they have an underlying meaning (cause) or are to be accepted as
revealed teaching without the need for rationalization?

The jurists agreed about the permissibility of the bequest of the corpus, but disagreed about usufruct. The majority said it is permitted. Ibn Abī Laylā, Ibn Shubramah, and the Ahl al-Ẓāhir said that a bequest of the usufruct is void. The argument of the majority was that usufruct carries the meaning of wealth. The argument of the other group was that the usufruct stands transferred to the heir and the deceased now has no ownership, thus, a bequest of what lies in the ownership of another is not permitted to him (the testator).

Regarding the amount (extent), the jurists agreed that a bequest is not valid for more than a third of the estate in the case of the person who has heirs. They disagreed about the person who has not left heirs, and also about the extent whether it is a third or less than it? All of them adopted the opinion that a bequest is not permitted for more than a third for one who has heirs according to what is established from the Prophet (p.b.u.h.), ”that he visited Sa’d ibn Abī Waqqāṣ and he said to him, ‘O Messenger of Allāh, my ailment has overcome me as you can see and I have wealth, but no one inherits me except a daughter that I have. Do I, then, bequeath two-thirds of my wealth?’ The Messenger of Allāh (p.b.u.h.) said, ‘No!’ Sa’d said to him, ‘Half?’ He said, ‘No!!’ The Messenger of Allāh (p.b.u.h.), then said, ‘A third, a third is (more than) enough. If you leave your heirs rich, it is better than leaving them indigent, dependent on people.” The jurists, due to this tradition, adopted the opinion that a bequest should not exceed a third.

24.3. Gift (Hibah)

The meaning of hibah or gift is to be understood in terms of the meaning of contract in Islamic law as well as the concept of māl and property described earlier (see section 15). A gift is a unilateral declaration, therefore, it falls within the meaning of ʾiltizām and not ‘aqd. Further, a gift is a gift of the corpus. Gifts of the usufruct are those that are deferred, and they are called ʿāriyah (see below) or a grant or what resembles them. Among them are those in which the stipulation is the duration of the lifetime of the donee and these are called al-umrā, like a person gifting to another residence in a house for his lifetime. The jurists disagreed about this into three opinions. First, that this is a definitive gift, that is, it is the gift of the corpus. This was the opinion of al-Shāfiʿī, Abū Hanīfah, al-Thawrī, Aḥmad, and a group. The second opinion is that the only thing in it that is for life is the utility, if he dies the corpus reverts to the donor or
to his heirs. This was Mālik’s opinion and that of his disciples. In case he stipulates succession, according to Mālik, it reverts to the donor or his heirs when the succession terminates. The third opinion is when he says that this is for you and your successors, the corpus passes to the ownership of the donee, but if he does not mention successors the corpus reverts on the death of the donee to the donor or his heirs. This is the opinion of Dāwūd and Abū Thawr.

Gift has three elements: the wāhib (donor), mawḥūb lahu (donee), and hibah (gift). The jurists agreed about the donor that his gift is valid if he is the owner of the donated property through a legally valid ownership, is in good health, possesses legal capacity, and has a valid power of disposal. They disagreed in the cases of (death) illness, prodigality, and insolvency. In the case of fatal illness, the majority said that it is valid up to the extent of a third (of his property) on the basis of its similarity to waṣīyah (bequest), that is, the gift in which all conditions are fulfilled.

The property that may be donated is anything that legitimately comes into a person’s ownership. The jurists agreed that a man has the right to donate his entire wealth to a stranger, but they disagreed about a person preferring some of his children over others or in donating all his wealth to some of them to the exclusion of others. The majority of the jurists of different regions held this to abominable for him, but if it takes place, it is valid. The Zāhirites said that no preference is permitted, not to speak of his donating all his wealth to some of them. Mālik said that preference is allowed, but he may not donate his entire wealth to some of them to the exclusion of others.

They disagreed in this topic about the permissibility of gifting a share in an undivided common property (mushā’). Mālik, al-Shāfi‘ī, Aḥmad, and Abū Thawr said it is valid. Abū Ḥanīfah said it is not valid. The reliance of the former group is on the fact that possession in hibah is as valid as possession in sale. Abū Ḥanīfah’s argument is that possession in it is not valid, unless it is separated as in the case of rahn.

There is no disagreement in the school (Mālik’s) about the permissibility of donating an undetermined thing or a nonexistent thing that is likely to come into existence. On the whole, each thing whose sale is valid in the law (shar‘) with the existence of gharar (can be gifted). Al-Shāfi‘ī said that all things whose sale is allowed, their donation is allowed, as in the case of a debt, and a thing whose sale is not allowed, its donation is not allowed. According to al-Shāfi‘ī, anything whose possession is not allowed, its donation is not allowed, as in debts and rahn.

Offer and acceptance is necessary in a gift, according to all. Among the conditions for the donee is
that he must be one whose acceptance and possession is valid. The jurists, however, disagreed whether possession is a condition for the validity of the contract? Al-Thawrī, al-Shāfi‘ī and Abū Ḥanīfah agreed that possession is among the conditions of validity of hibah and as long as he (the donee) has not taken possession, it does not become binding on the donor. Mālik said that the contract is concluded with acceptance and he is to be compelled to take possession as in sale. Possession, according to Mālik, is a condition of completion of hibah and not a condition of its validity, while it is a condition of validity according to al-Shāfi‘ī and Abū Ḥanīfah. Aḥmad and Abū Thawr said a gift is valid through the contract and possession is not one of its essential conditions, neither of completion nor of validity, which is also the opinion of the Zāhirites. An opinion, however, is related from Aḥmad ibn Ḥanbal that possession is a condition in things measured and weighed.

According to the Ḥanfīs, a gift may be revoked under certain circumstances. In Mālik’s view, a gift made to a son may be revoked by the father if the son has not married or has not raised debts.

24.4. ‘Ariyah (commodity loan) and qard (cash loan)

The words ‘āriyah and qard must be considered together. ‘Āriyah is the charitable act of lending commodities for use when the commodity lent is not itself consumed by such use. Thus, the original property must be returned after use. Qard is the lending of something that is consumed with use. Such things are called fungibles and they are paid back through substitute, like the return of a kilogram of wheat of a certain quality or the return of 10 dinars borrowed. In the first case, the ownership in the original commodity does not pass on the borrower. In the second case, on the other hand, as the property cannot be used without consumption, the ownership in the original commodity continues to remain with the owner.

‘Āirah and qard are benevolent acts that are recommended. A group from among the earliest ancestors emphasized it vigorously. It is related from ‘Abd Allāh ibn ‘Abbās and ‘Abd Allāh ibn Mas‘ūd, both saying about the words of the Exalted, “yamna‘ūn al-mā‘ūn,” that these are utensils in the house that people exchange among themselves, like hatchets, buckets, ropes, pots and what is similar to them. There is no other condition for the mu‘īr (lender) other than that he should be the owner of the thing lent (‘āriyah), either its corpus or its usufruct. The preferred view is that it is not proper on the part of the borrower, that is, to lend it further.
Commodate loans are granted in houses, land, animals, and in anything that can be identified by its substance as long as it has a permissible utility. It is, therefore, not permitted to allow the lending of slave-girls for sexual gratification, and borrowing of a woman’s services are considered abominable, unless the person is a consanguine relation (maḥram).

Qard, which is in fungibles and includes cash loans, is permitted as an exemption from the general rules of ribā and ṣarf (see sections 18.5 and 18.4) for charitable purposes.

24.5. Waqf (Charitable Trust)

A waqf is not a juristic person in Islamic law, as has been incorrectly assumed by many. A waqf in fiqh has the following essential characteristics:

1. The waqf is the “arresting” or “suspension” of property. This is called ḥabs al-‘ayn ‘alā milk al-wāqif or the suspension of the property within the ownership of the person making the waqf. This is Abū Ḥanīfah’s opinion. According to his two disciples, it is the suspension of the property by assigning to it the ḥukm of the ownership of Allah. In both cases, the suspension or arrest means that the property “cannot be sold or gifted or inherited” and this is a fundamental rule for the waqf.

2. The revenue or yield of the property declared as waqf goes to the beneficiaries for whom the waqf has been made, and the ‘ayn is assigned the status of a bonded slave or a servant of the beneficiaries, a slave who merely serves and who cannot be sold. Thus, when the property of the waqf requires expenses for repairs, the expenditure is incurred from the revenue (ghallah) and is assumed to be equivalent to the “subsistence allowance of the slave,” because the rule is that entitlement to profit or revenue is based upon a corresponding liability for bearing loss.

3. When the status of the waqf is that of a servant or slave for the poor beneficiaries of the waqf, who are entitled to its services or revenue, the nāẓir is granted the right to purchase on credit what he needs for the maintenance of the property of the waqf. If he does so, he alone is liable for the payment, and he alone will be sued for it, as he is the one who made the contract. This does not mean that the nāẓir becomes liable in the sense of the principle of liability. He is merely acting on
behalf of the beneficiaries, who are ultimately liable for such expenses. He, therefore, has recourse to the wealth of those who are benefiting from the revenue, and the most accessible wealth is the ghallah. In case the nāżir wishes to relinquish his post, while still owing payments for the repairs to the creditors, he is to transfer the debt to the new nāżir by means of assignment (ḥawālah). All these transactions have nothing to do with the suspended property itself, which is the waqf.

The purpose of the waqf is to enable the the wāqif to attain spiritual advancement, but the motive is not to be questioned and the waqf is valid without it. The donor has great flexibility in determining the purpose of the waqf, ie, the purpose for which the revenue of the property will be used. The Ḥanafīs even permit a waqf for the descendants of the donor’s family. This is called waqf ‘alā al-awlād.
Part VI

The Islamic State and Public Law
Chapter 25

The Islamic State and its Duties

The primary question for Islamic constitutional law is whether the period of the Prophet (p.b.u.h.) and that of the first four Khalīfahs, may Allah be pleased with them, be considered an Islamic state? Most modern jurists not only consider this period as one in which a state was established, but also consider it a model to be followed. Ibn Taymiyah faced with some legal issues in his time considered otherwise. He did not consider the period of the first four Khalīfahs as a state, but as a continuation of the Prophet’s mission. The Muslim state, in his view, came into being after this period. To understand this problem, we have to look into a few details of Islamic constitutional history.

25.1. Single state and multiple states

The Islamic state existed under a single Khalīfah for a long time. Later, in some areas sūlṭāns or amīrs started assuming power in different regions within the caliphate. Were these sultanates new and independent Islamic states? Were they under the authority of the Khalīfah? What was their authority and their relationship with the Khalīfah? The issue of single and multiple Islamic states turns on these questions.

A study of the Islamic political system and constitutional law shows that most of the ideas expressed by jurists and early thinkers appear to converge in the life and thought of Ibn Taymiyah. It would be instructive to narrate some of the efforts made by this great jurist. Identifying his mission in the evolution
of Muslim political thought, he tried to forge a union, with necessary amendments, between the views of the jurists, the literary works of the administrators, and the ideas of the falāsifah (philosophers). The political thought that had crystallized and matured up to the time of Ibn Taymiyyah is generally considered as three separate genres, or as three separate formulations of the theory of state: the juristic theory, the theory of philosophers, and the literary theory.¹ All these theories “set forth the divine nature of ultimate sovereignty and presuppose the existence of state within which the earthly life of the community runs its course and whose function is to guarantee the maintenance of Islam, the application of sharī’a, and the defence of orthodoxy against heresy.”² All three formulations tend to concentrate on the position of the ruler,³ but the juristic theory, which was developed gradually by the Ash‘arite school, was occupied with the historical continuity of the ummah; it considered the sharī’ah as supreme and upheld the khilāfah as the symbol of this supremacy.⁴ According to Gibb, the theory collapsed trying to legitimize the usurpation of power by the sultans and the amīrs.⁵ Al-Mawardī and al-Ghazālī both tried to justify the necessity of the universal caliphate and at the same time made concessions to the warlords. This was the beginning of the collapse of the theory. Al-Ghazālī had recognized that in his time government was a consequence solely of military power and whosoever had the allegiance of the holder of military power became the caliph.⁶ While al-Ghazālī included the sultanate as a necessary element in the universal caliphate, by the time of Ibn Taymiyyah, his contemporary Ibn Jamā‘ah went further and accepted the possibility of the absorption

¹ Ann Lambton describing these says: “Broadly speaking three main formulations can be distinguished; the theory of the jurists, the theory of the philosophers and the literary theory, in which I would include primarily mirrors for princes, but also the expositions of the administrators, since these are put forward mainly in literary works, and the scattered observations of historians on the theory of state.” Lambton, State and Government, xvi.

² Ibid. xvi (emphasis added).

³ Ibid. xvi. Cf. Rosenthal, Role of State, 23: “There is a first group of writings known as “Mirrors for Princes” which aim at the ruler, not at the state, and tend to give good advice.” He appears to imply that the other theories concentrate on the state, or khilāfah.


⁵ Ibid. 141, 164. “By this he appears to mean that the theory failed to make any credible assertion about a particular person having a right to rule.” W. Montgomery Watt, Islamic Political Thought (Edinburgh, 1981) 102.

of the caliphate itself into the sultanate. “[T]he element of coercive power had, as it were, swallowed up the primary element in al-Ghazālī’s caliphate, the \textit{imām}.”\textsuperscript{7}

Ibn Jamā’ah was writing after the extinction of the caliphate, when the earlier juristic theory had lost all meaning, but he made his proposal in complete disregard of some of the legal issues involved. For Ibn Taymiyyah the absorption of the caliphate was not a simple problem; it faced a legal obstacle. A rule had existed in law that all acts of the community derived their legal validity through the delegation of authority by the \textit{imām} and needed his overall supervision and approval. This authority had been derived from the Prophet, whose successor (\textit{khalīfah}) the \textit{imām} was. This rule is best expressed in the words of al-Ghazālī, who points out that the absence of the \textit{imām} (or \textit{khalīfah}) would nullify all acts of the community and involve them in sin. Discussing the consequences of the absence of the \textit{imām}, he says: “The judges are suspended, the \textit{wilāyāt} (authorities) are nullified, marriages are void, the decrees of those in authority cannot be executed, and all human beings are on the verge of \textit{harām}.”\textsuperscript{8} This idea also underlies the obligatory nature of the \textit{imāmah} and gives meaning to the historical continuity of the \textit{khilāfah}. It explains why the jurists, before Ibn Taymiyyah, clung to the concept of \textit{khilāfah}, even though in practice it had ceased to have any significance. This rule was demolished by the Mongols, when they put the Baghdad caliphate to the sword.

The foregoing description may be analysed into the following points:

1. Most of the jurists and philosophers upheld the idea of a single state known as the \textit{khilāfah}.
2. The \textit{khalīfah}, as the representative of the Prophet (p.b.u.h.) and of the first four \textit{khalīfas}, was the only person who had legitimate authority to rule and delegate such authority.
3. When in practice the \textit{khalīfah} lost power and the sultans started becoming more powerful, the jurists tried to justify the rule of the sultans so that the \textit{khalīfah} would recognize them and legalize their rule. When he did this the sultans would rule under the authority of the \textit{khalīfah} and delegation of powers would become legally valid. Jurists like al-Ghazālī maintained that if this was not done, all transactions within the authority of the sultan would become unlawful, even the marriages concluded would be void, and the people would be living in sin.

\textsuperscript{7}Lambton, 139, 141.
\textsuperscript{8}Al-Ghazālī, \textit{al-Iqtisād}, 240.
4. Ultimately, the *khilāfah* became very weak and the sultans gained more power. The sultans no longer felt the need for the legitimization of their rule. In other words, more than one Muslim state had come into existence.

5. The question was: what constitutional arrangement was to govern this new situation?

6. If the Islamic state was assumed to exist from the start, then, the logical conclusion would be that there must be a single state under the *khalifah*.

After the practical destruction of the *khilāfah*, Ibn Taymīyah set himself the task of demolishing its theoretical remnants. To do so, he did not “presuppose the existence of a state” from the earliest times. He went back to the period of the Prophet and denied that the state as implied by the concept of *khilāfah* had ever been established by the Prophet. He declared that the period of the Prophet could not be described as anything but *nubūwwah*. The Prophet’s authority arose from his function as a Prophet and not as the head of a state. Once this point was established, Ibn Taymīyah proceeded to separate the period of the first four caliphs from that of the Umayyads, calling the former as *khilāfat al-nubūwwah* and the latter as *mulk*. He saw the *khilāfat al-nubūwwah* not as a state, but as an overflowing of the task begun by the Prophet. This task could only be handled by those who were inspired by a very close contact with the Prophet. The *khilāfat al-nubūwwah* being inspired could not be passed on in succession or even imitated. The only thing that could be passed on was the principle of the supremacy of the *sharī'ah*. This principle could work efficiently whoever the ruler or rulers, one or more.

This is the crux of the matter. By detaching this principle from its symbol, the *khilāfah*, Ibn Taymīyah provided the legal foundation for a multiplicity of states. Thus, with the idea of the supremacy of *sharī'ah* and its legal implications, the view that the validity of all transactions depended on the universal caliphate appeared to be a fiction.

After detaching the principle of the supremacy of *sharī'ah* from the concept of *khilāfah*, Ibn Taymīyah started building up his theory of *imāmah*, by amending the existing juristic theory and by incorporating elements from the literary theory and the theory of the philosophers. In doing so, Ibn Taymīyah appears to be highly conscious of the separation between theory and practice in matters of law and the administration.

9 Today, however, we hear speakers and scholars saying that this is exactly the period that should be imitated.
of justice. His general program, the *siyāsah sharʿiyah*, a powerful exposition of his views on the *imāmah* should, therefore, be considered a uniform whole designed to subject all aspects of human life to the dictates of the *shariʿah*. He conceived of not one, but a multiplicity of states, and talked in his *al-Siyāsah al-Sharʿiyah* in terms of rulers rather than one ruler. With the removal of the limitations imposed by the universal caliphate, such a notion did not pose any problems for him. He retained the principle of *shawkah* (coercive power) as it had been developed by al-Ghazālī, along with the concept of *mubāyaʿah*. Al-Ghazālī had explained that the purpose of *shawkah* was to gauge public opinion as a large number of divergent opinions were gathered in one person possessing *shawkah* by virtue of his following. He says in his *al-Iqtisād*: “The purpose is that a large number of divergent opinions be gathered in one person commanding obedience, and the *imām* comes to command obedience . . . through the *mubāyaʿah* of this person.” Ibn Taymiyyah also turned down the idea of the *imām* being from the tribe of *Quraysh*, considering it as valid only for the period immediately following the death of the Prophet for purposes of the continuation of the Prophet’s mission.

As for the relationship that exists between the ruler and the subjects, it is not only that of principal and agent (*wakil*), but the *imām* is also the *walī* (guardian) and *sharīk* (partner) of his subjects.

On the whole, Ibn Taymiyyah realized the importance of “*siyāsah*” literature as a separate field. This realization is found in al-Ghazālī before him. While al-Ghazālī had kept his writings separate, Ibn Taymiyyah merged the “*siyāsah*” and the *shariʿah* elements to compose his *al-Siyāsah al-Sharʿiyah*, apparently in the attempt to reduce the gap between theory and practice. This treatise has much in common with the *siyāsatinmāmahs* of the administrators and other kindred literature.

Ibn Taymiyyah’s theory solves the problem of multiplicity of states. It does create another problem, however, and that is the imitation of the earlier rule of the first four *khalīfahs* in the present times as a model. If that period was not a state, but a continuation of the Prophet’s mission, it cannot be imitated according to Ibn Taymiyyah.

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10 This principle can easily be translated into its modern democratic form where the method of gauging “divergent opinions” is not *shawkah*, but universal suffrage.
25.2. The duties of the rulers in an Islamic state

The main idea that emerges from the efforts of Ibn Taymīyah, as discussed by various scholars, is that of the supremacy of the *shari‘ah* in a multiplicity of Muslim states. This principle was also upheld by the Ash‘arites. Once the supremacy of the *shari‘ah* is conceded as a basic principle, it becomes a simple matter to assess what such supremacy entails. To our mind, the supremacy of the *shari‘ah* means the total implementation of the purposes of the *shari‘ah* by each Muslim community. This would imply in turn that the form of government adopted by each community, though important in itself, does not affect this fundamental rule. Each community must maintain the supremacy of the *shari‘ah*. This supremacy will itself ensure that justice is maintained and the rights of each individual or group are secured through the due process of the law.

The duties of the ruler or the state under such a system are governed by the *maqāşid al-shari‘ah*. When we talk about the purposes of Islamic law in this context, we mean the positive aspect discussed earlier (see section 12.6.2) The following duties can be readily seen:

1. Each Muslim community must establish *dīn* in accordance with the first purpose of the law.

2. It must ensure the safety and welfare of all human beings under its governance. This is done by providing all means of sustenance and shelter in accordance with the second purpose of the *shari‘ah*.

3. The state must establish conditions for a sound family system in accordance with the dictates of the *shari‘ah* and the requirements of the third objective.

4. It is the duty of the state to provide conditions for the growth of healthy minds. The only way this can be done is by providing freedom of expression and a sound and universal education. This is how the fourth objective will be attained.

5. Finally, the state must also ensure the economic well being of the community as a whole. In addition to this, the wealth of the community is to be used to implement the first four goals.

All these duties must be accomplished in the listed order of priority, as required by the structure of the *maqāşid*. 
25.3. *Amr bī al-Ma‘rūf wa Nahy ‘an al-Munkar*

The word *ma‘rūf* means what is good in the literal sense, while *munkar* means what is bad. Technically, *ma‘rūf* is what conforms with the *sharī’ī* norms, while *munkar* is what does not conform with or what is against these norms. According to Ibn Rushd, the meaning of these terms and how they fit into the whole system is as follows:

It is necessary, before this, to know that the legal *sunan* (practices) pertaining to conduct have as their purpose the virtues of the believer. Some of them refer to respect, to whom it is due, and to the expression of gratitude, to whom that is due. The ‘*ibādāt* are included in this category. These are the *sunan* relating to ethical values. Some of the *sunan* relate to the virtue called ‘*iffah* (chastity, abstinence from undignified habits), and are of two kinds: *sunan* laid down about food and beverages, and *sunan* laid down about marital affairs. Some *sunan* refer to the requirement of justice and abstention from tyranny. These are the categories of *sunan* that require the maintenance of a balance in financial dealings, and the maintenance of a balance in personal relations (physical contact). Related to this category are (the *ahkām* of) *qiṣāṣ*, wars, and punishments, as the maintenance of justice is the aim of all of these. Among them are *sunan* laid down for individual integrity, and *sunan* laid down for all kinds of wealth and its valuation, through which is intended the attainment of the merit called generosity, and the avoidance of the meanness called *bukhl* (covetousness). *Zakāt* is included in this category from one aspect, and is included in the communal sharing of wealth from another; same is the case with charity (*sadaqāt*). There are *sunan* laid down for social life, which is the essential condition for human life, and the preservation of its benefits relating to conduct and knowledge, which are called statehood. It is for this reason that these *sunan* should be upheld by the leaders and the upholders of the *Dīn*. Among the important *sunan* for social life are those related to love and hate, and to cooperation for the maintenance of all these *sunan*, which is called al-nahy ‘an al-munkar, wa’l-amr bī‘l-ma‘rūf (prohibiting the blameworthy and requiring what is good), and which is love and hate, that is religious, which occurs either due to the evasion of these *sunan* or due to the evil intent of the believer in the *sharī’ah*. Most of what the jurists mention in the *Jawāmi‘*, among their books, is that which deviates from the...
four categories that are the merit of chastity, the merit of justice, the merit of courage, and the merit of generosity, and all kinds of worship (‘ibāda) are like conditions for the fulfilment of these merits.

Traditionally, enforcing the general morality or amr bi al-ma’rūf was a task that was assigned to the muḥtasib. Amr bi al-ma’rūf, in general, includes the following:

1. **What relates to the pure right of Allah:** To prevent the giving up of religious functions by the community as a whole, like the giving up of adhān by a community, the giving up of congregational prayers by the community as a whole, the giving up of fasting as a whole.

2. **What relates to individual rights:** To ensure the provision of public utilities to the members of the community and to ensure their smooth functioning by supporting such provision through the resources of the treasury.

3. **What relates to mixed rights:** To ensure the marriages of orphans and making other provisions for them; to ensure that women observe ‘iddah when required by law to do so; to ensure that the guardians perform their duties towards their wards, orphans, women and children.

As compared to this nahy ‘an al-munkar includes the following:

1. **What pertains to the rights of Allah:**
   
   (a) To ensure that the requirements of prayer in mosques are not violated, like provisions for the performance of ablution, as well as to ensure that other etiquettes of prayer are observed.
   
   (b) To deter the violation of Ramadān in public places, that is, when there is no legal excuse like journey or illness.
   
   (c) To ensure the payment of zakāt by one who is under an obligation to pay.
   
   (d) To prevent begging in streets.
   
   (e) To prevent incompetent persons from issuing legal rulings for the people.
2. **Market transactions:** To prevent transactions in *ribā* as well as other unlawful transactions; to prevent the violation of standard weights and measures; to prevent deception and misrepresentation in dealings; to prevent encroachments on streets and in markets.

3. **Rights of individuals:** To prevent the violation of the privacy of homes; to prevent the unnecessary prolonging of prayers by imams in mosques insofar as it affects the old and the weak.

25.4. **The Islamic state and democracy**

The duties of the rulers or the government aside, the major question that is faced in such a discussion is whether democracy is upheld by Islamic law as a means of good governance. In the author’s view, it is the preferred form that is advocated by Muslim jurists. The *imām* is always considered to be the agent (*wakīl*) of each citizen. The contract of *bay‘ah* is only a form of voting. The principle of *shawkah* was only a means of assessing the number of supporters a leader would have. This is clearly indicated by al-Ghazālī above. He says: “The purpose is that a large number of divergent opinions be gathered in one person commanding obedience, and the *imām* comes to command obedience . . . through the *mubāya‘ah* of this person.”

Today, it is up to the Muslims to implement the best system that can measure “a large number of divergent opinions.” For the present, democracy seems to be the only system that best conforms with this. A democratic government must guarantee the implementation of the purposes of the *sharī‘ah*, and consider this to be its primary duty. The basic rights of the citizens must flow from the *maqāṣid*.

25.5. **The Islamic state and the economic system**

The economic system within a state is usually a reflection of the priorities determined by a nation for itself. In an Islamic state, the priorities of the economic system are determined by the *maqāṣid*. The preservation of wealth, as we have seen above, is a purpose with the lowest relative priority. This does not imply that it has the least importance. The economic sub-system within the larger system represented by the Muslim community is required to serve the interests determined by the first four purposes of the *sharī‘ah*. Thus,

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the economy must be geared to meet the requirements of din as well as jihad. The second priority goes to life and the means of livelihood. The economic system must ensure that there is no one homeless or hungry within the community. After handling this, the next priority for this subsystem is to provide the basic means for pursuing a healthy family life. This will be followed by education and the development of the intellect. Once these needs have been met, the economy will pursue the goal of increasing wealth itself. This goal will be subject to the constraints placed by the sharī'ah as regards ribā and speculation in essential commodities. If the Muslims think today that a free market would attain this sub-goal, then, there appears to be no harm in it, as long as the first four goals have been met.

The real problem for the economic subsystem, and for Islamic economics as a discipline, is to identify in the light of the maqāṣid what kind of distributive justice is advocated by Islam. The measures advocated by modern scholars are somewhat vague. An indication of the kind of distributive justice prevailing in a community is the way it allocates and distributes social goods among its members. This in turn depends on the history and cultural heritage of the community from where the common and shared ideals of this community are derived. The Muslim community has its own ideals and is, therefore, distinct from other communities. These ideals are represented by the maqāṣid al-sharī'ah, which provide uniform norms to be pursued by the political, legal, and economic subsystems. An attempt to implant the ideals of another culture on to this community is likely to be hazardous and may even thwart its progress, because of the confusion this might cause. This is what is being witnessed all over the Muslim world today, as Muslim communities vacillate between Western principles of distribution and the shared ideals that have been handed to them by history. Before Muslim communities can revert to the shared ideals of their members, these ideals need to be translated, once again, into principles that would work in the modern age. Muslim economists appear to be occupied with this task, as most of their discussions pertain to issues of distributive justice.

When we examine the priorities in certain Western countries as a whole, especially in countries like the United States of America, we get the impression that the priorities may be entirely reversed as compared to those for the maqāṣid. Consider, for example, the statement: What is good for General Motors is good for the United States. This would imply that the preservation and protection of wealth has the highest priority in the United States. Consider the preservation and protection of 'aql. This is a lower category in the Islamic system, but it could be a higher category in the United States when viewed in terms of...
freedom of expression.
Chapter 26

Crimes and Torts

The distinction between torts and crimes is somewhat blurred in Islamic law. Many of the acts classified as offences under the law of bodily injuries can be designated as torts, especially those in which compensatory damages is the only remedy. Today, the real distinction would be based on whether the proceedings that follow the act are criminal or civil.

The word *jarīmah* is usually considered similar to the word offence, while crimes of a more serious nature are referred to as *jināyāt* (singular *jināyah*). Some of the *jināyat* today would be classified as torts. Petty offences are denoted by the use of the word *ma‘siyāh*. The emphasis in the words *ḥadd* and *ta‘zīr*, on the other hand, is more on the penalty provided rather than on the inherent nature of the act.

There are a number of rights that may be affected by a criminal act. These are the rights of Allah, as in most *ḥudūd*, the rights of Allah mixed up with the rights of individuals as in *qisāṣ* and *qadhf*, and rights involved in *ta‘zīr* and *siyāsah* offences. Ḥanafī jurists maintain that *ta‘zīr* offences affect the rights of individuals, but this may mean the rights of individuals collectively, which is what we mean by public rights. *Siyāsah* offences are considered to affect the right of the *imām* or the state and these again are public rights. In modern times the distinction between *ta‘zīr* and *siyāsah* offences has been ignored, and both are referred to as *ta‘zīr* offences. On the whole, we may assume that a crime, in Islamic law, affects public rights. Even when the right is purely the right of Allah, as in *ḥudūd*, the responsibility rests on the state, because state owes the right to Allah to implement the *ḥudūd*. 
On the whole, the characteristics of offences pertaining to life and bodily injuries are akin to torts. This may be the reason why such offences are classified as *jināyāt* by the Ḥanafi jurists. As already indicated, the term *jināyah* is applied by Ḥanafi jurists to mean homicide and bodily injuries as well as to torts. Al-Sarakhsi says:

Know that the term *jināyah* (جنایة) [delict] is used for an act that is forbidden by the law irrespective of its being directed at property or life, but in the jargon of the fuqahā’ the term *jināyah* is applied to an act directed against life and limbs. They designated the act against property by the term *qhasb* (غصب) when the general usage is different from it. ¹

This shows that some of the torts would be designated as *jināyāt*, while torts against property would fall under *qhasb*. It is to be noted, however, that the term *qhasb* includes certain acts that are pure crimes, for example, abduction and even rape after abduction, but this pertained to slave girls who were considered property.

26.1. The aims of the criminal law

The aims of Islamic criminal law are understood in terms of the protection of interests outlined earlier (see section 12.6.2), however, in terms of the theories of punishment no single purpose can sufficiently explain its multifarious aims. Islamic law views retribution, deterrence and rehabilitation as objectives of different penal programmes. Thus, punishment must involve working with the offender in such a manner that he can be reassimilated into the community. Simultaneously, the criminal must be treated in a way so as to effectively mitigate the demand for retribution. Further, punishments must serve as deterrents to potential offenders.²


26.2. Classification of Crimes in Islamic Law

Muslim jurists classified crimes on basis of the right violated. These, as stated earlier, were the rights of Allah, the rights of the individual, the rights of Allah mixed with the rights of the individual. The last category was divided into two types depending on whether it was the right of Allah that was predominant or the right of the individual. The classification on the basis of rights is linked directly with procedure. The kind of right violated determines the procedure to be followed in courts. If the right of Allah is violated, the procedure followed is that for ḥudūd and qīṣāṣ. When the right of the individual is violated, the procedure followed is that prescribed for taʿzīr, which maintains the nisāb in evidence of two females for one male. When the right of the state is violated, the procedure followed is that of siyāsah.

26.2.1. Classification on the basis of the right affected: ḥadd, taʿzīr and siyāsah

Jurists like al-Sarakhsi placed ḥudūd penalties, excluding the ḥadd of qadhf in the category of the pure right of Allah. The ḥadd of qadhf is classified as a mixture of the right of Allah and the right of the individual, in which the right of Allah is predominant. The offence of murder liable to qīṣāṣ is classified as a mixture of the right of Allah and the right of the individual, but here it is the right of the individual that is predominant. Taʿzīr and diyah are classified by most Hanafi jurists as belonging to the area of the right of the individual. The fuqahāʾ do not mention the siyāsah penalties, yet we know that the ruler exercised this jurisdiction right from the first century of the Hijrah onwards. The mazālim courts, the institution of the ‘āmil al-sūq, and the institution of the muhtasib belong to this jurisdiction. This was the area of the right of the state. Let us list these areas before proceeding further:

1. The right of Allah: The ḥudūd offences excluding the ḥadd of qadhf.
3. Mixed right—right of the individual predominant: The offence of murder punishable with qīṣāṣ.
4. Right of the individual: Diyāt and taʿzīr. It is to be noted that offences under taʿzīr have a very limited scope in the system devised by the jurists.
5. **Right of the state:** All the offences determined and defined through the *ijtihād* of the ruler, according to a defined methodology, adjudicated through a procedure determined by the state.

This classification makes a great difference in practice. It may also be used to point out the distinction between *ḥadd* and *taʿzīr*.

1. **Commuting the sentence and pardon:** The penalty for an offence against the right of Allah cannot be waived or commuted after apprehension and conviction. However, the penalty for an offence against the right of an individual alone or against the rights of individuals, that is, the right of the state, can be commuted. The important point to be made here is that if the right of Allah and the right of the state (or the right of the community as a whole) were the same thing, the state would not be able to commute any sentence according to the system developed by the jurists, whether awarded as *ḥadd*, *taʿzīr*, or as *siyāsah*. We know very well that the state can pardon any sentence that is not a *ḥadd*. The reason is that sentences other than *ḥadd* are not awarded and applied as a right of Allah.

2. **The operation of *shubhāt* (mistakes) in *ḥudūd*:** *Shubhāt* (lit. doubt) in the right of Allah has the effect of waiving the penalty of *ḥadd*, while it does not have the same effect in *taʿzīr*. *Qiṣāṣ* (retaliation) has been assigned an element of the right of Allah as it is waived due to *shubhāt*. This kind of doubt is not to be confused with the benefit of a doubt that goes to the accused in positive law, which is a doubt in the mind of the judge as to whether the crime has been proved beyond doubt. Islamic law has no objections to this, as proving an offence beyond doubt is a requirement in Islamic law. *Shubhāt* mentioned here exists in the mind of the accused at the time of the commission of the act on the basis of conflicting opinions about the *ḥukm* or because of a particular set of facts. An example of *shubhāt al-mīlkh* is, in the opinion of Mālik, when the offender steals (or takes by way of stealth) the property of the *bayt al-māl* (treasury) under the impression that he is part owner of the property. In law the *shubhāt* are referred to as mistakes: mistake or ignorance of fact and mistake or ignorance of law.

3. **Shubhāt and *taʿzīr*:** All *taʿzīr* is the right of the individual and it is for this reason that *shubhāt*
does not operate in it. This is the claim made by al-Kāsānī. Some jurists, mostly Shāfiʿites,² have said that taʿzīr can also be a right of Allah. This is an inconsistent statement, for taʿzīr as a right of Allah would prevent pardon (ʿafw), which is an acknowledged attribute of taʿzīr.

4. Criminal proceedings and evidence: The evidence of women is not admissible in the right of Allah, that is, in ḥudūd, while it is in the case of taʿzīr, which is the right of the individual, but the niṣāb of one man and two women has to be maintained, as in the case of other rights of the individual. No such restriction is applicable to the right of the state and a single woman can furnish evidence that is admissible in cases falling under siyāsah, just as circumstantial evidence is admissible whenever the ḥaqq al-saltanah is in issue. In other words, the criminal proceedings and requirements of evidence change according to the right involved. In Pakistan today, taʿzīr and siyāsah are both classified under the heading of taʿzīr.

There are other manifestations of this distinction, but these will suffice for the present purposes.

26.2.2. Differences between taʿzīr and siyāsah

Another problem arises, however, with respect to taʿzīr. We have been maintaining that crimes are classified into ḥadd and taʿzīr, with qiṣṣās being associated with ḥadd. The Islamic law of crimes as applied throughout Islamic history appears to present three categories: ḥadd, taʿzīr, and siyāsah. This apparent difference needs to be resolved.

The fuqahāʾ rarely discuss taʿzīr in detail, with the result that it is extremely difficult to determine the exact scope of taʿzīr. Some research has been done on this by scholars, but there is need to be more analytical and to avoid logical inconsistencies. In addition to this, the ruler carried out this function through a policy called the siyāsah sharʿīyah. This may be translated as the “administration of justice according to the sharīʿah.” When such administration conformed with the dictates of the sharīʿah, it was

³ Al-Mawardi is one of the first to have said this. See al-Ahkām al-Saltānīyah, 237. There are some later Ḥanafi jurists too who have maintained that taʿzīr may be a right of Allah or the right of the individual. One such Hanafi jurist is Ibn ʿAbīdīn. He does, however, realize the inconsistency and is forced to say that when taʿzīr is a right of Allah, it cannot be commuted, that is, it will not accept ʿafw (pardon). See Ḥāshiyyah Ibn ʿAbīdīn, vol. 3, 192.
called *siyāsah ‘ādilah* or administration according to justice. If his policy or administration deviated from the norms of *sharī’ah*, it was called *siyāsah zālimah* or tyrannical administration.

According to the writings of the later jurists and their rulings, we can notice two main differences between *ta’zīr* and *siyāsah*:

1. *Ta’zīr* is the right of the individual, while *siyāsah* pertains to the pure right of the state. This means that in *ta’zīr* a private injury has also been caused through the offence. In *siyāsah* the offence is mainly against the public order. It is for this reason that habitual offenders are prosecuted under this right.

2. Accordingly, in *ta’zīr*, because it is the right of the individual, the *nisāb* of witnesses has to be maintained, i.e., two female witnesses for one male witness. This is the same as in commercial transactions, because they pertain to the right of the individual. In *siyāsah* there is no such limitation and the ruler or the state may determine the standards of evidence.

Now some modern scholars conclude that *ta’zīr* can be a right of Allah and a right of the individual, and by right of Allah they mean the right of the state, because they equate the two. They base their opinion on the views of some *fuqahā’*. It is, however, felt that *ta’zīr* should be designated as the right of the individual. This is the practice of the Hanafites and appears to be based on analytical consistency. An example will illustrate why.

If a man steals from the *bayt al-māl* there is no *ḥadd* penalty for him. The reason is based on *shubhāt al-milk*. The *bayt al-māl* is the common property of the Muslims and for purposes of *ḥadd* the offender is considered to have committed a theft from his own property that is jointly owned with the Muslims. *Ḥadd* is waived due to the doubt, actual or legal, in the mind of the offender arising from joint ownership of the property. This person, however, is not allowed to go scot free. He is awarded punishment under the rights of the state, as *shubhāt al-milk* is not operative against these rights, but it is effective in the waiver of punishment in the right of Allah. If *ta’zīr* is declared as a right of Allah, this particular offender will go scot free on the basis of the same *shubhāt*, as the right of Allah is to be waived in such a case, which would defeat the purposes of the law and those of social control. To state it differently, if both *ḥadd* and *ta’zīr* are considered the right of Allah, the doubt or *shubhāt* related to ownership would operate in both.
There is another difficulty involved with the concept of ta‘zīr. In the case of murder or qatl ‘amd the penalty is qisās, but only when the offence is proved through the testimony of two male ‘adl witnesses. If the offence is not proved in a certain case, but there is sufficient circumstantial evidence to convict the offender, will the state try this person under ta‘zīr or under siyāsah? Under ta‘zīr, the system of the fuqahā’ requires two witnesses again, with one male being replaced with two females, that is, almost the same kind of testimony. In siyāsah the standards of testimony are lowered and the case can be proved more easily.

The only solution appears to be to merge the two areas of ta‘zīr and siyāsah with the standards of proof and modes of procedure being determined by the imām. This the Muslims appear to have done already, without taking into account the niṣāb for testimony. The point that needs to be emphasized here is that this area, whatever the name chosen, cannot be designated as a right of Allah, as this would invoke shubhah and its consequences. In this case the right belongs to the state or to the Muslim community. This will avoid logical inconsistencies and help build upon the system erected by the fuqahā’.

26.3. Offences and their penalties

The offences for which specified penalties are provided are called hudūd. Those in which qisās or reparation is provided are called jināyāt. Punishments that are at the discretion of the judge when the offence is related to a private injury are called ta‘zīr. Offences that are mainly directed against the system and society or where the pure right of the state is affected are called siyāsah penalties. Some offences that are corrected by acts of personal penance are called kaffārīt (expiation).

26.3.1. Ḥadd Penalties

Ḥadd is defined as penalty prescribed in the Qur’ān and the Sunnah as a pure right of Allah. Some jurists list seven such offences: zinā (unlawful sexual intercourse); sariqah (theft from a place of safe custody); hirābah (robbery with the force of arms); qadhf (false accusation of unlawful sexual intercourse); shurb

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4 Thus, for example, the Hudūd Ordinances applied in Pakistan do not require the testimony of two male witnesses. An offence classified as ta‘zīr can be proved through the testimony of one witness, even when the witness is a female.
(drinking of intoxicating beverages); *riddah* (apostasy); and *baghy* (rebellion). The last two are omitted by some jurists, who presumably consider apostasy and rebellion to fall under the *siyāsah* jurisdiction of the state. We shall describe the first five.

26.3.1.1. *Zinā* or unlawful sexual intercourse

Unlawful sexual intercourse is considered an offence against the right of Allah. It should not be confused with adultery, which is a Western concept. This offence consists in having sexual intercourse with any person not one’s lawful spouse. In the case of males, Islamic law permits sexual intercourse in the case of *milk yamīn*, i.e., lawfully owned slave girls. It is for this reason that the Ḥanafīs define the offence as: “intercourse without *milk* or *shubhat milk*.” *Milk* arises from a valid marriage or, in the case of males, ownership of a female slave. The *shubhat milk* is a mistake of fact of ownership and arises from an irregular marriage, marriage during *‘iddah*, or in the case of an *umm al-walad* already set free or a slave girl sold but not delivered to the buyer or the slave girl of one’s son or other near relative. In the cases of *shubhah*, the penalty of *ḥadd* is waived and may be replaced with *ta‘zīr*.

The punishment for *zinā* in the case of a *muḥsān* (married or once married) is *rajm* or death by stoning, with the Zāhirī school maintaining that 100 stripes are to be awarded before stoning. The Khārijīs denied the validity of *rajm* as the penalty is not mentioned in the Qur’ān. The punishment for the non-*muḥsān* (never married) is 100 stripes, while exile or imprisonment for a year may be awarded as *ta‘zīr*. The majority of the schools hold exile of one year to be part of the *ḥadd*.

The offence is proved through the testimony of four eligible witnesses who give evidence of the actual act of penetration. In the alternate, the accused must confess four times. The offence cannot be proved by circumstantial evidence, like pregnancy, except in the opinion of Mālik. The action against the perpetrator, especially according to the Ḥanafīs, should not be delayed. Many jurists believe that it is recommended and meritorious for the witnesses or complainants to refrain from bringing charges against the perpetrator so as to protect society from the consequences of publicity and to enable the person to settle the offence privately with Allah. The *Hidāyah*, for example, begins the description of the offence with this recommendation. If this is the recommendation for *ḥadd*, then, it may be argued that *ta‘zīr* for such offences is not justified; there should only be the offence of *ḥadd* along with its conditions of proof. Of course, rape is a different
26.3.1.2. **Qadhf** or false accusation of unlawful sexual intercourse

The meaning of the word *muḥṣan* is different for the offence of *qadhf* and here it means one who is chaste, i.e., he or she has not been convicted for the offence of *zinā*; being married is not a condition. Anyone who is competent and adult, whether male or a female, Muslim or not, slave or free is liable if he falsely charges a chaste person (*muḥṣan*) with unlawful sexual intercourse (*zinā*) or charges one of being illegitimate. Thus, the offence can be committed by making such an accusation against a dead person and in this case the aggrieved persons would be the children.

The punishment of *qadhf* is 80 stripes for a free person and forty for a slave. The offence is proved by confession or testimony of two adult male free Muslims. The defence is possible by producing 4 witnesses who shall testify to *zinā* committed by the complainant or the person accused of *zinā*.

A husband who makes a charge against his wife is also liable to *hadd*, unless he adopts the procedure of *liʿan*. This involves a charge of *zinā* or denial of the paternity of the child by swearing four times by Allah that he is speaking the truth and a fifth time he calls down a curse upon himself if he is lying. The wife can deny such a charge in a similar fashion and her word is given preference.

26.3.1.3. **Shurb** or drinking of wine or intoxicating beverages

There are two separate offences under this head according to the Ḥanafīs: drinking *khamr* (wine) in any quantity, and being intoxicated by another prohibited beverage. As to what is a prohibited beverage is a matter of dispute among the Ḥanafi jurists. The other schools do not make any distinction between the beverages and each intoxicating liquor is designated as *khamr* the consumption of which is punishable whatever the quantity consumed. Actual intoxication thus is not a separate crime according to these schools. The Prohibition Order has preferred the majority opinion and not the Ḥanafi view. There is, thus, a single offence liable to *hadd* under the Order.

The crime is proved by the testimony of two adult male witnesses who should see the accused drinking and should testify while the smell of the drink is on the person of the accused, unless delay is caused due
to unavoidable circumstances. This is the view of the Ḥanafīs except, Muḥammad al-Shaybānī. The other jurists, especially Mālik, allow proof of the offence by intoxication as well as smell.

26.3.1.4. **Sariqah or theft**

The offence of *sariqah* or theft is committed if the offender takes from a place of safe custody (*ḥirz*) by stealth property of the value of one dinar according to the Ḥanafīs and 1/4 dinar according to the majority in which he has neither the right of ownership (*milk*) or semblance of ownership (*shubhat milk*). A basic ingredient of this offence, according to all the schools, is that the property stolen must be owned by someone. The Theft Ordinance implemented in Pakistan drops this condition, apparently to accommodate ownership of juristic persons as the concept of juristic person is not recognized by Islamic law. *Ḥirz* is of two kinds: by itself (*biʾl-makān*) and by a guard or watchman (*biʾl-ḥīfẓ*).

The charge must be brought by the owner unless of course the thief himself confesses. If the thief repents and returns the property he cannot be accused. The offence is proved by the testimony of two persons who should see the thief removing the property from the *ḥirz*. Some jurists do not impose the condition of *ḥirz* nor of the *nisāb*, i.e., the minimum value of one dinar, the Ūrahīs being the foremost among them. The condition of *shubhat milk* removes from the ambit of the offence a large number of cases. *Taʿzīr*, however, can be implemented in these cases and in cases where other conditions of proof for *ḥadd* are not met.

26.3.1.5. **Ḥirābah or robbery through the force of arms**

This offence is also referred to as major (*kubrā*) theft and the previous one as minor (*sughrā*) theft. The crime is also related to the offence of homicide. It is a serious offence having different penalties varying with the nature of the case. It may first be divided into robbery of travellers who are far from aid, and armed entrance into a private home with an intent to rob it. Punishments range from amputation of the right hand and left foot for the first offence and amputation of the left hand and right foot for the second offence. The condition of the *nisāb* is also imposed after dividing the property taken amongst the culprits. If only death has been caused, punishment is death by the sword as *ḥadd* and not as *qiṣās*. Homicide along with plunder invoke the punishment of crucifixion. Each person involved in the crime is liable for...
the punishment whatever the nature of his individual act. However, if one is a minor ḥadd lapses for the others as well. If the offender repents and surrenders before apprehension, the ḥadd is waived, but any liability for homicide in such a case is subjected to qisāṣ proceedings for settlement.

26.3.1.6. Apostasy (riddah)

Apostasy or riddah invokes the penalty of death for men. Apostasy occurs when the offender rejects Islam by commission or omission with the awareness of the penalty. From some texts of the jurists it appears that crossing over to the dār al-ḥarb, i.e., joining the enemy may be essential for the completion of this crime. This, however, is not the general view. Some time is given to the accused to repent which ranges from three days to the discretion of the state. The penalty of death being for men, women are to be subjected to physical punishment with an interval of three days till they repent. Rebellion (baghy) is also considered by some as ḥadd.

26.3.2. Jināyah (bodily injuries) and qisāṣ

The word jināyah, as explained above, means damage to property as well as homicide and bodily harm. In pre-Islamic times an attack against a tribesman was treated as an attack against the tribe itself. Retaliation was against the tribe of the offender though sometimes the actual offender could be punished through arbitration. Islamic law modified the traditional Arab law in three ways:

1. The blood feud was abolished.

2. Vengeance could be exacted only after determining guilt of the accused through judicial proceedings. The crimes were to be proved by two witnesses or by confession. Where the killer is not known the method of compurgation qasāmah is adopted for differing purposes according to the different schools.

3. Different punishments were laid down for different offences according to the degree of culpability.

In the case of homicide, four kinds of punishments have been laid down by the sharī‘ah: qisāṣ (retaliation), diyyah (blood money), kaffārah (expiation), and prevention from inheritance whenever relevant.
The kinds of acts leading to death of the victim are divided in different ways by the jurists. The division preferred by the majority of the Ḥanafīs is as follows:

26.3.2.1. *Qatl 'amd* or Murder

This is the case of deliberate intent which implies the use of a deadly weapon which is meant to cause death. The weapon must be one that is usually “prepared for killing.” Modern day guns and knives would therefore be included. The standard used for determining culpability for this offence is external. It is only the Mālikī jurists who do not judge the offence by the use of a weapon and mere hostility of the offender towards the victim is considered sufficient. The offence entails *qiṣāṣ* (retaliation) and there is no *kaffārah* (expiation) in it according to the Ḥanafīs. Retaliation, however, can be waived by way of pardon (*‘afw*) gratis or by charging a sum of money, which may be more or less than the *diyāh*, by way of *sulh* (settlement) or by claiming the *diyāh*. The Ḥanafīs do not allow the claiming of the *diyāh* without the consent of the offender. The killer cannot inherit from the deceased.

26.3.2.2. *Shibh al-'amd* or culpable homicide not amounting to murder

The Mālikīs do not recognize this kind of offence and merge it with the first one. According to the majority, the offence is committed if the weapon used is not “readied for killing.” The Ḥanafīs maintain that killing with a blunt weapon will result in this offence and not murder. The exception is killing with an iron rod, because the Qur’ān says that there is great strength in iron. The majority are somewhat lenient on this count. In Mālikī law a person can be guilty, as has been noted above, only of with the intent to cause harm, i.e., through *‘udwān* or an act of hostility. As both offences combined amount to murder under the Mālikī system, their definition of murder is very wide.

The new provisions of the PPC pertaining to *qiṣāṣ* and *diyāh* mix the eternal standards used by the Ḥanafīs as well as the subjective standards of the common law that attempt to discover what “went on in the mind of the accused.” This may result in confusion in applying the law.

The penalty for *shibh al-‘amd* is “enhanced” blood money to be paid by the *‘āqilah* along with expiation. The killer is also debarred from inheriting from the victim.
26.3.2.3. *Qatl khaṭa‘* or manslaughter

This covers cases of mistake or *khaṭa‘* and cases that run on the same lines as mistake. There are different types of such mistakes. They may be divided into two broad types on basis of whether the act is voluntary or involuntary:

1. **Voluntary acts:** This has further three types:
   
   (a) The first may be called mistake of purpose, which arises, for example, when a person shoots and kills something which he believes to be an animal but which is in fact a human being.

   (b) Another case is that of mistake in performance where a person aims at a target but misses and kills someone.

   (c) In both the above cases the act is deliberate and intrinsically likely to kill but is not directed against a human being. If it were directed against a human being and someone other than the victim is killed, i.e., in case of transferred malice, it is only the Ḥanbalī law that considers it as ‘*amd*. The majority consider even this as manslaughter or *khaṭa‘*.

2. **Involuntary act:** This is the case of *shibḥ al-khaṭa‘* in which the act is wholly involuntary. This is the case, for example, if a person falls from a height upon another person and kills him or something slips from his hand and falls on another. A driver losing control of his vehicle and killing a pedestrian would be liable under this head.

   Blood money is to be paid by the ‘*āqilah* in all cases of *khaṭa‘*, and the killer cannot inherit from the victim.

26.3.2.4. *Qatl bi-al-sabab* or indirect homicide

The majority, except for the Mālikīs, draw a distinction between a direct killing (*mubāsharat*an) and an indirect killing (*qatl bi-al-sabab*). Indirect homicide may be intentional or unintentional. Intentional homicide amounts to *qatl ‘amd* and the offender is to be subjected to *qiṣāṣ*. The Ḥanafīs, however, maintain...
that *qisāṣ* means equality and to maintain equality retaliation should also be implemented indirectly. As this is not possible the penalty is converted to blood money to be paid by the offender himself and not by his ‘*āqilah. The well known example of indirect homicide is killing by perjury.

Unintentional indirect killing leads to liability for blood money, however, the offender is not liable to *kaffārah* nor is he debarred from inheritance.

26.3.2.5. Justifiable homicide

Homicide which is not actionable is the execution of a death sentence, the killing of an outlaw as he is not legally protected, killing in self defence and sometimes in grave provocation. Death resulting from medical treatment with the consent of the deceased.

26.3.2.6. Bodily harm

There is no category of *shibh al-‘amd* or quasi-‘*amd* in cases of bodily harm other than homicide. Retaliation is possible where exact equality can be maintained and there is no danger of exceeding the extent of the injury caused. Accordingly, cutting of the bones from other than the joints is not permitted as exact equality cannot be maintained in such cases. Fractions of the *diyah* are fixed as compensation for different cases. For injuries to the skull the compensation is estimated and is called *ḥukūmah*.

26.3.3. *Ta‘zīr* or penalties imposed by the state

The word *ta‘zīr* is sometimes translated as discretionary penalties. This may be misleading insofar as discretionary means offences and penalties determined arbitrarily. This may be against the principle of legality. It really means those offences that may or may not be made culpable by the state. Today, the distinction between *ta‘zīr* and *siyāsah* is not maintained so the bulk of the criminal offences in Islamic law are covered by *ta‘zīr*.

It has been maintained that the distinction between *ḥadd* and *ta‘zīr* punishments did not exist during the time of the Holy Prophet (p.b.u.h) but was devised later by the jurists in response to the needs of the early Islamic empire of the Umayyads. It is implied in the alternate that there were no *ta‘zīr* punishments...
in the early days and ta‘zîr grew later out of the discretionary punishments imposed by the gâdî. The matter is of fundamental importance and concerns the doctrine of hadd itself. The Muslim jurists have, however, relied on some traditions to justify the existence of ta‘zîr penalties even in the days of the Holy Prophet (p.b.u.h.).

The object of ta‘zîr is reformation and the degree of punishment to cause this varies with each individual. Men are classified systematically by some jurists like al-Kâsînî into four classes: 1) the most distinguished of the upper classes; i.e. officials and officers of the highest rank (who usually belonged to the ruling family in those days); for them a communication from the judge through a confidential messenger is sufficient; 2) the notables, i.e. the intellectual elite and the fuqahâ‘; they are summoned by the gâdî and admonished by him; the middle classes, i.e., the merchants: they are punished by imprisonment; 4) the lower strata of the people: they are punished with imprisonment of flogging. This type of classification, as is obvious, cannot be valid for the present times as it is against the principle of “rule of law,” which requires that every person be treated equally.

The punishments cover a range of severity as follows:

a) a private admonition to the guilty party, sometimes by letter; b) a public reprimand in court; c) a public proclamation of the offender's guilt (tashhîr); d) a suspended sentence; e) banishment; f) a fine; 9) flogging (which may be inflicted with severity greater than that permitted for hadd); h) imprisonment; and i) death. If it seems advisable to the judge he can completely remit the ta‘zîr, but a claim of the individual shall stand.

The process of trial is simple in contrast to that for hadd. Ta‘zîr is inflicted on a confession even if withdrawn or on the testimony of two witnesses one of whom can be replaced by two women. Substituted testimony (shahâdah ‘alâ shahâdah) is also admitted. According to some, the judge can even render judgement on the basis of his own knowledge.

Offences under ta‘zîr include perjury, usury, and slander. Many thefts, acts of unlawful intercourse, and false accusations of unlawful intercourse that escape the rigorous rules under the hadd punishments can be dealt with under ta‘zîr. Offences under ta‘zîr may, however, be divided into three broad classes. First. are the crimes which belong to the genus of the offences punishable under hadd and that fall short of the act that entails hadd, like preliminaries to unlawful intercourse or simple larceny and so on. Second, those crimes that are normally punishable under hadd, but in which by reason of mistake of law or fact
or other reasons the penalty is replaced by *ta‘zir*. Finally, those which are not punished by *ḥadd* but fall under the provisions of the law, i.e., an express justification in the text like: consumption of pork, breach of a trust by a guardian, false testimony, usury, slander and corruption generally.

The discretionary element of *ta‘zir* punishments has perhaps prevented the development of the subject by the Muslim jurists who have rarely dealt with it systematically. It is worth mentioning here that the penal programme of *ta‘zir* conceived by these jurists is no longer practicable today. The general principles, however, can be given effect in the form of individualization of punishment and reformation of the offender. With the codification of the law in the present times the discretion of the *qādī* shall be severely restricted within the scales of penalties provided for different offences. Further, a very flimsy barrier can be recognized or put up today between *ta‘zir* and *siyāsah* punishments.

26.3.4. *Siyāsah shar‘īyah* or the administration of justice

The meaning of *siyāsah* has already been discussed above. According to this doctrine the Muslim ruler is granted a broad discretion to deal with the criminal offences, provided his acts do not blatantly violate the principles of *sharī‘ah*. This is ensured when he seeks to protect and preserve the interests recognized by the *sharī‘ah* in a manner described earlier. He, thus, possesses by virtue of this authority power to inflict severer punishments on a much wider scale than is available to the judge under *ḥudūd* and *ta‘zir*.

Western writers have tried to show that *siyāsah* punishments were purely a secular matter. Muslim jurists, on the other hand, like al-Mawardi, al-Qarafi, Ibn Taymiyah, Ibn al-Qayyim and Tarabulusi have all tried to show that not only is *siyāsah* compatible with the *sharī‘ah* but envelopes the entire law though the term is usually applied to administrative penalties determined by the ruler. They also maintain that the basis of *siyāsah* is its concern with the public interest (*maṣlaḥah ʿāmmah*), which varies with time and place. It is for this reason that *siyāsah* regulations must change and conform to the needs of the time. These regulations have been applied mostly by the *mazālim* courts that enjoyed a much wider jurisdiction and great flexibility of procedure as compared to the court of the *qādī*.

One of the essential conditions stipulated to ensure that *siyāsah* provisions laid down by the ruler shall conform to the principles of the *sharī‘ah* is that the ruler must be a *mujtahid*. In practice, however, he seeks the approval of whosoever is the *mujtahid* of the age. At least, this is what the Ottoman Sultans
practised when they issued their *qānūn’namas*. Approval was sought for all such provisions from the *shaykh al-Islām*. According to the codes of these rulers punishments by way of *siyasah* were to be inflicted for various crimes not covered by the strict *shari‘ah* law and for many other crimes which could not be proved by the strict procedure of the *qadī* courts. The punishments awarded during the times of the Turks were execution, amputation, stripes, exile, branding of the forehead, servitude on the galleys, shaving off of the beard, confiscation of property and fines. Most of these punishments were awarded according to the spirit of the times and cannot be considered as binding precedents.

In our own times a governmental decree issued in 1961 by the Government of Saudi Arabia allowed a *qādī* to go beyond the Ḥanbalī rules if the decision was faithful to the sources of the Islamic law. Under its *siyāsah* jurisdiction the government established boards to deal with matters relating to commerce, labour, taxation and traffic. Penalties have also been legislated under this jurisdiction. Higher courts have been established and *maẓālim* courts are also functioning.

26.3.5. **Ghašb (Usurpation, Misappropriation)**

The word *ghašb* (usurpation) and *itlāf* (destruction) are subtypes of the word *jināyah* (crime, tort), which is a term that includes both crimes and torts in their modern day meaning. *Itlāf* is treated as part of *ghašb* by some jurists, while others treat it separately.

The word *ghašb*, in its literal sense, means the taking by force of a thing from another for utilization. In its technical meaning it is defined as: “The taking of a protected marketable thing without the permission of the owner and in a manner that deprives the owner of its possession.” The word “protected” means legally protected and thus excludes enemy property. The word “marketable” (*mutaqawwam*) means things that have no marketable value, like wine, swine and other non-marketable things. The stipulation of loss of possession is designed to exclude benefits or mesne profits and these cannot be the subject of *ghašb*, at least according to the Ḥanafīs. Here one should refer to the issue of damages, discussed earlier, where it was said that compensatory damages and wages or lost profits cannot be combined in one award. Further, according to the above meaning, the abduction of slaves would be included in the meaning of *ghašb*, but not the abduction of free persons.

There are three types of liability associated with *ghašb*:

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1. Sin in the hereafter.
2. Restitution of property as long as it exists in its original form.
3. 日报记者 (compensatory damages) if the property is destroyed. Compensation for fungibles is through payment by mīthl (similar) and where that is not possible payment is by qīmah (value).

There are detailed rules for things that have changed in shape, have grown or yielded mesne profits, while in the possession of the usurper.

26.3.6. Destruction of Property (İtalāf)

Destruction of property takes place either after ghāṣb or without it. Technically, it is defined as the conversion of property so that its usual intended benefits are no longer available to the owner. In fact, the offence is technically that of ghāṣb, because destruction of property in most cases may be treated as ghāṣb first and then ıtalāf.

The causing of miscarriage in the case of slave girls would fall under this head. Further, unlawful confinement of a person till such time that some of his property is wasted due to lack of care also invokes compensatory damages, besides the criminal liability. The usual liability in cases of destruction of property is compensatory damages.
Chapter 27

War and Fiscal Laws

27.1. *Jihād* and Truce

Within the *maqāsid* the interest of *Dīn* represents the external goals of the Muslim community. The positive aspect of this interest conveys a single goal: to spread the message of Islam in the whole world. The instrument utilized for attaining this goal is *da’wāh* in conjunction with *jihād*. There are numerous opinions on the meaning and role of *jihād* in the modern age. Here we are relying on the opinions of the jurists. Ibn Rushd summarizes the views of the jurists as follows:

> Why wage war? Muslim jurists agreed that the purpose of fighting with the People of the Book, excluding the (Qurayshite) People of the Book and the Christian Arabs, is one of two things: it is either their conversion to Islam or the payment of *jizyah*. The payment of *jizyah* is (stipulated) because of the words of the Exalted, “Fight against such of those who have been given the Scripture as believe not in Allāh or the Last Day, and forbid not that which Allāh and His Messenger hath forbidden, and follow not the religion of truth, until they pay the tribute readily being brought low.”¹

The majority of the jurists also argued about the taking of *jizyah* from the Magians, because of the saying of the Prophet, “Establish with them the practice adopted for the People of the Book.” They

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¹ Qur'ān 9: 29
disagreed about the polytheists other than the People of the Book, whether jizyah is to be accepted from them. A group of jurists said that jizyah is to be charged from all polytheists. This is Malik’s opinion. Another group exempted from this the Arab polytheists. Al-Shafi’i, Abu Thawr, and a group of jurists said that jizyah is to be imposed only upon the People of the Book and the Magians.

The reason for their disagreement is the conflict of general and specific implications (in the texts). The general implication is in the words of the Exalted, “And fight them until persecution is no more, and religion is all for Allāh,” 2 and in the saying of the Prophet, “I have been commanded to fight mankind until they say, ‘There is no God but Allāh.’ If they say this their lives and wealth are protected from me, unless there is another claim on them, and their reckoning is with Allāh.” The specific meaning is in the directive of the Prophet to the commanders of troops when he sent them to Arab polytheists who, it is known, were not the People of the Book, “When you come to face your enemy, the polytheists, invite them to opt for three choices,” and he mentioned jizyah as one of them. 3

This leaves no doubt that the primary goal of the Muslim community, in the eyes of its jurists, is to spread the word of Allāh through jihād, and the option of poll-tax is to be exercised only after subjugation. Can the Muslim community suspend this activity in case of necessity or without it? Ibn Rushd provides the answer:

Is truce permissible? A group of jurists permitted this initially (without warfare) without necessity, if the imām considered it to be in the interest of the Muslims. Another group of jurists did not permit it, except on the basis of a compelling necessity, such as the avoidance of disturbances or for gaining for the Muslim community some concessions from them, which are not in the nature of jizyah as the condition for jizyah is that they be subject to the laws of the Muslims, or even without taking anything from them. Al-Awzā’ī permitted that the imām may negotiate a truce with the disbelievers on the basis of something that the Muslims would give to the disbelievers if that is required as a necessity for avoiding (greater) trials, or on the basis of any other necessity. Al-Shafi’i said that the Muslims are not to make any concession to the disbelievers, unless they fear that they would be

2 Qur’ān 8:39
overwhelmed by the sheer number of the enemy, or because of a severe ordeal that they are subjected to.

Those who upheld the permission of making a truce when the imâm saw an interest (of the Muslims) in this are Mâlik, al-Shâfi‘î, and Abû Ḥanîfah, except that al-Shâfi‘î stipulated that the duration of the truce should not be for a period greater than the one transacted by the Messenger of Allâh with the disbelievers in the year of al-Ḥudaybîyah.

The reason for their disagreement over the permissibility of truce without a necessity is the conflict of the apparent meaning of the words of the Exalted, “Then, when the sacred months have passed, slay the idolaters wherever ye find them,”4 and His words, “Fight those who do not believe in Allâh nor the Last Day,” 5 with His words, “And if they incline to peace, incline thou also to it, and trust in Allâh.” 6 Those who maintained that the verse commanding fighting unless they believe or pay the jizyah has abrogated the verse implying peace said that truce is not permitted, except in the case of necessity. Those who maintained that the verse implying peace has restricted the other said that truce is permitted if the imâm considers it proper. They supported this interpretation with the act of the Prophet in this case, because his truce in the year of al-Ḥudaybîyah was not based upon necessity.7

This shows that the aggressive propagation of Islam and the activity of jihâd can be suspended with or without necessity in the opinion of some jurists, but it is only a transitory phase, for which some jurists fix a specified period, while others do not.

Montgomery Watt maintains that the expansion of Muhammad’s city-state into an empire raised the expectation that the Islamic empire would ultimately include the whole human race.8 We would agree with Professor Watt on this point with a slight qualification. The idea that Islam (not the Islamic empire) would

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4 Qur‘ân 9 : 5
5 Qur‘ân 9 : 29. Pickthall’s translation has been changed here. His translation of this verse reads, “Fight against such of those who have been given the Scripture as believe not in Allâh nor the Last Day.” This translation is correct, but only when the complete verse is taken into account.
6 Qur‘ân 8 : 61
7 Ibid. 283–284.
ultimately include the whole human race is not based on early conquests alone, but is an acknowledged
goal of the Muslim community, and it arises from the texts of the Qur’ān as well as the Sunnah, as quoted
by Ibn Rushd above. According to such reasoning, the Muslim community may be considered to be passing
through a period of truce. In its present state of weakness, there is nothing much it can do about it.

Will this community annul this truce, if tomorrow it were to gain in strength? Perhaps, this is what
Watt has in mind when he says that that intentions of ultimate world domination are not so much a
cause of worry for the non-Muslim states as are the treaties signed by the Muslim states, for “the division
of the world into the sphere of Islam and the sphere of war is by no means a thing of the past. In so
far as traditional Islam grows in strength it could come into the forefront of world politics.” Debating
this point would be futile, and much depends on how far the world has progressed in terms of justice,
fair-play, mutual cooperation, and freedom from exploitation, by the time the Muslim community gains
in strength. It is to be hoped that in this modern world, where religion has been given a back seat in
the general scheme of things and where other problems that affect the planet as a whole loom large, the
Muslim community will continue to maintain the truce and agreements in a spirit of cooperation and focus
more on the institution of da’wāh (invitation) than on the instrument of jihād (holy war), especially when
there are legal opinions supporting truce.

27.2. The Ahkām of Enemy Property

Many of the decisions taken about enemy property are a matter of history for the present times as the
circumstances have changed completely. Yet, a study of the divisions of enemy property and its categories
may provide important principles.

27.2.1. The fifth of the spoils (khums)

The jurists agreed that a fifth of the spoils, other than the lands acquired by force from the possession of
the Byzantines belonged to the īmām and the rest, four-fifths of it, were for those who seized it, because
of the words of the Exalted, “And know that whatever ye take as spoils of war, lo! a fifth thereof is for

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9 Ibid.
Allāh, and for the messenger and for the kinsmen (of the Prophet) and orphans and the needy and the wayfarer, if ye believe in Allāh and that which We revealed unto Our slave on the Day of Discrimination, the day when the two armies met. And Allāh is able to do all things. [Qur'ān 8 : 41] They disagreed about the fifth into four well-known opinions. The first is that the fifth is divided further into five parts in accordance with the explicitly mentioned shares in the verse. This was al-Shāfi‘ī’s opinion, i.e., it is to be so divided. The second opinion was that it is to be divided into four parts, and that the words, “is for Allāh,” are only an opening statement and do not imply a fifth share. The third opinion was that it is to be divided, today, into three shares, and that the share of the Prophet and the kinsman was eliminated with the death of the Prophet (p.b.u.h.). The fourth is that the fifth is of the same category as fay’ (booty) to which both the rich and the poor are entitled. This is Mālik’s opinion and of the jurists generally.

Safīy was a well-known share for the Prophet (p.b.u.h.), and it was something that he used to select from the undivided spoils, which could be a mare, a slave-girl, or a male slave. It is related that Safīy was from Safīyy. They agreed that no one after the Messenger of Allāh (p.b.u.h.) is entitled to Safīy, except for Abū Thawr who held that it is to be treated in the same way as the share of the Prophet (p.b.u.h.).

27.2.2. The four-fifths of the spoils

The majority of the jurists agreed that four-fifths of the spoils are for those who seize them, if they acted with the permission of the imām. They disagreed about those who act without the permission of the imām, about the person entitled to a share in the spoils, about the time of the entitlement, how much, and also about the entitlement from the spoils before the division.

The majority of the jurists maintain that four-fifths of the spoils are for those who seize it whether they proceeded with the permission of the imām or without his permission, because of the general implication of the words of the foregoing verse. A group of jurists said that if a detachment or an individual act without the permission of the imām, then, whatever they bring back is a reward (nafl) that is to be appropriated by the imām. Another group of jurists said that, in fact, all of it is to be taken by the person who seized it. The majority relied upon the apparent meaning of the verse, while the others relied upon the nature of the acts that occurred during the period of the Messenger of Allāh (p.b.u.h.). This is so as all troops used to proceed with the permission of the Prophet (God’s peace and blessings be upon him), and it appears
that they thought the permission of the *imām* was a requisite condition for it, but this is weak.

Who has a share in the spoils? They agreed that they are those who are males, free, and have attained puberty (among those who participated in the fighting). They disagreed about the opposite characteristics, that is, about women, slaves, and those who had not attained puberty but were nearing it. A group of jurists said that there is no share for women or slaves in the spoils, but some gifts are to be given to them. This was Mālik’s opinion. Another group of jurists said that no presents are to be given to them nor is anything to be paid to them from the spoils. A third group said that they have the same share as the other sharers in the spoils. This was al-Awsāṭ’s opinion. They also differed about the minor approaching the age of puberty (the adolescent). Some of the jurists said that a share is to be assigned to him. This was al-Shāfi‘ī’s opinion. Some of them stipulated that he should have the ability to fight. This was Mālik’s opinion. Some said that he is to be given a gift.

A share in the spoils, in the view of the majority of the jurists, is given to the soldier on one of two conditions. He should either be one who had participated in the battle, or he should be one who had sheltered the fighting forces.

They disagreed about the horse-rider under the issue of how much is due to the fighter. The majority said that the rider has three shares; one share for him and two for his horse. Abū Ḥanīfah said that only two shares are due to the rider, one for the horse and one for him. The reason for their disagreement is the conflict of the relevant traditions and the conflict of analogy with a tradition. Abū Dāwūd has recorded from Ibn ‘Umar “that the Prophet (p.b.u.h.) allotted three shares for a man and his horse, two shares for the horse and one for its rider.” He also recorded a tradition from Mujammī‘ ibn Jāriyāt al-Anṣārī that has the same import as the opinion of Abū Ḥanīfah. The analogy that conflicts with the apparent meaning of the tradition of Ibn ‘Umar is that the share of a horse should not be greater than that of a human being. This is why Abū Ḥanīfah preferred the tradition that conforms with this analogy over the tradition that opposes it. This analogy, however, does not hold, as it is the human being who is the rider of the horse and who is entitled to the share of the horse, and it is not unlikely that the effectiveness of the rider riding a horse be thrice as much as the foot-soldier.

The jurists agreed about the prohibition of purloining the spoils. This is based upon what is established from the Messenger of Allāh (p.b.u.h.) about this, like his saying, “Turn in the thread and the garment, for purloining is a shame and a disgrace, on the Day of Judgment, for those who practice it.”
They disagreed about the penalty of the person who purloins the spoils. A group of jurists said that his baggage is to be set on fire, while others said that there is no penalty for him except reprimanding him. The reason for their disagreement is their dispute over the authenticity of the tradition of Shāliḥ ibn Muhammad ibn Zā‘idah from Sālim from Ibn ‘Umar that he said, “The Prophet (p.b.u.h.) said, ‘Burn the baggage of the person who purloins.’”

27.2.3. The *anfāl* (rewards)

The jurists agreed about the permissibility of the *imām’s* granting of a reward out of the spoils for whomsoever he likes, that is, to add to his share his share. They disagreed, however, about the items from which a reward is to be given, about its amount, and about whether it is permitted to promise it before the battle? Further, they disagreed whether a Muslim fighter is entitled to the possessions of the disbeliever whom he has slain, or whether he is not entitled to it unless the *imām* grants it as a reward for him.

A group of jurists maintained that the *nafl* (reward) is to be paid from the *khumus* (fifth), which is due to the Muslim treasury. This was Mālik’s opinion. Another group of jurists said that the reward is due from the fifth of the *khumus* alone, which is the exclusive share of the *imām*. This view was selected by al-Shāfi’ī. A third group of jurists said that such favours are to be granted from the spoils as a whole before division. This was the opinion of Aḥmad and Abū ‘Ubaydah. Some of these jurists (in the third group) permitted (even) the giving away of the entire spoils as reward.

The jurists disagreed about the amount that the *imām* may give away as reward. A group of those who permitted the giving of rewards from undivided spoils said that it is not permitted to grant more than a third or a fourth on the basis of the tradition of Ḥabīb ibn Maslamah. Another group of jurists said that the *imām* may grant a detachment all that it has acquired as spoils on the basis that the verse about *anfāl* is not abrogated and governs the issue, and that it is to be construed in its unrestricted general meaning. Those who maintained that it is restricted by this tradition said that it is not permitted to him to give as reward more than a fourth or a third.

Is the *imām* permitted to make a promise of reward before the battle? The jurists disagreed about this. Mālik disallowed this, while a group of jurists permitted it.
27.2.4. Muslim property recovered from disbelievers

The jurists disagreed into four well-known opinions about the property of Muslims that is recovered from the possession of the disbelievers. The first is that the wealth of the Muslims that is recovered by the Muslims from the possession of the disbelievers is for the owners of that wealth, and the warriors who recovered it are not entitled to any of it. Those who held this opinion include al-Shafi’i, his disciples, and Abū Thawr. The second opinion is that what is recovered by the Muslims is treated as spoils for the army and the owners are not entitled to any of it. This opinion was held by al-Zuhri and ‘Amr ibn Dinar. The third opinion is that the owner of the property is entitled, without any payment, to what is discovered of the property of Muslims before division, but what is discovered after the division is to be given to the owner after he pays its value. Those who hold this opinion are divided into two groups. Some of them maintained that this rule applies to all Muslim property that is recovered by the Muslims from the possession of the disbelievers, whatever the manner in which it came into the possession of by the disbelievers and at whatever location. Those who held this opinion include Mālik, al-Thawrī, and a group of jurists, and it is also related from ‘Umar ibn al-Khaṭṭāb. Some of them made a distinction between what came into the possession of the disbelievers by the use of force, and which they carried off until they transported it to the land of the polytheists, and between what was taken back from them before they were able to seize and carry off into polytheist territory. They said that this property, if it is identified by the owner before its division, belongs to him, but if he comes across it after the division he has a right to it after paying its price. They maintained, on the other hand, that the property that was not gathered by the enemy so as to be transported to their land belongs to the owner before the division and after the division; and this is the fourth opinion.

27.2.5. Land conquered by the use of force (‘anwatan)

The jurists disagreed about the land that is conquered by the Muslims by the use of force. Mālik said that the land is not to be divided and stays as a trust (waqf) with its kharāj (revenue) being spent for the interest of the Muslims, like the maintenance of those engaged in the defence of Islam, the construction of bridges and mosques, as well as other avenues of welfare. This is the case, unless the imām is at some time of the opinion that maṣlāḥah requires it to be divided, in which case he may do so. Al-Shafi’i said that...
conquered lands are to be divided like spoils, that is, into five parts. Abū Ḥanīfah said that the imām has a choice in dividing it or imposing kharāj on its disbelieving tenants leaving it in their possession.

The reason for their disagreement is what is thought to be a conflict between the verse of sūrat al-Anfāl and the verse of sūrat al-Ḥashr. This is so as the verse of sūrat al-Anfāl implies through its apparent meaning that anything acquired as spoils is to be divided, and these are the words of the Exalted, “And know that whatever ye take as spoils of war, lo! a fifth thereof is for Allāh, and for the messenger.”[Qur’ān 8 : 41] On the other hand, the words of the Exalted in the verse of al-Ḥashr, “And those who came after them say; Our Lord! Forgive us and our brethren who were before us in the faith, and place not any rancour toward those who believe,”[Qur’ān 59 : 10] when read in conjunction with the case of those to whom fay’ (booty) was granted may indicate that all people, those present and the posterity, are partners in the fay’. It is related from ‘Umar (may Allah be pleased with him) that he commented on the words of the Exalted, “And those who came after them say; Our Lord! Forgive us . . .,” and said, “I do not think that this verse does anything but make it (the land) common for all the people, even for the shepherd at Kada’. “ He, therefore, did not divide up the lands of Irāq and Egypt that were conquered in his time with the force of arms.

27.2.6. Fay’ (booty)

Fay’ according to the majority of the jurists is all that moves from the possession of the disbelievers to that of the Muslims, because of intimidation and fright, without their having “urged any horse or soldier.” The jurists disagreed about the avenues of its expenditure. A group of jurists said that fay’ is for all Muslims, poor or rich, and the imām has the right to give from it to the fighters, to the administrators and governors, and to spend it on the places of frequent use by the Muslims, like the construction of bridges and maintenance of mosques and other things, and there is to be no five-fold division in it. This was upheld by the majority, and it is established from Abū Bakr and ‘Umar. Al-Shāfi‘ī said that there is khumus (one-fifth) in it, and this fifth is subdivided among the categories that have been mentioned in the verse of spoils. These are the same categories that have been mentioned for the division of the fifth of spoils (ghanīmāt). The remaining, he said, is to be spent in accordance with the ījtihād of the imām, and he may spend part of it upon himself and his family, and on whoever he deems rightly entitled. One
group of jurists said that \textit{fay’} is not subject to five-fold division and that it is to be divided among the five categories among whom the \textit{khumus} is distributed.

27.2.7. \textit{Jizyah} (poll-tax)

From who is it permissible to take \textit{jizyah}? The jurists agree unanimously that it is permissible to take it from the non-Arab People of the Book, and from the Magians. They disagreed about those who have no scripture, and about those who are the People of the Book but are Arabs, and this after they had agreed that it is not permissible to take it from a \textit{Kitābī} who is from the tribe of Quraysh.

The jurists agreed that it is imposed on those who exhibit three characteristics: being a male, \textit{bulūgh} (attainment of puberty), and being free. It is not imposed upon women or upon minors insofar as it is a substitute for being subjected to slaughter, and slaying, and the slaying of women and minors is prohibited. Likewise, they agreed that it is not imposed upon slaves. They disagreed about some categories of such persons like the insane and the crippled, the aged, and the monks, and the poor, whether they are to be considered as being liable for it when their condition improves. All these cases are a matter of \textit{ijtihād} and there is no clear determination for them in the law. The reason for their disagreement is their dispute whether such a person can be lawfully slain in war, that is, out of these types of persons.

The amount, according to Mālik, is four \textit{dīnārs} for those who transact in gold and forty \textit{dirhams} for those who transact in silver, along with rations for Muslims and hosting them for three days, and is not to exceed this or to be less than this. Al-Shāfi‘i said that the minimum is fixed and it is one \textit{dīnār} and the maximum is not fixed but depends on what they negotiate to pay. A group of jurists said that there is no determination in this and it is left to the \textit{ijtihād} of the imām. This was maintained by al-Thawrī. Abū Ḥanifah and his disciples said that \textit{jizyah} ranges between twelve \textit{dirhams}, twenty-four \textit{dirhams}, and forty-eight \textit{dirhams}. The poor person is not to pay less than twelve \textit{dirhams} and the rich person is not to pay more than forty-eight \textit{dirhams}. The person of average means is to pay twenty-four \textit{dirhams}. Ahmad said that one \textit{dīnār} or its equivalent in woven cloth (Yemeni), and it is neither to be increased nor decreased. The reason for their disagreement is the variation in the traditions on the topic.
27.3. **Zakāt and ‘Ushr**

Zakāt is a religious duty to be performed in compliance with the right of Allah. The determination of its obligation through the Qur’ān, the Sunnah, and from ījmā‘ (consensus) is well-known, and there is no dispute about this. In the following description, the word zakāt is applied to mean the levy on wealth in general, but in the context of land or grains it means ‘ushr or the prescribed rate if different.

According to Ibn Rushd, the Muslim jurists agreed that it is obligatory upon every Muslim, who is free, bāligh, sane, and who owns wealth equal to the (minimum) prescribed scale (nisāb) through a complete (unencumbered) ownership. They disagreed, however, about its obligation upon the orphan, the insane, the slaves, the ahl al-dhimmah, and the person with deficient (encumbered) ownership like a person who is under debt or is a creditor, or, for example, when the capital of the wealth is placed in a trust (ḥabs, waqf).

27.3.1. Wealth of minors

With respect to minors, one group said that zakāh is obligatory on their wealth. This was the opinion of ‘Alī, Ibn ‘Umar, Jābir, and ‘Ā’ishah from among the Companions (may Allah be pleased with them all), and of Mālik, al-Shāfi‘ī, al-Thawrī, Aḥmad, Ishaq, Abū Thawr, and others from among the jurists. Another group said that there is no zakāh at all on the wealth of the minor. This was the opinion of al-Nakha‘ī, al-Ḥasan, and Sa‘īd ibn Jubayr from the Tābi‘ūn. One group of jurists made a distinction between the yield of the land and wealth not derived from the land. They said that there is zakāh (‘ushr) on the yield from the land, but there is no zakāh on what is besides this like cattle, liquid assets, goods (chattel), and other things. This was the opinion of Abū Ḥanīfah and his disciples. Yet another group distinguished between liquid assets and other things saying that there is zakāh on the wealth except on liquid assets.

27.3.2. Those under debt

The jurists disagreed about those owners (of wealth) who are under debt, and whose debts are more than their wealth, or they cover an amount on which zakāh can be levied while they have in hand wealth on
which zakāh is due. A group of jurists said that there is no zakāh on the wealth, whether it is grains or something else, unless the debts are deducted from it. If the remaining amount (after payment of debts) reaches the minimum amount subject to zakāh, it is to be paid otherwise not. This was the opinion of al-Thawrī, Abū Thawr, Ibn al-Mubārak, and a group of jurists. Abū Ḥanīfah and his disciples said that debts do not ward off zakāh on grains, but they do prevent it on other kinds of wealth. Mālik said that debts prevent zakāh on liquid assets alone, unless these include goods that can pay off the debt, in which case zakāh is not prevented. A group of jurists maintained, in contrast to the first view, that debts do not prevent zakāh at all.

27.3.3. Wealth liable to zakāt

The jurists agreed about some of the categories in which zakāh is obligatory and disagreed about others. The agreed upon categories include two kinds of minerals, namely, gold and silver that are not molded into jewelry, three categories of animals, namely, camels, cows, and sheep, two categories of grains, namely, wheat and barley, and two categories of fruit, namely, dates and raisins, and about olives there is some deviant dispute.

They disagreed about gold only when it is in the form of jewelry. This is so as the jurists of Ḥijāz, Mālik, al-Layth, and al-Shāfi‘ī, maintained that there is no zakāh on it if it is intended for adornment and wearing. Abū Ḥanīfah and his disciples said that zakāh is to be levied on it. The reason for disagreement is its vacillation between being goods and being gold and silver that are used primarily as a medium of exchange for all other things. Those who held them to be similar to goods, whose primary purpose is utility, said that there is no zakāh in it (jewelry). Those who considered them similar to gold and silver, the primary purpose of which is to facilitate exchange, said that it is subject to zakāh. There is also another reason for their disagreement, and that is the conflict of traditions on the issue. It is related from Jābir from the Prophet (p.b.u.h.) that he said, “There is no zakāh in jewelry.” ‘Amr ibn Shu‘ayb has related from his father from his grandfather “that a woman came up to the Messenger of Allāh (p.b.u.h.) accompanied by her daughter, who was wearing (two) gold bracelets on her hands. He said to her, ‘Do you pay zakāh on these?’ She said, ‘No!’ He said, ‘Would it please you if Allah were to put on your hands, on the Day of Judgment, two bracelets of fire?’ She took them off and placing them before the Prophet (p.b.u.h.) said,
‘They are for Allāh and His Messenger.’” Both traditions are weak, particularly the tradition of Jābir.

The jurists agreed that the quantity of silver on which zakāh is levied is five awqiyah (ounces), because of the authentic saying of of the Prophet (p.b.u.h.), “There is no ṣadaqah in what is less than five awqiyah (ounces) of silver.” They disagreed about the stipulation of a nisāb for minerals other than silver, and also about the amount due on them. An awiqiya, in their view, was equal to five dirhams by measure. They agreed that the amount due on this is one-fourth of a tenth. This applies to gold as well, that is, zakāh is one-fortieth. This is so as long as they are in a state when they do not cease to be minerals.

There are detailed discussions on the nisāb for different things. It is not possible here to go into these details as well as the different opinions and interpretations of the jurists.

27.3.4. Holding period for wealth

The majority of the jurists stipulate, for the obligation of zakāh on gold, silver, and cattle, the passage of the ḥawl (one year), because this is established from the four caliphs, was known widely among the Companions, was practised widely, and because of their belief that its being so widely known and practised without any opposition is not possible, unless there was an earlier precedent (from the Prophet). It is related from Ibn ‘Umar from the Prophet (p.b.u.h.) in a (marfū’) tradition that he said, “There is no zakāh on wealth unless one ḥawl (year) has passed over it.” This is agreed to unanimously by the jurists.

The number of categories for whom zakāh is due is eight, and they have been mentioned in the Qur’ān in the words of the Exalted, “The alms are only for the poor and the needy, and those who collect them, and those whose hearts are (to be) reconciled, and to free the captives and the debtors, and for the cause of Allāh, and (for) the wayfarers; a duty imposed by Allāh. Allāh is Knower, Wise.” [Qur’ān 9:61]

27.3.5. Those entitled to zakāt

The number of categories for whom zakāh is due is eight, and they have been mentioned in the Qur’ān in the words of the Exalted, “The alms are only for the poor and the needy, and those who collect them, and those whose hearts are (to be) reconciled, and to free the captives and the debtors, and for the cause of Allāh, and (for) the wayfarers; a duty imposed by Allāh. Allāh is Knower, Wise.” [Qur’ān 9:61]
They disagreed about their number on two issues. First, whether it is permissible that the entire zakāh be spent on one category out of the categories, or whether they are partners in the ṣadaqah and it is not permitted to single out one category for it? Mālik and Abū Ḥanīfah held that it is allowed to the imām to spend it on one category or on more than one category, if he thinks that there is need for it. Al-Shāfi‘ī said that this is not permitted and that he is to spend it to on the eight categories mentioned in the words of Allāh.

With respect to the amount of wealth that prevents the entitlement to zakāt, al-Shāfi‘ī said that the limit preventing it is the minimum to which the name can be applied. Abū Ḥanīfah held that a wealthy person is one who owns the nisāb, as it is these persons whom the Prophet (p.b.u.h.) termed as wealthy in his words addressed to Mu‘ādh in his tradition, “Inform them that Allāh has made ṣadaqah obligatory for them, which is to be taken from their wealthy and is to be given to their poor.” As the rich here were those who owned the nisāb it follows that the poor should be their opposites. Mālik said that there is no limit in this and it is a matter referred to ijtihād.

The jurists disagreed in this topic about the description of the poor and the needy and about the distinction between them. A group of jurists said that a poor person (faqīr) is better off than the needy (miskīn), and this was upheld by the disciples of Mālik from Baghdād. Another group said that the needy person is in a better condition than the poor. This was the opinion of Abū Ḥanīfah, his disciples, and al-Shāfi‘ī in one of his two opinions. In another opinion al-Shāfi‘ī said that both terms indicate the same meaning, and this was the opinion of Ibn al-Qāsim.

With respect to the amount that is to be given to each category, the debtor is to be given an amount that he owes, if his debt was due to a legitimate cause, not extravagance, in fact, due to a necessity. Likewise, the traveller is to be given an amount that will transport him to his land. It appears that for the warrior, in the view of those who consider the wayfarer to be the warrior, it is an amount that will take him to the battle front. They disagreed about the amount of ṣadaqah that is to be given to a single needy person. Mālik did not put a limit on this and left the matter to ijtihād. This was also al-Shāfi‘ī’s opinion, who said that it does not matter if the person is given an amount equal to the nisāb or less than the nisāb. Abū Ḥanīfah disapproved of giving a person an amount equal to the nisāb. Al-Thawrī said that no one is to be given in excess of fifty dirhams. Al-Layth said that he is to be given an amount with which he can employ a servant, in case the person has a family and the zakāh is enough. Most of them agreed
that it is not proper to give the person a grant with which he becomes a person for whom ṣadaqah is not permissible.
Chapter 28

Courts, Procedure and Evidence

Administration of justice is called siyāsah sharʿiyah in Islamic law. In its wider meaning it includes the courts of the qāḍī as well. Siyāsah sharʿiyah then deals with the enforcement of law as well as policies in an Islamic state.

28.1. Courts

There are three categories of institutions through which the siyāsah sharʿiyah of the Islamic state is implemented. These are as follows:

28.1.1. Mażālim Courts

This is the highest category of courts. They deal with appellate matters as well as with those that are beyond the jurisdiction of the qāḍī. All “rights of state” are adjudicated by these courts. The rights of the state, as pointed out several times, are different from the rights of Allah, which are adjudicated by the qāḍī. Further, the procedure followed by these courts is not restricted by the strict requirements for the court of the qāḍī as regards the number and qualifications of witnesses and the type of admissible evidence. The matters of evidence and procedure are left to the ʿijtihād of the imām.
28.1.2. Court of the Qāḍī

The qāḍī deals with ḥudūḍ, qisāṣ, and taʿzīr where the requirements provided in the sharī‘ah about witnesses and procedure are strictly followed. The qāḍī also deals with civil matters like contracts, torts and also the personal law. The qāḍī is also responsible for the property belonging to waqfs and the affairs of orphans and their property. In other words, the qāḍī adjudicates the rights of Allah as well as the rights of the individual.

28.1.3. Court of the Muḥtasib

The muḥtasib courts, which are treated as courts by the fuqahā’, are responsible for the enforcement of the general morality and the policies of the state in accordance with the Islamic norms. In other words, the court of the muḥtasib is responsible for what is called amr bi al-maʿrūf wa nahiḥ ‘an al-munkar. This has been described earlier under the duties of the state.

28.2. Adab al-qāḍī:

The first thing to be appreciated when studying the law of procedure in Islam is that the fuqahā’ have written only about the procedure to be followed in the court of the qāḍī. Thus, the fuqahā’ did not address the procedural details of the mazālim courts or, with some exceptions, even those of the muḥtasib. This was the responsibility of the various governments throughout Islamic history. It is unfortunate that no government shouldered the responsibility of systematically developing the law and procedure for which it was responsible. Even the rulings given were never recorded, except in the times of the Ottoman Turks. The material available for these courts is therefore scanty. The determination of the procedure and the rules of evidence to be followed in the mazālim courts is left to the ijtihād of the ruler, i.e., the state. The state employs the general principles in the Qur’ān and the Sunnah for the determination of these rules.

What are the implications of these distinctions for the present times? The first implication is that procedural laws, like the Criminal Procedure Code, fall entirely within the mazālim jurisdiction. The qāḍī is responsible for ḥudūḍ and qisāṣ alone. The qāḍī is also responsible for taʿzīr, but only when a distinction is made between taʿzīr and siyāsah, and they are treated as separate jurisdictions. If this distinction is
abolished, as has been done in the Muslim countries today, this jurisdiction moves to the mazālim courts as well.

Another implication is that it is futile to amend the existing Criminal Procedure Code in the light of what the fuqahā’ have said, or to look for precedents in their work that will be applicable to the mazālim courts. The only way that the Cr.P.C can be amended to conform with the Islamic norms is to determine the general principles and rules that will govern this procedure.

The Civil Procedure Code is a different matter, and the fuqahā’ have dealt with many procedural details similar to those mentioned in the CPC or even in the Specific Relief Act. Further, most of the matters covered by the CPC fall within the jurisdiction of the qāḍī anyway.

After having said this, we may note that the procedure to be followed in the court of the qāḍī is called adab al-qāḍī. This subject also deals with the qualifications of the qāḍī, the decorum of the court, as well as matters of professional ethics for a judge.

28.2.1. Qualifications of the qāḍī:

According to most jurists, the qāḍī must be a free, Muslim, major, male, sane, and ‘adl. It is maintained by some that fisq leads to removal of the qāḍī, but his judgments remain valid. The jurists disagreed about the qāḍī’s qualifications and ability for ijtihād. Al-Shāfī’ī said that it is necessary that he be a mujtahid. Abū Ḥanīfah said that the judgment of a layman is valid. Ibn Rushd maintains that this is also the opinion of the Mālikī school, and the existence of the qualification of ijtihād is merely recommended.

The jurists differed about the condition of being a male. The majority said that it is a condition for the validity of the judgment. Abū Ḥanīfah said that it is permitted for a woman to be a qāḍī in cases involving financial claims. Al-Ṭabarī said that it is permitted to a woman to be a judge in all things without any restrictions. Those who denied the right of a woman to be a judge compared the office of the qāḍī to the office of the head of state. Those who permitted her judgment in cases of financial claims, did so comparing it to the permissibility of her testimony in such claims. Those who considered her judgment as executed in each thing said that the principle is that any person who is able to render judgment is qualified, except in matters restricted by consensus, like the office of head of state.
28.2.2. Jurisdiction

The sole function of the qādī is the adjudication and protection of rights. These rights are either the rights of Allah, as in the ḥudūd, the rights of individuals, as in civil matters as well as in ta‘zīr (as distinguished from siyāṣah), mixed rights as in qiṣṣāṣ and qadhāf. The protection of rights is related to the property of the orphans, the management of waqf property and other such matters. The qādī does not deal with the rights of the state (as distinguished from the rights of Allah), as these fall within the jurisdiction of the mażālim courts.

Regarding matters in which he renders judgment, the jurists agreed that the qādī adjudicates each right, whether it pertains to the right of Allāh or to the right of human beings. He is the representative of the head of state for this purpose. He is also responsible for registration of marriages and appointment of executors. About the question whether he appoints the imāms in the jāmi‘ah (congregational) mosques there is disagreement. Does he appoint his successors in case of absence caused by illness or a journey? There is disagreement over this too, unless he has been authorized to do so. He does not oversee public life nor the other various offices, but he supervises interdiction of the prodigal and the insolvent.

28.2.3. Procedure

According to Ibn Rushd, the jurists agreed unanimously about how the qādī renders judgment, saying that it is obligatory upon him to maintain exact equality between the two parties during the judicial session, and that he should not hear one of them in the absence of the other. He should commence with the plaintiff and ask him to produce testimony, if the defendant denies the claim. If he does not have any evidence (testimony) and the matter relates to a financial claim, an oath becomes obligatory upon the defendant by agreement. If the case relates to divorce, or marriage, or homicide, the oath becomes obligatory upon the defendant, according to al-Shāfi‘ī, by the mere filing of the claim. Mālik said that it does not become obligatory unless it is accompanied by a male witness. If the matter relates to a financial claim, does the defendant take an oath about it by virtue of the claim itself or he delays the oath till the plaintiff proves the mingling of rights? They disagreed about this, with the majority of the jurists of the regions saying that an oath becomes binding on the defendant by the filing of the claim itself due to the general meaning in the words of the Prophet (p.b.u.h.) in the tradition of Ibn ‘Abbās, “The burden
of evidence is upon the plaintiff and the taking of oath is upon the defendant.” Mālik said that the oath does not become obligatory, except through the proof of rights by the plaintiff. This was also the opinion of the seven jurists of Madinah.

When does he issue the judgment? This invokes conditions, some of which refer to the mental state of the qāḍī, some refer to the time of execution of the judicial order and the time of decision, and some refer to the restraining of the disputed property and its recovery, in case it is corporeal property.

The time when the qāḍī renders his judgment is when he is not emotionally disturbed, because of the words of the Prophet (peace be upon him), “The qāḍī is not to render judgment, if at such time he is in anger.” On similar grounds, Mālik held the opinion that the qāḍī is not to render judgment when he is thirsty, hungry, in fear, or in some such state that interferes with his understanding. If, however, he renders a correct judgment in any of these states, they agreed that his judgment is to be executed.

The time of execution of his judgment is after the determination of a period and the granting of an opportunity for raising of objections (appeal). The meaning of execution here is that he confirms or rejects the proofs adduced by the plaintiff. Does he have the right to hear further arguments after the judgment? There are conflicting opinions from Mālik. The best known is that he may hear arguments in things pertaining to the right of Allāh, like waqf (trust) and manumission, but not in other cases. It is said that he may not hear arguments after the execution of judgment, and this is called ta‘jīz (inability). It is said that he does not hear arguments from any of them, while it is also said that a distinction has to be made between the plaintiff and the defendant, which is after he has expressed his inability to do so. Ta‘jīz appears to be something like the rule of res judicata.

The time for restraining the property arises when the case is established, but before objections are raised. This takes place when the person, who is in possession of the claimed property, does not wish to litigate, and has recourse to the seller for the price he paid. If he should need to claim it from the seller, it is up to the seller to agree with him in this so that its purchase from him is established, in case the other person is denying it, or confirm it for him if he is acknowledging it. The person in possession, from whom the property is being claimed, may take the property from the person claiming it by paying him its value. Al-Shāfī‘ī said that he should buy it from him (paying the price not the value). If the property perishes in the hands of the possessor, he is to compensate it, but if it perishes during the litigation, they disagreed as to who is to compensate it. It is said that if it perishes after the claim is established, the compensation
is upon the claimant, and it is said that the claimant compensates after the judgment, but after proof of
the claim and prior to the judgment, it is the person from whom it is claimed who compensates it.

28.2.4. Evidence

A judgment may be based on one or more of four things: testimony, oath, refusal to take an oath, and
confession. It may also be based on a combination of these things. The different aspects of these four forms
are described below.

28.2.4.1. Testimony (Shahādah)

The discussion of witnesses relates to three things: qualifications, gender, and number. The number of
qualifications considered for the acceptance of a witness are five: ‘adālah, puberty, Islam, freedom, and the
absence of an accusation. Some of these are agreed upon, while others are disputed. The jurists agreed
about ‘adālah and its stipulation for the acceptance of testimony, because of the words of the Exalted,
“[O]f such as ye approve as witnesses,” [Qur’ān 2:282] and His words, “[A]nd call to witness two just men
among you.” [Qur’ān 65:2] They disagreed as to what was meant by ‘adālah. The majority maintained
that it was a qualification in addition to Islam, which requires that the witness abide by the prescribed
obligations as well as recommendations, avoiding prohibited and disapproved acts. Abū Ḥanīfah said that
apparent adherence to Islam is sufficient for ‘adālah as long as no vile act is known of the witness.

The jurists agreed that Islam is a condition for the acceptance of testimony, and that the testimony of
a disbeliever is not permitted, except for their disagreement regarding its permissibility in bequests made
on a journey, because of the words of the Exalted, “O ye who believe! Let there be witnesses between
you when death draweth nigh unto one of you, at the time of bequest — two witnesses, just men from
among you, or two who are not from among you.” [Qur’ān 5:106]. Abū Ḥanīfah said that it is permitted
upon the conditions mentioned by Allāh, while Mālik and al-Shāfī’ī said that it is not permitted; they
considered the verse as abrogated.

About the impeachment of a witness on the basis of affection for the litigant, the jurists were unanimous
that it was effective in the rejection of testimony. They disagreed about the rejection of the testimony
of an ‘adl witness through impeachment on the basis of feelings of love or hate, which causes worldly
enmity. The jurists upheld its rejection. The case about which they agreed is the testimony of a father in favour of his son or of the son in favour of his father; similarly, in the case of a mother for her son and that of the son for his mother. The point where they disagreed about the effectiveness of impeachment is that of spouses rendering testimony one for the other, with Mālik and Abū Ḥanīfah rejecting it and al-Shāfiʿī, Abū Thawr, and al-Hasan accepting it. Ibn Abī Laylā said that the testimony of a husband for his wife is acceptable, but not that of the wife for her husband, which was also the opinion of al-Nakhaʿī. The case in which they agreed about the ineffectiveness of impeachment is the testimony of a brother, unless he is casting suspicion away from himself, according to Mālik, and as long as he is not completely dependent on his brother. The exception is al-Awzāʿī for he said it is not permitted. Within this topic is their disagreement about the acceptance of the testimony of an enemy against his enemy. Mālik and al-Shāfiʿī said that it is not acceptable while Abū Ḥanīfah said that it is.

The jurists agreed that the offence of zinā cannot be proved with less than four male ḍal witnesses. They agreed that all claims, with the exception of zinā, are proved by two male ḍal witnesses. Al-Ḥasan al-ṣaṣr disagreed saying that no right is to be acknowledged with less than four witnesses on the analogy of rajm, but this is weak because of the words of the Exalted, “And call to witness, from among your men, two witnesses.” [Qurʾān 2 : 282]

All of them agreed on the point that a judgment becomes obligatory with testimony of two witnesses without the oath of the plaintiff, except that Ibn Abī Laylā said he must take an oath (as well). They agreed that financial claims are established through one male ḍal witness and two female witnesses, because of the words of the Exalted, “And if two men be not (at hand) then a man and two women, of such as ye approve as witnesses.”

They disagreed about their testimony for purposes of ḥudūd. The opinion that is adopted by the majority is that the testimony of women is not admissible in ḥudūd, with men or independently. The Zāhīrites said that it is admissible, when accompanied by the testimony of a man and if there is more than one woman, for all kinds of litigation on the basis of the apparent meaning of the verse. Abū Ḥanīfah said that their testimony is accepted in financial claims and in matters other than the ḥudūd related to the personal law, like divorce, retraction of divorce, marriage, and emancipation.
28.2.4.2. Oaths (Aymān)

The jurists agreed that the claim against the defendant is dismissed because of an oath, i.e., when the plaintiff does not have evidence. They disagreed whether the claim of the plaintiff can be established through it. Mālik said that the right of the plaintiff in what was denied by the defendant is established, and the rights established against him are extinguished if claimed by a person against whom their cancellation stands proved, in a case where the plaintiff has a stronger cause of action and prima facie chance of success. Other jurists said that a claim by the plaintiff cannot succeed on the basis of an oath, whether it is for the denial of a right established against him or for the securing of a right that is denied to him by the defendant.

All of them are in agreement that the oath refuting a claim or establishing it, is an oath upon the name of Allāh, and that there is no God but He. The opinions of the jurists are similar in its description. According to Mālik it is, “By Allāh, The One beside Whom there is no God,” without further additions. Al-Shāfi‘ī adds to this, “He Who knows what is hidden, just as He knows what is declared.”

They disagreed about a judgment based upon oath along with a supporting witness. Mālik, al-Shāfi‘ī, Ahmād, Dāwūd, Abū Thawr, the seven jurists of Madinah, and a group said that a judgment may be rendered on the basis of an oath and a supporting witness in cases of financial claims. Abū Ḥanīfah, al-Thawrī, al-Awzā‘ī, and the majority of the jurists of Iraq said that no judgment can be based upon an oath and a supporting witness. This means that there should be two witnesses. Likewise, these jurists disagreed about the rendering of judgment on the basis of an oath and two witnesses who are women. Mālik said that it is permitted as two women have been made to stand in the place of one man. Al-Shāfi‘ī said that it is not permitted as a woman can be a substitute with one male witness, not alone nor with another woman. Is judgment to be rendered on the basis of an oath in ḥudūd that are related to the rights of human beings, like qadhf and bodily injuries? There are various opinions depending upon the nature of the offence.

28.2.4.3. Defendant’s Refusal to Take the Oath (Nukūl)

The jurists disagreed about establishing a right against the defendant by his refusal to take the oath. Mālik, al-Shāfi‘ī, the jurists of Ḥijāz, and a group of the Irāqī jurists said that if the defendant refuses to
take the oath no right is established for the plaintiff by the refusal itself, except when the plaintiff takes an oath or he has one witness. Abū Ḥanīfah, his disciples, and the majority of the jurists of Kūfah said that the qāḍī is to render judgment for the plaintiff against the defendant on the basis of the refusal itself, in cases of financial claims, after asking him thrice to take the oath.

The reliance of those who maintained the rendering of judgment on the basis of nukūl is on the argument that as testimony is for the establishment of the claim and oath is for its dismissal, it is necessary that the claim be established against him because of his refusal to take the oath. They said that its transference from the defendant to the plaintiff is against the texts, as the texts explicitly state that an oath is one of the means available for the defendant.

28.2.4.4. Case Tried Before Another Judge

One of the things about which the jurists agreed is the validity of the judgment of a qāḍī on the basis of an epistle received from of another qāḍī. According to the majority, this is possible with supporting testimony, i.e., when the qāḍī, before whom the case has been proved through two ‘adl witnesses, testifies that the case stands proved, that is, this should be recorded in the epistle that he sends to the other qāḍī, with two witnesses testifying to the fact that it is the epistle of the qāḍī, and that he records their testimony for its proof. It is also said that it is sufficient if it is recorded in the qāḍī’s own writing, and this was the earlier practice.

28.2.4.5. Personal Prior Knowledge of the Qāḍī

An issue about which the jurists differed is the judgment of the judge based upon his own knowledge. They agreed that the qāḍī may decide matters of ‘adālah and the discrediting of witnesses on the basis of his own knowledge, but if witnesses render testimony contrary to his own knowledge, he is to abstain from rendering judgment on the basis of his own knowledge. They also agreed that he may decide on the basis of his own knowledge about the confession or denial of the litigant, except for Mālik, who said that he must have two witnesses for the confessions and denials of litigants.

Abū Ḥanīfah and his disciples restricted what the qāḍī decides on the basis of his own knowledge, saying that he is not to render judgment on the basis of his own knowledge in the ḥudūd, but he can do so...
in matters other than these. Abū Ḥanīfah further restricted the knowledge on the basis of which he decides, saying that he is to decide on the basis of knowledge that is acquired during the judicial proceedings, but not on the basis of knowledge that was acquired prior to that. This pertains to the admissibility of what stands proved in previous litigation.

28.2.4.6. Confession/Acknowledgment (Iqrar)

When a confession is explicit, there is no disagreement about the obligation of judgment based upon it. The examination of this topic relates, however, to the person whose confession is valid. When the confession is ambivalent, there is no disagreement about its rejection.

28.2.4.7. Estoppel

The rule about estoppel is recognized in certain cases, especially by later jurists. The Majallah, for example, acknowledges it explicitly.
Chapter 29

Islamic Law and Human Rights

The problem of human rights cannot be discussed in a few paragraphs. Yet, some basic issues can be highlighted including the source of these rights in Islamic law. This will facilitate further thinking on the issues and lead to their refinement. Some of the basic issues are, therefore, stated below:

1. **History as a tunnel:** History, it is said, is like a tunnel and if a community has moved through it for 1400 years or more, it cannot be moved to a different tunnel with one swift jerk. This means that each civilization has its own idea of rights. Europe and America have their own history, their own tunnel, and their own set of rights, which have rightly been called Anglo-European or Anglo-American rights. Even when the rights granted or recognized by each civilization are the same or similar, the way one civilization views its rights may not conform with the way the other will view them. In many cases, the same set of rights may be incomprehensible on the other side. They are the “received ideals” of each civilization, as Roscoe Pound would put it. These rights have, therefore, to be understood and explained in the light of the history and ideology of each civilization. Thus, when Western concepts of human rights are explained to the average Muslim he will not understand them clearly, and will always try to measure them in terms of his own Islamic background. In short, human rights must be explained to Muslims in terms of their own history and beliefs.

2. **The global village:** The world cannot become a global village on the basis of a single dominating
and expanding culture. If it ever does, it will be a combination and compromise between various civilizations—as many as there are. A related question is whether the world is a collection of living organisms surviving on the basis of the existential game theory—coexistence with the permission to play as a reward—or whether it is collection of organisms that are in fact predators thriving on the flesh and blood of others? The matter cannot be left to Huntington to resolve.

3. **The types of rights:** All over the world there are two types of rights: the rights of the state and the rights of the individuals. In case of conflict, the question usually is as to which right is to be preferred. In Islam there are three types of rights: the right of Allah, the right of the state and the right of the individual. The biggest surprise is that rights that are considered human rights are not guaranteed as the rights of the individual, but as human rights granted to individuals as “rights of Allah.” What does this mean? It means:

(a) That the state owes these rights to Allah just as it owes other rights of Allah.

(b) That these rights cannot be restricted for the sake of public rights that are merely rights of state; they can be restricted by other rights of Allah that have been granted a higher priority. Further the restriction of these rights can only take place through a clear evidence from the texts.

(c) That these rights are outside the ambit of state law; no law can be made that restricts these rights.

(d) That these rights cannot be suspended whatever the emergency facing the state; the only emergency for which they may be suspended is a clear evidence from the sharī‘ah.

4. **Human rights emerge from the maqāsid al-sharī‘ah:** It has already been explained that the maqāsid have a positive aspect as well as a negative aspect. The rights are based on the positive aspect (see section 25.2 above). Freedom of religion is based on the positive aspect of the preservation of dīn. This right is only to be restricted when the exercise of this right amounts to an attack on the preservation of the entire system, which is also a right of Allah flowing from ḥifṣ ‘alā al-dīn. The right to life, free movement and the like are based on ḥifṣ ‘alā’ al-nafs. The rights of women,
the rights of reproduction, and the rights of children are to be derived from the preservation of the family. The right to freedom of expression is based on the preservation of the intellect. It may be restricted when the preceding rights are attacked. The right to pursue a living of one’s choice is based on the purpose of preservation of wealth and property.

The *maqāṣid al-shari‘ah* represent the “spirit of the Islamic laws” as laid down in the Qur‘ān and the Sunnah. All types of rights recognized and enforced by the state are, therefore, based on and linked to these purposes or interests.
Part VII

History of Islamic Law and its Schools
Chapter 30

The Islamic Legal Heritage

The history of Islamic law is divided into seven periods. The state of the society in the pre-Islamic period may be examined before studying these periods.

30.1. Nature of Pre-Islamic Law

Arab society, before Islam, was based upon tribal loyalties, and these in turn arose from blood kinship, adoption and affiliation. Violence, tribal wars, raids and plunder were the norm. The family structure was weak and women were treated as chattel. Women were also denied inheritance and were often subjected to concubinage in a permissive society. Despite the tribal nature of society, the law was not totally rudimentary.

The customary law regulated relations between the members of the society. Makkah and Madinah were trading centres and market transactions were governed by the customary law of property, contract and obligations. The existence of this law is evident from the terminology used in the Qurʾān. The enforcement of the commercial law was carried on by the traders themselves through their law merchant. In Madinah, there were elementary forms of land tenure.

Criminal law had advanced from the stage of strict liability to that of a system of reparations (diyāt). An elementary form of legal administration was also in existence. It was administered mostly through
arbiters called *hakam*.

It was at this juncture that the law of Islam was revealed. Revelation engulfed the Arab Peninsula and made far-reaching modifications in the existing law, modifications that not only changed the life of the Arabs, but also the future course of history. Over time, the primitive law of the Arabs was gradually converted into a mature legal system that served many nations and peoples.

30.2. **The First Period**

The first period in the history of Islamic law commences with revelation and ends with it (610 A.D. to 632 A.D.). The first source of law during this period was the Qurʾān, while the second was the *Sunnah*.

30.2.1. **The Qurʾān**

The Qurʾān was revealed over a period of about 23 years, of which over 12 years represent the Makkan period prior to the Hijrah and 10 years fall within the Madinan period. The laws laid down in the Qurʾān covered: the position of women, children, orphans and the weak; restrictions on the laxity of morals and strengthening of the marriage tie and family life; the law of retaliation, theft, drinking, gambling, prohibition of usury and interest in all forms, and the performance of contracts. Most of these laws were revealed in a gradual manner in response to issues and cases faced by the Muslims.

30.2.2. **The Sunnah**

The *Sunnah* was the second source of law during this period. The *Sunnah* too was laid down in response to actual cases like the verses of the Qurʾān. The *Sunnah* did not enjoy the status of a text in this period, but it did so for later periods, when it was relied upon for the derivation of the rules. In this period it was directly settling cases and providing legal guidance to the Muslims.
30.2.3. **Fiqh**

*Fiqh* was not developed as an independent subject in this period. Law was clothed in the general ethical and moral teachings of the *sharī'ah*. Revelation began laying emphasis on general concepts of *iḥsān*, *qist*, *ʿadl*, *afw* and compassion for the weaker members of the society. Once the community had fully absorbed the general objectives of the *sharī'ah* detailed rules were laid down. The law of homicide prevailing in pre-Islamic times was based on a system of private justice, and was dominated by the notion of tribal vengeance. This was radically altered and replaced by *qiṣāṣ* (retaliation). Sexual offences, penalties for which were non-existent, were subjected to severe punishment. The drinking of wine was gradually condemned and then made punishable.

30.2.4. **Changes in society**

The formation of the Muslim community destroyed the roots of tribalism and the tribal set-up was totally superseded by the family as a basic unit of society. As a result of which the position of women was totally transformed. The law of contract was regulated by injunctions of fairplay and honesty while usury (*ribā*) was condemned and declared a war against Allah and his Prophet. All transactions involving gambling and deception were eliminated. In addition to all this, a large number of fundamental principles were laid down which guided the future generations to frame detailed rules.

30.2.5. **Compilation**

The Qurʾān was recorded in this period by the scribes of the Prophet (p.b.u.h). The *Sunnah* and judicial decisions of this period were not recorded like the Qurʾān, but were preserved in the memory of the Companions. These reached the later generations through narrations. Perhaps, the reason why the *Sunnah* was not recorded in this early period was the fear of its being mixed up with the Qurʾān.
30.3. The Second Period: *al-Khulafā’ al-Rāshidūn*

This period begins with the death of the Prophet (p.b.u.h.), in the year 11 A.H., and ends with the commencement of the reign of Mu‘āwiyah ibn Abī Sufyān, in the year 41 A.H. In this period, the Companions reached different parts of the globe performing the function of rulers, generals, judges and *muftīs*. The rapid growth of the Islamic state and interaction with other races influenced the growth of *fiqh*.

30.3.1. Sources of law

To the sources of the first period, another source was added in this period. This was *ijmā‘* (consensus of opinion). This arose from the practice of the Orthodox Caliphs of consulting the Companions on important issues. It is obvious that some of the Companions were using other methods too like *qiyās*, *istiḥsān* and *maslahah mursalah*, although they were not known by these names during this period. In this period, the Qur’ān was collected and compiled and further some rules could be discerned in the practice of the Companions with respect to the acceptance of traditions, however, the Companions in this period were very strict in accepting traditions.

It was in this period that the foundations of Islamic legal system were refined and developed. A large number of legal principles were laid down and established through the decisions of the Companions. The period is characterized by freedom of expressing opinions. It was these opinions that became precedents for later periods.

30.4. The Third Period: *Tābi‘ūn* (Followers)

This period begins in the year 41 A.H. and extends up to early 2nd century of Hijrah (132 A.H). The entire period, then, falls within the rule of Banū Ummayyah.

30.4.1. Sources of *fiqh*

The sources of Islamic law in this era were the same as those in the one preceding it; namely, the Qur’ān, the *Sunnah*, and *ijmā‘*. The use of analogy and *istiḥsān* became much more systematic toward the end of
this period through the methods of the founders of the early schools. The occurrence of *ijmā’* with the participation of all the jurists of the *ummah* became more difficult. It was now confined to regions and hence the schools of each region. This is how we find it recorded in most books of *fiqh*. In other words, a claim of *ijmā’* in the later periods usually means consensus on a principle of law within a school of law.

30.4.2. **Narration of Traditions**

The narration of traditions became widespread. The need for knowing traditions had also increased due to new cases coming up for decision. The areas in which knowledgeable Companions lived became centres of learning of traditions and *fiqh*. The growing need for traditions as precedents also led to falsehood in the narration of traditions. False traditions compelled some of the jurists to evolve very strict rules for checking the authenticity. This obviously affected the development of Islamic law.

30.4.3. **The Rise of the Early Schools**

This period saw the birth of some of the greatest jurists of Islam. Abū Ḥanīfah was born in 80 A.H. and he was 52 years of age at the close of this period. His student Abū Yūsuf (b. 113 A.H.) must have been close to finishing his education. Muḥammad al-Shaybānī was born in 132 A.H. and must have studied under his teacher for a few years, because Abū Ḥanīfah died in 150 A.H. Mālik ibn Anas was born in 95 A.H. and was almost 40 years old at the close of the period. Besides these jurists, there were many other jurists like Ibrāhīm al-Nakha’ī, al-Awzā’ī, Ibn Abī Laylā and a host of other who lived during this period. Many of these jurists were appointed *qādīs* and their decisions were later recorded by Muḥammad al-Shaybānī in his well known books.

Collectively, these early schools decided such a large number of cases that the foundations of Islamic law as a legal system were firmly laid. It is perhaps for this reason that Joseph Schacht maintained that the law as we know it today was more or less settled in this period. This law was then recorded by al-Shaybānī, in the next period, not only for his own school, but also for those like Ibn Abī Laylā and al-Awzā’ī.
30.5. The Fourth Period: Growth

This period begins in early 2nd century Hijrah (132 A.H.) and continues up to 350 A.H. thus spreading over a period of more than 200 years. It stands out, as compared to the Periods which preceded it and those which followed it, because of three main distinctions:

1. *Fiqh* flourished in this period and achieved maturity.
2. Compilation of all kinds of knowledge took place, the most remarkable being that of *fiqh*.
3. The remaining schools of *fiqh* were formed in this period and established.

30.5.1. Growth and compilation of *fiqh*

There were many factors which had an impact on the growth of *fiqh*, the most important of these were: the concern of the Abbasides for *fiqh* and the *fuqahāʾ*, most of whom were appointed *qādis*; freedom of expressing juristic opinions; the knowledge movement made unrivalled progress in every field leading to compilation and translation of innumerable works. The Muslim scholars in general and the *fuqahāʾ* in particular, benefited immensely from these developments.

The compilation of *fiqh* began toward the end of the period of Banū Umayyah. An outstanding example is Mālik’s *Muwaṭṭaʿ* in which he has recorded the decisions from ‘Ā’ishah, Ibn ‘Umar, Ibn ‘Abbās and others. Ibrāhīm al-Nakhaʾī collected the opinions of his teachers. This was followed by Abū Yūsuf’s *Kitāb al-Kharāj*. The first true works of *fiqh*, however, that determined the shape of all future works on Islamic law were Imām Muḥammad al-Shaybānī’s books called the *Zāhir al-Riwayāt*. As these works are huge, it appears that the work must have commenced shortly after the death of Abū ʿAbdullāh in 150 A.H. Al-Shaybānī died in 189 A.H. Fifty years later, al-Shāfiʿī wrote his book *al-Risālah*, which is the first book on *uṣūl al-fiqh*. He also wrote his books called *al-Umm* and *Ikhtilāf al-Hadīth*. The first major work of the Mālikī school, called *al-Mudawwanah al-Kubrā*, was compiled during the early part of the third century by Saḥnūn. This was a compilation of the opinions given by Ibn al-Qāsim on the issues settled in al-Shaybānī’s books. ʿAḥmad ibn Ḥanbal was born in 164 A.H. and died in 241 A.H. He was primarily a traditionist and
collected around 40,000 traditions in the six volumes of his *Musnad*. His school was developed later by his students.

During this period, *fiqh* became an independent science in which great thinkers specialized. Islamic History and history in general is witness to the achievements of these scholars. *Usūl al fiqh* as a science was also laid down systematically. These principles were now available for use to those who were to follow. The work of these centuries stood within reach of every scholar aspiring to be a jurist.

30.5.2. **Compilation of the Sunnah**

The compilation of the *Sunnah* passed through three phases:

1. **The first phase.** The first phase commences in early 2nd century Hijrah when ‘Umar ibn Abdul ‘Azīz, one year prior to his death, asked his representative in Madinah, Abū Bakr Muḥammad ibn ‘Amr ibn Ḥazm, to record the traditions of the Prophet (p.b.u.h.). Ibn Ḥazm recorded traditions in the form of a book, which unfortunately the Khalifah was not able to read himself as death had overtaken him. Thus began the movement for the recording of traditions. All areas of the Muslim world participated in this noble task. Traditions were collected in Makkah by Ibn Jurayj, in Madinah by Muḥammad ibn Isḥāq and Mālik ibn Anas, in Basra by al-Rabī’ ibn Ṣābiḥ and Ḥammād ibn Salamah, in Kūfah by Ṣufyān al-Thawrī, in Syria by al-Awzā‘ī, in Yemen by Ma‘mar, in Khurāsān by ibn al-Mubārak, and in Egypt by al-Layth ibn Sa‘īd. The method adopted by these ‘ulamā’ was to collect and arrange traditions according to subjects in separate chapters like traditions pertaining to *ṣalāt*, sales (*buyū‘*).

2. **The second phase.** The second phase begins with the end of the 2nd century Hijrah. During this period the ‘ulamā’ were occupied with collecting the traditions in accordance with the methods of *masānīd*. The content of this method was to collect traditions, which a particular Companion had narrated, like Abu Hurayrah for example, in one chapter. This would be called *musnad* of Abū Hurayrah and the traditions in it dealt with different subjects. The basis of such compilation was the unity of the narrator not the unity of the subject matter as against the previous method. The foremost of these *masānīd* were of ‘Abd Allāh ibn Mūsā al-Kūfī, of Ḥammād al-Khazzī, of Isḥāq ibn
Rahlwih, of ‘Uthmân ibn Shaybah. Though there were many of these *masānīd* they have not reached us except that of Imâm Aḥmad ibn Ḥanbal, through which is known the method adopted in the *masānīd*.

3. *The third phase.* The third phase begins in the middle of the 3rd Century Hijrah and continues till its end. In this age the ‘ulamā’ distinguished the *ṣaḥīh* from the *ghayr ṣaḥīh* and each Imâm of the traditions laid down conditions for judging the traditions which are sometimes similar to those laid down by others and sometimes different. These Imāms compiled their books in accordance with the chapters of *fiqh* recording under each head traditions related to a single subject alone. It was the same method that was adopted for the compilation of the *Sunnah* in the first phase.

The followers of this method are the six Imāms who have the privilege of preserving the *Sunnah* from all intruders. They are: Muḥammad ibn Ismā‘īl al-Bukhārī (d. 265 A.H.), Muḥammad ibn Ḥajjāj al-Nisāpūrī (d. 261 A.H.), Abū Dāwūd Sulaymān ibn al-Ash‘at al-Sijjistānī (d. 275), Abū ‘Īsā Muḥammad ibn ‘Īsā al-Salām al-Tirmidhī (d. 279 A.H.), Abū ‘Abd Allāh Muḥammad ibn Yazīd al-Quzwaynī better known as Ibn Mājah (d. 273 A.H.) and Abū ‘Abd al-Rahmān Aḥmad ibn Shuhayb al-Nasā‘ī (d. 303 A.H.). The books enjoy a great status in Islamic literature and for the later jurists they are the second source of *fiqh* after the Qur‘ān.

30.5.3. **Compilation of tafsīr**

During the time of the Tabi‘ūn the need for *tafsīr* had increased manifold, especially the *tafsīr* of the verses relating to the *ahkām*. These interpretations were narrated mostly mixed up with the *Sunnah* and the *ahkām* of *fiqh*. Towards the end of the period of the Tabi‘ūn, the scholars began collecting the meanings of the Qur‘ān and started compiling these in the form of a separate field of knowledge called *‘ilm al-tafsīr*. The scholars of each area concentrated on collecting what had been passed on through their teachers from the Companions or the Prophet.

During the period of the Abbasides, scholars undertook the compilation of these *tafāsīr* and arranged them in accordance with verses and *sūrahs* of the Qur‘ān. Most of these works are not available, though al-Ṭabarī has quoted some of them.
30.6. The Fifth Period: The Maturing of the Legal System

This period extends from 350 A.H to the 8th century of the Hijrah, and is characterized by most writers as one of stagnation and *taqlīd*. Such labels attached to this period amount to gross injustice to the great minds of the Muslim world who lived in this period. Our entire method of studying Islamic law and more than 95% of the literature that we deem as the original sources of Islamic law is a product of this golden period. In fact, the entire literature of the Shāfi‘ī and Ḥanbalī schools is a product of this age.

This was the age of the great systematizers. It was through their efforts that the Islamic legal system reached full maturity. The greatest activity is witnessed during the 5th and the 6th centuries of the Hijrah. It produced the great minds who are household words, so to say. Jurists like al-Dabūsī, al-Jaṣṣāṣ, al-Māwardī, al-Shīrāzī, al-Sarakhsī, al-Bazdawī, al-Juwaynī, al-Ghazālī, Ibn Rushd, al-Kāsānī, al-Rāzī, al-Nawawī, al-Qarāfī, al-Marghinānī, Ṣadr al-Shārī‘ah, Ibn Qudāmah al-Maqdisī and a host of others are the shining examples of this period. To term this period as one of stagnation is to display ignorance about, and a lack of appreciation of, the true history of Islamic law.

To estimate the contributions of this period would require volumes. It would be pertinent to say that all the disciplines, their classifications and expositions are a contribution of this period. *Uṣūl al-fiqh* was truly developed as a discipline during this period. Most of the credit given to al-Shāfi‘ī needs to be shared with the jurists of this period. A new field of *qawā‘id fiqhīyah*, as a discipline, owes its existence to the jurists of this period. The theory of the purposes of law or the *maqāsid al-sharī‘ah*, which is more developed than the modern theories of interest and values, is a product of this age. The separate discipline of *ahkām al-Qur‘ān* as well as some of the greatest commentaries (*tafsīrs*) are a contribution of this age.

It is also true that some of the doctrines and movements that may irritate some modern minds were also the product of this age. For example, *taqlīd* as a doctrine was formulated during this period. The controversy between the Ahl al-Ra‘y and the Ahl al-Ḥadīth also came to full bloom in this period.

30.7. The Sixth Period: The Age of Qānūn and Codification

This period may be said to extend from the 14th century CE to the 17th century CE before the advent of colonization. In this period some attempts were made to codify laws. Two outstanding examples are...
provided by the Ottoman state in Turkey and the Mughal empire in India, especially the rule of Awrangzeb Alamgir.

The administration of justice within the Islamic legal system was carried out from the start through two cooperating spheres. The state was responsible for military, fiscal matters and crimes in general, while the jurists dealt with matters of personal law, waqfs, commerce and the ḥudūd penalties. The courts responsible for matters dealt with by the state were called mazālim courts. Besides these, there were institutions like the inspector of the markets (āmil al-sūq) and the institution of the muḥtaṣib. The authority exercised by the state was called siyāsah. This was a wide area and covered almost every area that the fuqahā’ did not deal with. The qāḍīs had their own courts and were more or less autonomous.

A code means a set of laws promulgated and enforced by the state. In this sense, there had never been any codification in Islamic law. An early suggestion by Ibn Muqaffah to Abū Ja’far al-Mansūr could not be implemented as Mālik is said to have advised against it in the year 148 A.H. when the Khalifah went there to perform ḥajj and again in 167 A.H. after he had written the Muwatā’. The obvious reason appears to be the desire of the rulers not to interfere with the part of the sharī‘ah that dealt with the personal matters of people, in which they followed the school of their choice. This situation continued till the Ottoman times.

30.7.1. The Ottoman Qānūn

The first real attempts at codification were made by the Ottoman rulers. These dealt mainly with the criminal law and were called qānūn nāmahs. The process reached its zenith during the period of Sulaymān ‘Ālishān when Turkey dominated Europe including the sea routes. Joseph Schacht writing about this period said that these laws were the “swiftest laws in Europe.” Uriel Heyd has made a detailed study of the Ottoman criminal laws of these times and has even translated a number of the firmāns and qānūn’nāmahs.

30.7.2. The Mughal Empire

Awrangzeb ‘Ālamgīr, 11th century A.H./17th century CE made some efforts at codification too. He issued firmāns relating to ta‘zīr, but his major contribution was in the area of sharī‘ah law based on the
Zahir al-Riwāyah. He appointed a commission headed by the Nizām of India. The result was the Fatwā ʿĀlamgīribā. It is a comprehensive work based on the model of the Hidāyah and comprises six volumes.

This, however, was not a code in the modern sense of the term, as it was not binding upon the subjects. Further, it covers the entire spectrum of Islamic law as expounded by the fuqahā’, but it does not cover the law administered by the state.

30.8. The Seventh Period: Colonization and After

During the age of colonization most Islamic laws were slowly replaced by Western laws. Only the areas of personal law were left intact. In Turkey, European laws were adopted by choice. This process was started in 1850. The sharī’ penalties were dropped and taking of interest was made permissible.

A civil code based on the sharī‘ah was also prepared. This was the famous Majallat al-Aḥkām al-ʿAdlīyah (The Corpus of Juridical Rules) a result of the efforts a committee headed by Ahmad Jawdat Pasha. The Majallah remained in force in Turkey and most of the territories formerly under the Ottoman regime. Turkey abrogated it entirely after World War I, while in the Lebanon and Syria it was eliminated in stages.

In India, the British rulers permitted the application of personal laws and a law was passed in 1772 that provided that the sharī‘ah should be applied to all cases relating to inheritance, marriage, and other matters of personal law. Al-Hidāyah, Sirājiyah and small parts of some manuals were translated. In the middle of the 19th century, a legislative movement was launched and resulted in the abolition of slavery in 1843, Penal Code and Criminal Procedure Code (1862), Indian Evidence Act (1872), Companies Act (1913), Shariat Act (1937) and a host of other laws.

In the application of the Islamic laws the judges did not always stay within the confines of the manuals of Islamic law and this resulted in what is called Anglo-Muhammadan law.

In Egypt, the Shāfi‘ī law had been the official law, with some interruptions, till the Ottoman rulers made Hanafī law the official law of the country. In 1874, after independence from Turkey the National Civil Code was enacted and Islamic law was relegated to personal matters. A code was also made for the sharī‘ah courts embodying 647 articles. In 1920 the Mālikī and Shāfi‘ī laws were reintroduced for certain matters. In 1936, ʿAbd al-Razzāq Sanhūrī Pasha headed a committee to prepare a new code incorporating...
some Islamic provisions as well. The code consists of 1149 articles. The first article of the code provided that a judge should have recourse to the principles of the Islamic *sharī’ah* in the absence of legislative provision in any particular case. The code was enforced in 1949. The Egyptian constitution, however, places a limitation on this by admitting only those rules that are definitive, i.e., those about which there can be only one opinion.
Chapter 31

The Schools of Islamic Law

The schools of Islamic law are not sects; they are systems of interpretation. Each school has its own independent set of principles, which cannot be mixed up with the principles of other schools without causing inner contradictions and analytical inconsistency. The set of principles adopted by each school is followed by the jurists within the school. It is obvious that the use of one set of principles may lead to a different legal opinion on the derived law. For example, it is an established principle within the Ḥanafī school that the legal opinion of a Companion of the Prophet, especially a jurist Companion, sets a binding precedent for the later jurists; it has to be followed. The Shāfīī school does not follow this principle.

31.1. The Ḥanafī School

Kufah, a city in Iraq, gradually turned into a centre of *fiqh* and learning. The reason for its being so is traced to the decision of ‘Umar (R), who sent ‘Abd Allāh ibn Mas‘ūd (R) (d. 32 A.H.) as a teacher and *qāḍī* for this area. This learned Companion trained a large number of jurists, who in turn produced students many of whom attained great fame. Among these jurists were Alqamah al-Nakha‘ī, his nephew Ibrāhīm al-Nakha‘ī, Qāḍī Shurayḥ, and Ḥammād ibn Abū Sulaymān.
31.1.1.  **Abū Ḥanīfah: The Founder**

The founder of the Ḥanafī School was Abū Ḥanīfah Nuʿmān ibn Thābit ibn Zūṭah, possibly of Afghan origin. Imam Abū Ḥanīfah was born in Kufah in the year 80 A.H. (699 A.D.) and died in 150 A.H. (767 A.D.). He is also called Imām Aʿzām or the Great Imām. He began his early education in scholastics (*kalām*) and later developed an interest for jurisprudence under the tutorship of his Shaykh, Ḥammād ibn Abū Sulaymān (d. 120 A.H.).

He was a textile merchant by profession and it is said that due to this reason his *fiqh* reflects his practical approach to legal problems. Abū Ḥanīfah was later given the title of the leader of the school of Ahl al-Raʿy. He is reported to have met some Companions as well, foremost amongst them is Anas ibn Mālik.

31.1.2.  **Jurists of the School**

Out of the pupils of Abū Ḥanīfah, four are famous; they were: Abū Yūsuf Yaʿqūb ibn Ibrāhīm al-Anṣārī (113–182 A.H.), Zufar ibn Hudhayl ibn Qays (110–158 A.H.), Muḥammad ibn al-Ḥasan ibn Farqād al-Shaybānī (132–189 A.H.), and Ḥasan ibn Ziyād al-Luʿlūʿī. Through these disciples, the fame of the Ḥanafī school spread far and wide. Abū Yūsuf was appointed judge in Baghdad and later became the Chief Qāḍī with authority to appoint judges all over the kingdom. He, thus, had the opportunity to propagate the school of the great Imām.

31.1.3.  **Early works of the School**

Muḥammad ibn al-Ḥasan al-Shaybānī, who must have been 18 years old when Abū Ḥanīfah died, takes the credit for recording not only the first books of the Ḥanafī school, but also those of the entire Islamic legal system. The books written by him were of two types: the first were called *ẓāhir al-riwayah* or books of the primary issues, while the second were called *al-nawādir* or unusual cases.

In addition to the above, he wrote *Kitāb al-Ḥujjah `alā Ahl al-Madīnah*, a book on the use of traditions, and another book on traditions called *al-Āthār*. His version of Mālik’s *Muwatṭa*’ is also considered highly reliable. Abū Yūsuf also wrote a book on traditions called *al-Āthār*, and his *Kitāb al-Kharāj* is very well
known.

The above books form the foundation of Ḥanafī fiqh. In fact, most of the books of the other schools are a response to what is recorded in these books. Al-Mudawwanah al-Kubrā of the Mālikī school compiled by al-Saḥmūn is a response to the rulings given in the above books. Much of al-Shāfi‘ī’s work is also in response to these works.

31.1.4. Influence of the School

The Ḥanafī school was predominant in Iraq during the Abbaside Caliphate since it was preferred officially. It was also the official school in the Ottoman State and in the Mughal kingdom in India. Its adherents constitute more than one-third of the Muslims of the world and its followers are in a majority in Pakistan, India, Bangladesh, Afghanistan, Turkey, Iraq, Syria, and the newly independent states of Central Asia.

31.1.5. The Ḥanafī School and legal theory

Ḥanafite legal theory revolves around the use of general principles. The first task for the Ḥanafī jurist, when he is faced with a new case, is to see whether this case can be accommodated under a general principle. If the case is covered directly by a principle, the jurist finds no difficulty in assigning to it the ḥukm of the governing principle. If the case does not fall under one principle, the jurists would try to accommodate it under another principle. A principle that governs a case may itself be a sub-principle of a wider principle, or even be an exemption from it or a corollary.

Abū Ḥanīfah, however, is reported to have said: “This knowledge of ours is an opinion; it is the best we have been able to achieve. He who is able to arrive at a different conclusion is entitled to his opinion as we are entitled to our own.” Explaining the modes of ijtihād adopted by him, he said: “If I do not find my answers in the Book of Allah or in the traditions of the Prophet (p.b.u.h.), I seek the views of the Prophet’s Companions, from whose opinion I do not deviate. But when it comes to Ibrāhīm, al-Sha‘bī, Ibn Sīrīn, al-Ḥasan, ‘Aṭā’ and Sa‘īd ibn Jubayr, well, they were persons who resorted to independent interpretation and I will do likewise.”

The principles according Abū Ḥanīfah are: proof by the Qur’ān and by the Sunnah, ijmā‘ and the opinion of a Companions. He does not mention qīgāṣ (analogy) and istiḥsān (juristic preference) as these are
principles of interpretation rather than true sources of Islamic law. *Istihsān* is the preference of a general principle over analogy. Al-Shaybānī, however, uses analogy and *istihsān* in his books and attributes it to his teacher as well.

It has been mentioned by Ibn Khaldūn in the Muqaddimah that Abū Ḥanīfah acted upon *raʾy* and did not accept the majority of the traditions. He accepted only 17 traditions, says Ibn Khaldūn. This view is not correct and is based on vicious propaganda against the Ḥanafī School. Anyone who studies the *fiqh* of the Ḥanafi school will realize that Abū Ḥanīfah accords the *Sunnah* its proper status, like the other founders of schools. Further, how can a jurist who considers even the opinion of a Companion as binding on him refuse to consider the *Sunnah* as binding or reject traditions without justification.

Abū Ḥanīfah accepted *qiyās* (analogy) and acted upon it like the other founders of the *Sunnī* schools. On a closer examination of the principles relating to *qiyās* used by the Ḥanafi school, it becomes apparent that its scope is narrower when compared with the methods of the other schools. This strictness is overcome by the principle of *istihsān*. *Istihsān* is nothing more than the preference of a stronger principle over strict analogy. *Istihsān* is also used by the Mālikī school, but it is rejected by the Shāfiʿīs.

31.2. The Mālikī School

The Mālikī school emerged as the school of the people of Medina or the people of Hijaz. In its methods it owes its origin to ‘Abd Allāh ibn ‘Umar (and to ‘Umar (R) himself according to some), Zayd ibn Thābit, Ibn ‘Abbās, ‘Ā’ishah, Sa’īd ibn al-Muṣāyyib and other Companions (may Allah be pleased with them all).

31.2.1. Mālik ibn Anas: The Founder

The Imām of this school was Mālik ibn Anas ibn Mālik ibn Abī ‘Āmir al-Asbāḥī. Mālik was born in Madīnah in the year 93 A.H. (or 95 or 97). He lived all his life in Madīnah where he died in the year 179 A.H. (795 C.E.). He received his early education from ‘Abd al-Rahmān Harmaż and then became a student of Rabīʿah ibn ‘Abd al-Rahmān, known as Rabīʿat al-Raʿy. At the age of 17 he started giving lessons in *fiqh* and traditions. He himself says, “I began teaching when seventy Shaykhs had approved that I was qualified to do so.” He was universally acknowledged as a jurist. Al-Shāfiʿī is reported to have said
of him: “After the Tābi‘ūn, Mālik is God’s authority amongst His creatures. . . . If traditions carry Mālik’s authority hold on to them.”

The authority of Mālik as a traditionist is undisputed. He studied traditions under Nāfi’, the client of Ibn ‘Umar, under al-Zuhrī, Abū al-Zinād, and Yahyā ibn Sa‘īd al-Anṣārī. Bukhārī says that the soundest chain of narration is “Mālik from Nāfi’ from Ibn ‘Umar,” and then “Mālik from al-Zuhrī from Sālim from his father.” This is sufficient proof of the authority that Mālik enjoyed as a traditionist.

Mālik is the author of the well known book *al-Muwatṭa’*, which is at once a book of traditions and *fiqh*. It is said that he wrote this book over a period of 40 years. Al-Shāfi‘ī said of this text: “No book on earth, after the Book of Allah, is more accurate than the book of Mālik.” (It should be noted that the sound *ṣaḥiḥ* compilations were compiled much later). *Al-Muwatṭa’* was transmitted in several versions, two of which have come down to us. The first is the version of Muḥammad ibn al-Ḥasan al-Shaybānī (printed in India), while the second was that of Yahyā al-Laythī (d. 234), which has been published in Egypt and commented upon by al-Zurqānī, al-Suyūṭī and others.

The pupils of Mālik include Muḥammad ibn al-Ḥasan of the the Ḥanafī school and Muḥammad ibn Idrīs al-Shāfī‘ī the founder of the Shāfī‘ī school. Those belonging to the Mālikī school were: Yahyā al-Laythī, the narrator of *al-Muwatṭa’,* Asad ibn al-Forūṭ al-Tūnisī (d. 213 A.H.), ‘Abd al-al-ʿām al-Tanḥūkī, also known as Saḥnūn from Qayrawān (d. 240 A.H.), ‘Abd al-Ḥāmīn ibn al-Qāsim (d. 191 A.H.), Ashhab ibn ʿAbd al-ʿAzīz al-Qaysī (d. 204 A.H.), and ‘Abd Allāh ibn ‘Abd al-Ḥakam (d. 214 A.H.).

31.2.2. Jurists of the School

Among the later jurists of the school, who attained fame were: Abū al-Walīd al-Bājī, Ibn Rushd (the grandfather), Ibn Rushd (the grandson, author of *Bidāyat al-Mujtahid*), Ibn al-ʿArabī, Sīdī Khalīl, and al-Khirashī.

The earliest major work of the school is *al-Mudawwanah al-Kubrā*. Ibn al-Qāsim, who was the student of Mālik for 20 years, issued rulings on cases already decided by the jurists of Iraq (primarily the Ḥanafīs) when these were presented to him by Asad ibn al-Furūt. The decisions were rendered in the light of Mālik’s opinion as well as Ibn al-Qāsim’s own. The decisions were recorded by Saḥnūn. The work is voluminous and makes very interesting reading. As Saḥnūn died in 240 A.H., the work must have been compiled a few
years earlier (say around 230 A.H.). Other works are *al-Mukhtasar* by Sīdī Khalīl. Many commentaries have been written on this work. Ibn Rushd’s *Bidāyat al-Mujtahid* is well known. It is unique because of its comparative approach, and is used for instructional purposes in many institutions.

### 31.2.3. Mālikī School and legal theory

Mālik’s name and method are usually associated with the Ahl al-Ḥadīth, because he was the first traditionist. Mālik’s stature as a traditionist is acknowledged by all, but he was an equally great jurist. This was acknowledged by Abū Ḥanīfah, who on visiting him said: “He truly is a faqīh.” When Mālik’s opinions and those of his school are examined in some detail, it becomes obvious that the preferred method was analytical based on the use of general principles. In fact, the methodology of this school is closer to that of the Ḥanafī school than to any school of the traditionists. Both accept *istiḥsān* and the opinion of a Companion. The Mālikī school accepts the principles of *maṣlaḥah* and *sadd al-dharīʿah*, which are nothing more than the use of general principles.

Mālik did not lay down his principles separately in a compiled form. His students and later jurists of the school derived these principles from Mālik’s *fiqh* and compiled them. These jurists maintain that the sources of *fiqh* according to Mālik are: the Qur’ān; the *Sunnah*; *ijmāʿ*; *qiyās* (analogy); practice of the people of Medina (*ʿamal*); opinion of a Companion; *istiḥsān*; *maṣlaḥah mursalah*; and *sadd al-dharīʿah* (blocking the lawful means to an unlawful end). The modes of *ijtihād* adopted by Imām Mālik had the following distinctive features.

1. **Practice of the people of Madinah preferred over *qiyās***.

2. **Maṣlaḥah Mursalah.** *Maṣlaḥah mursalah* is defined by jurists as that interest which has neither been expressly confirmed by the Lawgiver nor has it been rejected. In other words, it is a principle derived by the jurist after seeking support from the purposes of law.

3. **Opinions of the Companions.** Mālik holds the view that opinions of the Companions constitute a valid proof for purposes of the *aḥkām* and should be preferred over *qiyās*. This hold true when there is no tradition from the Prophet on the case.
4. **Sunnah (Khabar Wāhid).** Mālik lays down that individual narrations should not be contrary to the practice of the people of Madinah. If an individual narration is contradicting such practice then it is not a legally valid proof (*hujjah*).

5. **Istihsān.** Mālik has upheld the principle of *istihsān* in some of his decisions. The Mālikī jurists (particularly Ibn al-‘Arabī) have explained the meaning of this principle as practised by Mālik.

The Maliki school was quite influential in Muslim Spain (Andalus). Its followers can be found today in North Africa, Central and West Africa and Eastern Arabia. Modern jurists place a high value on his doctrine of *maṣlaḥah*.

31.3. **The Shāfi‘ī School**

31.3.1. **Muḥammad ibn Idris al-Shāfi‘ī: The Founder**

The founder of this school was Abū ‘Abd Allāh Muḥammad ibn Idris ibn al-‘Abbās ibn ‘Uthmān ibn al-Shāfi‘ī al-Ḥashimī al-Māṭlabī. He belonged to the Quraysh tribe and was born in Ghaza in the year 150 A.H. (767 A.D.) and died in Egypt in the year 204 A.H. (819 A.H.)

When he was two years old his father died and his mother took him to Makkah. He memorised the Qur’ān at the age of 7 years. He went to the desert to live with the tribe of Hudhayl where he learnt the language and poetry. On coming back he studied under the Muftī of Makkah, Muslim ibn Khālid al-Zanjī. It is said that al-Zanjī allowed him to give legal opinions when he was only 15 years old. Al-Shāfi‘ī travelled throughout his life from one place to another. At the age of 30 he was offered a post by the Governor of Yemen. As a result of some intrigue and subsequent accusation he was deported from Yemen and was sent to Baghdad in the year 184 A.H. to appear before the Caliph. It is said that Muḥammad al-Shaybānī played an effective role in his defence and he was released. He stayed with al-Shaybānī and acquired knowledge from him. He refers, in the *Kitāb al-Umm*, to the discussions that took place. He had earlier been the student of Mālik and studied *al-Muwatta‘* under him. Al-Shāfi‘ī left for Makkah in the year 188 A.H. In 195 A.H. he came back to Iraq and stayed there for two years and returned to Hijaz. In 198 A.H. he paid his third visit to Iraq and after a few months left for Egypt. It is said that he wrote...
his books al-Risālah, Kitāb al-Umm, and Ikhtilāf al-Ḥadīth in Egypt. If this is true, then, he must have written all this in the last six years of his life, which appears to be an incredible task.

His book al-Risālah is considered to be the first systematic work on ʿusūl. His book al-Umm, however, is considered to be more important. The book falls into seven volumes and has been recorded in a scientific and dialectical form by his pupil, al-Rabīʿ ibn Sulaymān. There has been a controversy around the real author of this book in recent times on the basis of what some earlier scholars like al-Ghazālī and others have said that the book was actually written by al-Buwaytī a student of al-Shāfīʿī. It is maintained that after al-Buwaytī had written it Rabīʿ ibn Sulaymān expanded and rearranged it. Dr. Zaki Mubarak endorsed this view in 1934. This, however, does not undermine the value of the book which had no parallel in the works of those days as far as its method of exposition is concerned.

31.3.2. Jurists of the School

The prominent jurists of the Shāfīʿī school are: Ismāʿīl ibn Yaḥyā al-Muzanī, the author of al-Mukhtāṣar, Yūsuf ibn Yaḥyā al-Buwaytī, Rabīʿ ibn Sulaymān and Ahmad ibn Ḥanbal. These were his pupils and in later times the Shafiʿī school has produced outstanding personalities like al-Shirāzī, al-Juwaynī, al-Ghazālī, al-Rāzī, al-Nawawī and many others.

There is, however, a big gap between the works of al-Shāfīʿī and the later well known works of the school. In fact, the gap extends over two or more centuries. The fully developed school upheld certain doctrines that were not upheld by the founder. Perhaps, the doctrines were being refined and tested during this large gap of two and a half centuries. It is possible that there were a large number of works in between, but these are not extant.

31.3.3. Shāfīʿī School and legal theory

The method of interpretation adopted by al-Shāfīʿī was directed against the use of general principles. The reason appears to be the desire to stay as close to the revelation as possible, i.e., wahī in both its meanings. Thus, a basic rule he made was: “If the chain of a tradition is complete and sound, it must be followed.” This rule, he insisted, should be followed irrespective of general principles. Accordingly, most of his other principles of interpretation appear to be designed against the strengthening of general principles.
Al-Shafi‘i was the first jurist to write about the rules of literal construction and then construct his *fiqh* on them. These principles are available in his book *al-Risālah* and are visible in the *Kitāb al-Umm*. In this book he also discussed *qiyyās al-ma‘nā, ijmā‘*, and *istihsān*. The major emphasis, however, was on the *Sunnah* as a source of law. In a way, he is the leader of the Ahl al-Ḥadīth or those who are inclined towards applying the traditions literally once a sound chain is established. He laid down conditions for the acceptance of the traditions on the basis of which he is sometimes given the title of the helper (*nāṣir*) of the *Sunnah*. He accepted the four sources of law: the Qur’ān, the *Sunnah*, *ijmā‘* and *qiyyās*. Al-Shafi‘i does not consider the opinion of a Companion as a valid principle nor does he attach weight to the practice of the people of Madinah.

Al-Shafi‘i attacked the principle of *istihsān* used by the Ḥanafīs as well as Mālikīs and condemned it. A closer examination of his arguments, however, reveals that he did not identify the exact nature of this principle as used by both Ḥanafīs and Mālikīs, which is very much within the ambit of the texts, and this is acknowledged by some Shafi‘ī jurists like al-Ghazālī.

The principle of *ijmā‘* is accepted by al-Shafi‘i, but not exactly in a form laid down by the classical definition. Al-Shafii does not mention *maslahah mursalah* in his principles. The jurists of his school reject it outright, however, it is maintained by modern writers that al-Shafi‘i uses this principle and calls it *qiyyās fī al-qawā‘id*, but this opinion is not supported by al-Shafi‘i’s works, especially when his methodology was directed against general principles.

31.4. The Ḥanbalī School

31.4.1. Aḥmad ibn Ḥanbal ibn Asad al-Shaybānī: The Founder

The founder of the school is Abū ‘Abd Allāh Aḥmad ibn Ḥanbal ibn Asad al-Shaybānī al-Baghdādī. He was born in the year 164 A.H. (780 A.D.) in Baghdad and died there in 241 A.H. (855 A.D.). He visited Syria, Hijaz, Yemen, Kufah and Basrah for purposes of collecting traditions. He was a pupil of al-Shafi‘i for some time. He compiled a major work on traditions entitled *Musnad al-Imām Aḥmad*, which contains more than 40,000 traditions.
31.4.2. Jurists of the School

Among the jurists of this school are Muwaffaq al-Dīn ibn Qudāmah, the author of al-Mughni, Shams al-Dīn ibn Qudāmah al-Maqdisī, the author of al-Sharḥ al Kabīr, Taqīy al Dīn ibn Taymiyah, author of the Fatāwā and other works and Abū ʿAbd Allāh ibn Bakr al Zariʿī better known as Ibn Qayyim al-Jawziyyah.

31.4.3. Ḥanbalī School and legal theory

The approach of the Ḥanbalī school is similar to that of the Shāfīʿī school. In fact, this school is more literalist than the Shāfīʿī school. While al-Shāfīʿī was not inclined to accept mursal traditions, the Ḥanbalī school did and preferred them over general principles and on analogy constructed on them.

The Ḥanbalī school derives its literature from the later jurists who have laid down the principles of their imām. Ibn Qayyim al-Jawziyyah states that these principles are five:

1. **The Texts (Nūṣūṣ).** The Qurʾān and those traditions whose chains are complete are to be preferred over any other kind of source whether textual or rational.

2. **Opinion of a Companion.** These are of two kinds: First, an opinion of a Companion in which he has not been opposed by others; this is accepted. Second, when the opinions over an issue are more than one. In such a case that which is closest to the texts is to be accepted.

3. **The Daʿīf and Mursal Traditions.** We have said that al-Shāfīʿī does not accept a tradition the chain of which is cut up or there is a defect in it; Aḥmad ibn Ḥanbal does. These traditions are not to be rejected totally, but are to be used for the establishing of the aḥkām in order of strength. These traditions also are preferred by the Imām over qiyās.

4. **Qiyās.** Qiyās is the source of law as a last resort. When all the above sources fail to reveal a ʿḥukm the jurist may then have recourse to qiyās (analogy).

The Ḥanbalī school existed for some time in Iran, before that country became Shīʿah, and also in Baghdad. The school then faced virtual extinction before it was rejuvenated by Ibn Taymiyah and his
pupil Ibn Qayyim al-Jawzīyah in the seventh and eighth centuries. It came to life again in the 18th century in Saudi Arabia at the hands of Muḥammad ibn Ṭāhā ibn al-Ṭāhā ibn al-Sa‘ūd it was declared as the official school of the Kingdom. The followers of this school, sometimes called Wahhābīs, are found in central Saudi Arabia, and in Pakistan and India as well. It is to be noted that the majority of the people in Saudi Arabia are Shāfī‘īs.

31.5. The Extinct Schools

There were three other Sunnī schools, besides the four mentioned above, but they became extinct. These were the school of al-Awzā‘ī, the Zāhirī school and the school of al-Ṭabarī. Most of the extinct schools did not accept analogy as a source of law, and this could be the reason for their extinction.

31.5.1. The Awzā‘ī School

Abū ‘Amr ‘Abd al-Rahmān ibn ‘Amr, known as al-Awzā‘ī, was of Yemini origin, but was born in Ba‘labak (Lebanon) in the year 88 A.H. and died in 157 A.H. This makes him a contemporary of Abū Ḥanīfah. His name is associated with the Ahl al-Ḥadīth, who do not accept analogy and opinion as a source of law. Al-Awzā‘ī was the imām of Syria, just as Abū Ḥanīfah was in Kufah. What is known about him is through Abū Yūsuf’s work called Kitāb Siyār al-Awzā‘ī, which is found in volume 7 of al-Shāfī‘ī’s Kitāb al-Umm. Some material has been published in Saudi Arabia, which includes some more work on the opinions of Awzā‘ī. His opinion’s are also found in al-Shaybānī’s works.

The Awzā‘ī school flourished in Syria and later moved to Spain, however, with the emergence of the Shāfī‘ī school in Syria and the Mālikī school in Spain, the school disappeared. The main reason for its extinction appears to be the non-acceptance of analogy as a source of law.

31.5.2. The Zāhirī School

This school gets its name from the word zāhir (apparent), which was also a title given to its founder. The name implies a literalist method of looking at the apparent meaning of the texts and rejecting analogy. It may be considered an extension of the method adopted by al-Shāfī‘ī. Al-Shāfī‘ī, however, accepted
analogy, while this school condemned and rejected it. It is, perhaps, also for this reason that the Shāfi‘ī school survived, but this school did not.

Dāwūd ibn ‘Alī al-Iṣfahānī, better known as Abū Sulaymān al-Zāḥirī, the founder of the school, was born in Kufah in the year 200 A.H. and died in 270 A.H. At first he was a follower of the Shāfi‘ī method, but later switched over to his own method and founded a school. He was called al-Zāḥirī, because he followed the literal meanings of the Qur‘ān and the Sunnah. His method was similar to that of al-Shāfi‘ī’s, but he differed when he vehemently rejected analogy, unless it was based upon a text, i.e., qiyyās al-ma‘nā.

He had many followers until the 5th century A.H., but then it started diminishing and died out completely in the 8th century. One of the most distinguished followers was Ibn Ḥazm al-Anadaluṣī (d. 456 A.H.). Being a staunch literalist, he condemned the analytical methods of the Ḥanafīs. His well known books on the law are al-Iḥkām fī Uṣūl al-Aḥkām and al-Muḥallā. His works on comparative religion are equally well known, for example, al-Fiṣal fī al-Miṣal wa-al-Ahwā’ wa-al-Nihal. There is a controversy about the word al-fiṣal in the title as to whether it is al-faṣl.

31.5.3. The Ṭabarānī School

Abū Ja‘far Muḥammad ibn Jarīr al-Ṭabarānī was born in Āmul, Tabaristān in the year 224 A.H. and died in Baghdad in 310 A.H. He is well known for his Tafsīr as well as Tārīkh, both of which are voluminous and important works. His Tārīkh is under translation in the West. His other books include Ikhtilāf al-Fuqahā’, al-Latīf, al-Basīṭ and al-Iḥtār. He founded his own school and gained some followers, but it died out in the 5th century A.H.
Chapter 32

Geographical distribution of the schools

It is difficult to be exact about the geographical distribution of the schools, but in general the following distribution is generally accepted:

1. Ḥanafī School. It is the dominant school in Turkey, Syria, Iraq, Jordan, Albania, the newly independent states of Central Asia, Afghanistan, Pakistan, India, Bangladesh and in Brazil. Ḥanafīs are also found in Egypt, Saudi Arabia, Iran and Yemen.

2. Mālikī School. This school is the dominant school in North and Western Africa including Morocco, Tunis, Algeria, the Sudan, Kuwait, Qatar, Bahrain and in parts of Libya. It is also present in Egypt and Saudi Arabia. In the past it flourished in Spain.

3. Shāfi‘ī School. It is the dominant school in Egypt (Mālikīs in sufficient numbers as well), Palestine, Kurdistan, Armenia, Indonesia, Malaysia, Sri Lanka, Philippines. Shāfi‘īs are found in Saudi Arabia, Yemen and Iran.

4. Ḥanbalī School. Saudi Arabia. Some in Pakistan, India as well.

6. **Shī'ah Imāmiyah.** Iran. Some in Syria, Lebanon, Pakistan, India.

7. **Zaydīs.** Yemen.

8. **Ismā'īlīs.** India, Pakistan.
Select Bibliography


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Glossary

adillah ʿijmāliyāh: The general evidences for the law that contain within them the specific evidences. The Qurʾān, for example, is a general evidence, while a verse of the Qurʾān pointing to a ḥukm is a specific evidence or the dalīl tafsīlī.

adillah tafsīlīyāh: Specific evidence. See also adillah ʿijmāliyāh.

ʾakhkām: Plural of ḥukm (rule).

ahlīyah: Legal capacity.

ahlīyat al-ʿadāʾ: Legal capacity for execution.

ahlīyat al-ʿawjūb: Legal capacity for the acquisition of rights and obligations.

ʿamal: Conduct. The principle used by Mālik ibn Anas to refer to the practice of the people (jurists) of Medina.

ʿamalīyah: Pertaining to conduct or acts.

ʿāmm: General. A general word or textual evidence, as distinguished from a specific word (khāṣṣ).

amr: Command.

āṣl: Origin; root; foundation. Source of law. The established case that forms the basis of the extension of the ḥukm in qiyyās (analogy). A principle of law. The principal amount in a debt.

āṯār: Traditions reported from the Companions of the Prophet (God’s peace and blessings be upon him).

ʿazīmah: A rule initially applied as a comprehensive general principle to which exceptions or provisos are provided by the law later. The exception is called rukḥṣah.

bayān: Explanation. Technically, the explanation (bayān) refers to the elaboration of meanings in the texts.

dalālat: The different ways in which the ʾakhkām are proved through the interpretation of texts.

dalālat al-nāṣṣ: The implication of an explicit text.

dalil: Evidence. In a literal sense the term means guide, but in technical terms it refers to an evidence that points to or indicates a rule (ḥukm).

darūri: Necessity. The term has particular significance for the purposes of law, the preservation of which is a necessity.

ḍhimmah: The equivalent of legal personality in positive law.
A receptacle for the capacity for acquisition.

duyūn al-ʿarḍ: The debts that become due during death-illness. They restrict the power of disposal of the person suffering from death-illness.

fāsid: Vitiated; irregular. It is also used in the sense of voidable in the positive law. A contract, however, is voidable at the option of the parties, while the fāsid contract can become valid only if the offending condition is removed. It is an unenforceable contract.

furūq: The art of distinguishing apparently similar cases.

gharīb: A principle or rule that is alien to the generally acknowledged propositions of the law.

ḥadīth: Saying. The written record of the Sunnah. One ḥadīth may contain more than one Sunnah.

ḥājāt: Needs; necessities. Used for the secondary purposes of the law that are complementary to the five primary pur-
poses or the ʿdarūriyāt.

ḥaqq al-saltānah: The right of the state as distinct from the right of Allāh.

ḥawl: One year. The prescribed period after which payment of zakāh becomes due.

ḥaṣl: Jest. Refers to cases where utterances made in jest may have legal effects. The examples are marriage, divorce, and manumission.

ḥifẓ: Preservation. The word was used by al-Ghazālī with reference to the purposes of law.

ḥujjah: Proof; demonstrative proof. An evidence in the sources that forms the basis of persuasive legal reasoning.

ḥukm: Rule; injunction; prescription. The word ḥukm has a wider meaning than that implied by most of the words of English deemed its equivalent. Technically, it means a communication from Allāh, the Exalted, related to the acts of the subjects through a demand or option, or through a declaration.

ḥukm sharʿī: See ḥukm. The term ḥukm sharʿī is used to apply to its three elements: the Lawgiver (Ḥākim); the maḥkūm fīh or the act; and the subject or maḥkūm ʿalāyih.

ḥukm taklīfī: The obligation-creating rule. The primary rule of the legal system.

ḥukm wadʿī: The declaratory ḥukm. A secondary rule of the system that facilitate the operation of the primary rules.

ʿijāb: Obligation-creating command.

ʿijmāʿ: Consensus of opinion. In the parlance of the jurists it is the agreement upon a ḥukm sharʿī by the muṣṭalḥāds of a determined period. This definition would exclude the employment of this principle by a political institution, unless it is composed of muṣṭalḥāds.

ijtihād: The effort of the jurist to derive the law on an issue by expending all the available means of interpretation at his disposal and by taking into account all the legal proofs related to the issue.

ʿillah: The underlying legal cause of a ḥukm, its ratio decidenti, on the basis of which the accompanying ḥukm is extended to other cases.

istiṣrār: Equivocality.

isnād: The chain of transmission of a tradition.

istiḍāl mursal: Legal reasoning that is based on a principle freed from the hold of individual texts, that is, it is let go into the realm of the purposes of the law. It is also called maṣlahah mursalah.

istiḥsān: The principle according to which the law is based upon a general principle of the law in preference to a strict analogy pertaining to the issue. The principle is used by the Ḥanafīs as well as the Mālikīs. This method of interpretation may be employed for various reasons including hardship.

istiṣḥāb: Presumption of continuity of a rule or of its absence. A principle within the Shāfī system, which in general terms means: the status quo shall be maintained. In a more technical sense, it means that the original rule governing an issue shall remain operative. In such a case, the primary rule assigned to all issues is that of permissibility.

istiṣlāḥ: As distinguished from the broader principle of maṣlahah, it is a principle that permits a more flexible type of analogy as compared to qiyās.

istiqrāʾ: Induction.

khāṣṣ: Particular; specific; specific word.
It is a report from the Prophet that does not reach the status of tawātūr, or of māshhūr according to the Hanafis, that is, there are one or two narrators in its chain in the first three generations: Companions, Ṭābiʿūn, and their followers. As compared to this, the māshhūr report has one or two narrators among the Companions, but it reaches the status of mutawātīl in the generation of the Ṭābiʿūn.

The implication contrary to the actual meaning of a text.

Reprehensible; abominable; disapproved.

Disapproval that is akin to prohibition.

Disapproval that is closer to permissibility.

The support or place of suspension of another thing. The underlying cause on which the ḥukm is suspended.

Recommended.

Utility.

The purposes of the shariʿah, whose preservation and protection amounts to the securing of an interest (maṣlahah).

Death-illness.

Interests preserved and protected by the shariʿah.

An interest that is not supported by an individual text, but is upheld by the texts considered collectively.

The principle that the shariʿah has determined goals or purposes and the securing of these purposes is an acknowledged interest (maṣlahah).
**tahqiq al-manāt:** The verification of the attributes of an established case in a new case offered for examination. This process does not need a jurist. For example, a beverage may be examined to see if it is an intoxicant. This may need a chemist or pharmacist not a jurist.

**tahrīm:** Prohibition.

**tahsīnāt:** The third category of purposes that are complementary to the first two categories.

**takhrīj:** Methodology of a faqīh based on reasoning from general principles.

**taklīf:** Obligation.

**taqlīd:** Following the opinion of another without questioning the *dālīl* on which reliance is placed or without lawful authority from the *shari‘ah*.

**tarjīh:** Preference of one evidence over the other.

**tawātūr:** Authentic transmission of reports and texts. A text or tradition reported by so many people in the first generation that its authenticity cannot be doubted.

**`urf:** Custom; usage. The usage during the period of the Prophet, which helps in discovering the original intent of the lawgiver.

**zāhir:** The apparent or literal meaning.
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