Al-Hidāyah
THE GUIDANCE
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Introduction

In the Name of God, Most Merciful and Compassionate

AL-MARGHĪNĀNĪ: THE JURIST

The Author of *al-Hidāyah*, Shaykh al-Islām, the Imām, Burhān al-Dīn Abū al-Ḥasan ‘Alī ibn Abī Bakr ibn ‘Abd al-Jalīl ibn al-Khalīl ibn Abī Bakr al-Farghānī al-Rushdānī, al-Marghīnānī was born on Monday the 8th of Rajab in the year 511 A.H, after the asr prayer. Abū al-Ḥasan was his kunyah, his first name was ‘Alī and his father’s name was Abū Bakr. The province to which he belonged was called Farghān, and Marghīnān was a city in this province. He is, therefore, generally referred to as al-Marghīnānī. He is said to be a descendant of Abū Bakr al-Ṣiddīq (God

1This introduction has borrowed substantially from the *Introduction* to *al-Hidāyah* written by the learned Shaykh, ‘Allāmah Imām ‘Abū al-Ḥasanāt Muḥammad ‘Abd al-Ḥayy al-Lakhnawī (God bless him) one of the greatest scholars of the Islamic ‘ulāmī in the Indo-Pak Sub-Continent. The introduction also relies upon our own unpublished essay on the *Islamic Legal Tradition*. It is a work that focuses more on the work of the jurists and its legal content and nature, rather than on biographies. Mawlānā ‘Abd al-Ḥayy al-Lakhnawī divided his introduction into six heads, beginning with the biography of the Author and a description of his works. The remaining five heads deal with the method of the Author, some errors, typographical and others, the meaning of Zāhir al-Riwayah, biographical details of the personalities mentioned in *al-Hidāyah*, and finally the chains of transmission leading up to the Author of *al-Hidāyah*. This is followed by a supplement to the introduction that records similar details, including the names of tribes and places mentioned in *al-Hidāyah*. The introduction and the supplement are spread over seventy-five pages and provide a wealth of information. Part of the description, as indicated, is based upon our own essay on the *Islamic Legal Tradition*. This essay deals with the organic structure and nature of the books in the Ḥanafī school as well as in the other Sunnī schools. Where the description is our own, some of the facts stated in the introduction have been transmitted on the authority of Imām al-Lakhnawī and earlier scholars.

2Apparently, his birthplace was the village of Rushtan in Uzbekistan.

3That is, he was alluded to by this name.
Al-Marghinani performed hajj and visited Madinah in the year 544 A.H. He died on the 14th of Dhi-l-Hajj in the year 593 A.H. One report records the date of his death as 596 A.H. He was buried in Samarqand.

Al-Marghinani's teachers include: Imam Najm al-Din Abü Haš Umar al-Nasafi, the author of al-'Aqâ'id al-Nasafiyyah fi al-Tawhid; Imam Sadr al-Shahid Hisâm al-Din 'Umar ibn 'Abd al-'Azîz; and Imam Dîvâ al-Din Muhammad ibn al-Husayn al-Bandani, the student of 'Alî al-Din al-Samarqandi, the author of Tuhfat al-Fuqahâ', who was also the teacher and father-in-law of Abû Bakr al-Kâsâni, the author of Badâ'î al-Samâ'i fi Tarrîb al-Sharî'î. His contemporaries held our Author in high esteem. These jurists include: Imam Fakhir al-Din Qâ'dîkhân; Sadr al-Kabir Burhân al-Din, the author of al-Muhit al-Burhânî; Imam 'Abd al-Din Muhammad ibn Ahmad al-Bukhârî, the author of al-Fatawâ al-Zahiriyyah; Shaykh 'And al-Din Abû Naṣr Ahmad ibn Muhammad ibn 'Umar al-Attâbî as well as others. It can be seen that in an environment where one is taught by giants in the field, and surrounded by great men, the standards are very high and one has to excel to be noticed. Al-Marghinani did much more than that.

Allamah 'Abd al-Ḥayy al-Lakhnawi refers to him as the leading Imâm of his times, having complete mastery over most of the disciplines and sciences of his day. There was no one like him in his times, he says, and he was past master in the discipline of khilaf that deals with the reasoning of different Imâms and schools of law. 'Abd al-Ḥayy al-Lakhnawi adds that there are six grades of jurists in the Hanafi school. The first grade is that of the mujtahid fi al-madhhab (full mujtahid within the school) and includes jurists like Imam Abû Yusuf, Imam Muhammad al-Shaybânî and other disciples of Imam Abû Ḥanîfah (God bless him). The second grade is that of the mujtahid fi al-masa'il that is able to settle issues on which there is no narration from the jurists of the first grade, however, such a jurist stays within the usûd and qawâ'id of the school and employs them to settle new issues. The jurists in this grade were al-Khâsaf, al-Tâhâwî, al-Karkhî, al-Sarakhsi and al-Hâlîwâni. The third grade is that of the ashâb al-takhrij or those who are capable of elaborating issues, highlighting the underlying reasoning and identifying the proper rule. The fourth grade is that of the asâb al-tarjîh, like al-Qudûrî and the author of al-Hidyah. These jurists are able to prefer, through legal reasoning, one opinion over another from among the opinions prevailing within the school. The fifth grade is that of muqâllids, who are able to distinguish between the stronger and weaker opinions, like the authors of the four acknowledged texts. The sixth is that of the grade below the previous grade, who have no ability to distinguish between the strong and the weak opinion or, as he says, to distinguish the north from the south. This places the author of al-Hidyah in the fourth grade, however, there are those who would grant him a higher status. The detailed classification of the jurists into six or seven grades is very helpful. Taken together they help us identify the various tasks that are undertaken within a school of law as well as to appreciate the abilities of the jurists who undertake these

1 Perhaps, this status is assigned to them by giving prominence to the major function they performed in their Mukhtasars or other works. This should not mean that they did not have other qualifications.
It is well known that the first works on Islamic law are those written by Imam Muhammad (God bless him). Some of these works were referred to as the Zubarah al-Rimah. Scholars assign several meanings to this term, and, however, the meaning we are interested in is that the Zubarah al-Rimah are "the preferred rules from among the different narrations of the rules." Imam Muhammad's works, besides the rulings of Abu Hamid, Abu Yusuf and Muhammad al-Shaybani (himself), include a large number of other views. The other views recorded are, for example, those of Taha, Ibrahim al-Nakha'i, Ibn Abu Layla, Abu Isma'il, and Al-Awza'i (and bless them all). A system of law that presents such a variety of opinions is difficult to follow, unless some rules are chosen for practice. Accordingly, after recording the rulings of different jurists, Imam Muhammad himself identified some of those rules that were to be followed by the people. These rules were referred to as the Zubarah rules or the rules preferred for compliance. These rules were primarily recorded in Kitab al-Aid or al-Mubta'. The recording of preferred opinions does not mean that other rulings were not recorded in this book. It is true that al-Jami' al-Saghir, however, that Imam Muhammad focused entirely on the preferred rules that were to be followed by the worshipper as well as the qadi. In fact, he focused mostly on rules that help deal with violations so that a ruling (fatwa), or a decision, can be given to one who seeks it. Thus, we do not find a description of what or what in al-Jami' al-Saghir. According to Ali ibn al-Lakhnawi (God bless him), he did not mention those rules that were followed day in and day out by every Muslim. The book was directed entirely at practice (of the jurist); the other details could be acquired from Kitab al-Aid. Al-Jami' al-Saghir was the first summary or precis in Islamic law that listed only those statements of the rules that were to be followed. The second such summary was al-Siyar al-Saghir, also. The creation of

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It is evident that Imam Muhammad's works and the details associated with them are well known and have been recorded by us in our books on Islamic jurisprudence, and by others in similar works.

It may be pointed out here that the entire book has not been published so far. Institutes like the Islamic Research Institute, International Islamic University, Islamabad are consuming huge resources contributed by Muslims, yet they continue to neglect this first and extremely important book.
these summaries shows the essential task of a madhhab or school of law: the bringing of uniformity into the law by identifying those rules, the zahir al-riwayah, out of a host of rulings, that were to be followed in practice by the school. These early summaries were not very comprehensive, because these were also the early days of the school; it had not acquired sufficient maturity.

The term mukhtasar appears to have been used for a rule book first by al-Muzani (God bless him). He died in 264 A.H., and it is possible that such books were written before his time. His Mukhtasar is usually published with Imam al-Shafi'i's Kitab al-Umm. In the Hanafi school, therefore, it was natural that al-Muzani's nephew, al-Tahawi, should use the term first. After this, the writing of mukhtasars became a regular feature, whether or not this title was used. Some of the well known mukhtasars of the Hanafi school are the following:

1. Al-Jami' al-Saghir and al-Siyar al-Saghir by Imam Muhammad al-Shaybani (d. 189 A.H.). These have been described above.
2. Mukhtasar al-Tahawi by al-Tahawi (d. 321 A.H.). He begins with the statement that the book contains rules that cannot be ignored or whose knowledge must be acquired.
3. Al-Kafi by Hakim al-Shahid (d. 334 A.H.). In these mukhtasars, the chain of transmission of fiqh coming down from the earlier Imams was maintained. This was the text chosen by Imam al-Sarakhsi (God bless him) for his 30 volume commentary al-Mabsut. Al-Marawazi created this book by summarising Kitab al-Asl and the two Jami's through the elimination of lengthy narrations and some repetitions.
4. Mukhtasar al-Karkhi by Imam al-Karkhi (d. 340 A.H.), the famous Hanafi jurist, who is also the author of Usul al-Karkhi. We have not had the opportunity to examine this book, but jurists often quote it in their works.
5. Mukhtasar al-Jassas by al-Jassas (d. 370 A.H.). He was al-Karkhi's student.
6. Mukhtasar al-Quduri by al-Quduri. This was the text chosen by al-Marghinani for his own Mukhtasar. Al-Quduri (d. 430 A.H.) ordered the chapters in his book according to al-Tahawi's book and not according to Imam Muhammad's al-Jami' al-Saghir. Al-Quduri is said to have written a commentary on al-Karkhi's Mukhtasar.
7. Tuhfat al-Fuqaha' by al-Samargandi (d. 538 A.H.). He was al-Kasani's teacher and his father-in-law. The book is highly organised and a strict application of the term mukhtasar will exclude this book from this category.
8. Bidayat al-Mukhtadi' by al-Marghinani (d. 593 A.H.). This is the matn of which al-Hidayah is the commentary.
10. Al-Fiqh al-Nafi' by Nasir al-Din al-Samargandi.

After this there was an abundance of such texts and what we mention below are just a few of the well known texts.

11. Al-Mukhtar lil-Fatwa by al-Mawsili (d. 683 A.H.). The commentary on this matn is written by al-Mawsili himself and is called al-Ikkhtiyar. This text is used in al-Azhar.
12. Majma' al-Bahrayn by al-Saati (d. 694 A.H.).
14. Wiqayat al-Riwayah al-Hidayah by Burhan al-Shari'ah Mahmud ibn Sadr al-Shari'ah (d. 747 A.H.). As the title shows, it was a summary prepared from al-Hidayah itself, not only its matn. Sadr al-Shari'ah al-Thani (d. 747 A.H.), the grandson and student of this author, summarised the summary further, calling it al-Niqayah, and wrote a commentary on it as well.

Some of the texts that are used by the madāris for teaching, referred to as the acknowledged texts (mutan mu'tabarah), are those mentioned at (6), (11), (13) and (14). Some add (12) to this list. In the grades mentioned above, these jurists, the authors of the mutan mu'tabarah, are referred to as muqallids. They cannot prefer opinions, but have the ability to identify the strong opinions that are to be followed, that is, opinions preferred by those in the higher grades. In our view, preference should be given to

12The Author, however, says that he has brought in additional issues that were not included by al-Quduri, and that he has tried to remove the difficulties encountered in studying al-Quduri. Further, he has provided the adillah (evidences) and arguments in brief.
Bidayat al-Mubtadi' as the matn for teaching purposes and thereafter al-Hidayah should be used as a commentary to understand the rules, as we elaborate below. Further, Mukhtasar al-Qudurí is included within Bidayat al-Mubtadi'.

The mukhtasars listed above and even those that are not listed form a linked chain. Each mukhtasar borrows from the one that precedes it. In this chain, preference is usually given to those opinions that came first. The attempt being to commence the statement of the rules with the opinions of the earlier Imams. This conforms with the system of precedents in Islamic law. In Islamic law, the precedents assigned priority are those that were laid down first and not those that came later. The reverse order is followed in the common law, with the latest decision being given precedence. The presumption in Islamic law is that the decisions arrived at earlier are closer to the usul, while those that came later are to be handled with caution. Those who are interested in this topic may examine the writings of Ibn `Abidin on the subject. This system of precedents attaches significance to chains coming down from the earlier imams, so as to distinguish the authentic from the spurious and the strong from the weak.

How does Bidayat al-Mubtadi compare with the other texts that have also recorded the preferred rulings? We will first, briefly, describe the creation of Bidayat al-Mubtadi', and then deal with those vital factors that make the matn what it is.

Al-Marghinānī in his introduction to Bidayat al-Mubtadi' states that in the early stages he resolved to write a fiqh text that would be concise yet comprehensive. After going through the texts, he found Mukhtasar al-Qudurí to be a very precise and amazingly comprehensive book. Nevertheless, he found the leading Shaykhs encouraging one and all to memorise al-Jāmi’ al-ṣaghīr. He, therefore, decided to merge the two without

*This is a wonderful topic for research. *

That is, they were derived by those who had greater knowledge of the evidences, as they were close to the period of the Prophet (God bless him and grant him peace) and were more proficient in the use of usul that they had laid down themselves.

Al-Jāmi’ al-ṣaghīr was reported by Imam Muhammad entirely on the authority of Imam Abu Yusuf. This adds to its strength. Imam Muhammad based the work on forty kitabs, however, he did not make bāhs or chapters within these kitabs. This work was undertaken by Imam Abu Tahir al-Dabbas. As to why this book was recommended for memorisation depended upon the nature of the cases mentioned. These represented some of the core issues settled by the school. According to some jurists, the issues of this book were held in very high esteem and it was deemed necessary that no one be allowed

Adding to the length, unless it became absolutely necessary. He also adds that he decided to call it Bidayat al-Mubtadi', and that if he were to write a commentary on it, he would call it Kifayat al-Muntahi.

The Author kept his word. Bidayat al-Mubtadi' incorporates within it almost the entire text of Mukhtasar al-Qudurí. On rare occasions he improves the text and refines it. We can safely say that almost three-fourths (if not more) of Bidayat al-Mubtadi' is Mukhtasar al-Qudurí. The rest of the text comes from al-Jāmi’ al-ṣaghīr and on some occasions even from Kitāb al-Asl. The order followed in Bidayat al-Mubtadi' is not that followed by al-Qudurí, rather it is the order laid down by al-Jāmi’ al-ṣaghīr. It is almost the same order that is followed by al-Sarakhsi in his al-Mabsūt.

Two things are to be noticed here. First, he combined two of the most powerful and highly respected statements of the preferred rules. The merits of both have been described above. Second, he did not reduce the size of the book. In fact, he expanded, refined and combined the statement of the rules to create a perfectly balanced book of rules. In his matn, the statement of the rules is complete and can be understood with relative ease as compared to later summaries. The later books either squeezed the texts to facilitate memorisation or started adding codes for identifying opinions. The later books have their merits, but the vital features that distinguish Bidayat al-Mubtadi' are missing to some extent.

There is yet another feature that we consider most important, and to explain that we have to go back to the great Imam (Abu Hanifah) and his disciples. Roscoe Pound, in his five volume work on jurisprudence, quotes from Hamilton's translation of the Hidayah and says that this is the beginning of the case method of studying law. In our view, this was not the beginning of the case method, rather the beginning was made by Imam Muhammad in his well known books, which in turn reflects the tremendous effort made by the learned Imam and his teachers. It is because of this contribution alone that he is rightly called the greatest (A'zam) Imam. Imam al-Sarakhsi after praising the Imam says the following:

*to become a qādi or permitted to issue a fatwā, unless he had understood the issues of this book. Allāmah al-Lakhnawi has listed about forty jurists who wrote commentaries on this book, and these are all the well known jurists whose works we study today. *
the formulation of cases, either actual or hypothetical, for explaining the rules. It is this that the Imam did along with his disciples. Without these cases, fiqh would not have been understood, neither by the Hanafi jurists nor even by those of the Maliki and Shafi'i schools, but that is another story. It is because of these cases and the associated rules that all jurists are dependents of Abu Hanifah, Nu'man ibn Thabit ibn Zohah (God be pleased with him). It is not without reason then that Allamah al-Lakhnawi says: *wa mā adraka mā Abu Hanifah?*

The way the rules are elaborated in these works through chains of related cases is simply outstanding and highly sophisticated. This method was developed into an art that reached its perfection in the works of jurists like al-Sarakhsi, who added a tremendous amount of supporting detail to these cases. Till this time, Islamic law was a practical law solving problems; it needed all this detail. Today, very few people appreciate these cases or even read and benefit from this unique method of elaborating the law. Credit for further organising the cases in the light of the rules must be given to Hākim al-Shahid as well. Nevertheless, great significance was attached to the study of the detailed cases by the earlier jurists. The idea is captured in another story. Abu al-Fadl Muhammad ibn Muhammad ibn Ahmad, al-Hākim al-Shahid, who was a qādī, wrote two books: al-Muntaqā' and al-Kāfī. The latter is the precis prepared from Imām Muhammad al-Shaybānī's al-Mabsūt and the two āmmī's. It is said that he died in the year 334 A.H. He was executed brutally by the Turks and, is therefore, referred to as Shahid. As the story goes, he is reported to have said prior to his execution that this is the fate of a person who prefers this world over the next. As to why he said this, some add that when he prepared al-Kāfī by removing repetitions and details from Imam Muhammad's books, the Imam appeared to him in a dream. In this dream, Imam Muhammad asked him, "Why have you done this to my books?" He replied, "The fuqahā' have become lazy so I deleted the repetitions and stated what is essential." At this Imam Muhammad became very angry and said, "May God cut you up like the way you have cut up my books." It is said that the Turks tied him between two tree-tops (by pulling them down) and he was split into two. In our view, this is not a very pleasing story for we feel that al-Hākim al-Shahid, may God bless him, made a powerful contribution to the case method that we have mentioned above. It does, however, tell us that true fiqh can be acquired only by working through the detailed cases. There is no method more powerful than this for the teaching of fiqh. It is also the method that dominated the scene for a long time, until the appearance of the literalists.

Al-Marghinānī's *Bidāyat al-Mubtadā'*, captures this vital feature to the extent of the statement of rules and related cases. We have pointed this out within the translation in a few places. In the later summaries, this vital feature was lost to a great extent. In fact, Allamah al-Lakhnawi warns us that we have to be careful about some of the summarised versions; however, this does not pertain to the recognised texts.

**CODIFICATION: THE GOAL OF ISLAMIC LEGAL TEXTS**

When we use the word "code" with reference to Islamic legal texts, we obviously do not mean a statute enforced with the authority of the state.
Codification with reference to Islamic schools means the attempt to bring uniformity into the law out of a mass of available rulings. Such a code, like all statutes, enables the subjects to follow the law with ease, and supports the experts in providing detailed rulings to the subjects (called fatwās).

The effort to bring uniformity into the law began with the mukhtaṣars and culminated in what are called the fatwā compilations. The term fatwā should not lead us to believe that these works are an entirely different class of texts. One of the earliest, and also one of the best, is Fatwā Qddrkhati. The Author was a contemporary of al-Marghinānī. In fact, he died one year before al-Marghinānī in the year 592 A.H. As al-Marghinānī died at the age of eighty-two, and one of his contemporaries was Qāḏi’khān’s teacher, it is possible that the latter was influenced by al-Hidāyān itself. In any case, his book is highly organised and follows almost the same arrangement as al-Hidāyāh as far as the arrangement of books (chapters) is concerned. Qāḏi’khān explains the nature of his book as follows:

I have mentioned in this book the issues that occur frequently, for which there is a need, around which the problems of the ummah revolve, and on which is focused the attention of the fuqahā’ and the imāms. These issues are of various kinds and types. Among these are those that have been transmitted from our earlier companions. There are those that are transmitted from the later Mashāʾikh (jurists), may Allāh be pleased with them all. I have arranged these issues in the format of the well known books... and where the views of the later jurists were many, I have mentioned one or two, and have given prominence to those views that are more reliable.  

24 In the first section, devoted to the muftī, that serves as an introduction to his book.

Abū Ḥanīfah and his disciples (God bless them).

Like the jurists in the third grade mentioned above: al-Karkhī, al-Jassās, al-Dabbūsī, and al-Sarakhsi, may God bless them all.

The learned jurist then gives some advice to the person issuing fatwās, the muftī, as to how he is to conduct himself in searching for and issuing of the ruling. We have translated the passage for the benefit of the readers, who would like to understand the way fatwās are issued. He says: “The muftī in our times, from among our (contemporary) companions, when he is asked for a fatwā on an issue, and is asked about an incident, should: (1) If the issue is related from our early companions through the zahir transmissions, without a disagreement among them, is to incline towards them and issue the ruling according to their opinion. He is not to oppose them with his own opinion, even

This shows that the only difference between the mukhtaṣars, like al-Qudārī and Bidāyat al-Mubtadī’, on the one hand, and a fatwā compilation, on the other hand, is that the latter incorporates the rulings of the jurists of the third grade as well. On rare occasions, it may include the rulings of jurists in the fourth grade, however, the essential condition would be that of the ability to undertake ijtihād. Thus, the mukhtaṣar can be used just like the fatwā compilation, however the fatwā compilations provide additional rulings, though of a lesser status. We may look at both as attempts to provide “codes” for stating the legal position for the benefit of the public. The message in both documents has been the same: the fatwā today is this.

If he is a full mujtāhid. The presumption is that the truth sides with our companions, and they are not to be opposed. His ijtihād cannot reach the level of their ijtihād. He is not to incline towards the opinion of a jurist who has opposed them. Nor is he to accept such a person’s hujjah (proof), because they knew the adillah (evidences) and could distinguish between an evidence that was authentic and established and one that was the opposite of this. (2) If the issue is disputed by our companions, and one of his disciples is siding with Abū Ḥanīfah (God bless him), he is to adopt their view, due to the combining of the conditions of (ijtihād) and the gathering of sound adillah in their view. If both disciples oppose Abū Ḥanīfah (through a common opinion), and if the difference is based upon a change in conditions due to the passage of time, like rendering a verdict on the basis of prima facie moral probity, he is to adopt the ruling of the two disciples, as the condition of the people has changed. Thus, in the case of muẓār’āh, mu‘ānālah and similar issues, he is to adopt the view of the two disciples. The basis is the unanimous agreement of the later jurists on these issues. In issues other than these, some have maintained that the muftī is to be given an option of choosing (between them) according to what his opinion guides him to. ‘Abd Allāh ibn al-Mubārak has said that he is to adopt the opinion of Imam Abū Ḥanīfah (God bless him) in such a case. They discussed the question as to who is a mujtāhid. Some said that if a person is asked about ten issues and he gives a sound ruling in eight of these and err in the rest, he is a mujtāhid. There are others who maintain that the mujtāhid is one who has necessarily absorbed (memorised) al-Mabsūṭ, identified the abrogating and abrogated texts, knows the muqaddam and mu‘ānawal, and is aware of the practices and customs of the people. (3) If the issue is found in books other than the Zāhīr al-Riwayāt, then if it is compatible with the usul (system of interpretation and qawa’id) of our companions, he is to act upon it. (4) If there is no narration about the issue from our companions, but the later jurists have agreed about it to some extent, he is to act upon it. If they have disagreed, he is to undertake ijtihād and issue the ruling that appears sound to him. If the muftī is a muqallid and not a mujtāhid, he is to follow the view of the person who has the greatest expertise in fiqh in his view, but he is to attribute the response to such a knowledgeable person. If the most learned person in fiqh, in his view, lives in a city other than his, he has to recourse to him in writing, and is not to work on conjecture for fear of fabrication.”
The distinction stated above is, therefore, based on two things: the status of the rulings incorporated and the number of rulings incorporated. Accordingly, a fatāwā compilation may be ten times the size of a mukhtasar. What then is the crucial difference between a fatāwā, like Bidwāt al-Mubtaddi', and a fatāwā compilation, such as the Fatāwā 'Alamgiriyyah of Fatāwā Hindīyyah as it is called? The difference has been explained by al-Marghinānī himself, and we would like to quote him here. He says:

He favoured the earlier jurists with success so that they were able to frame the issues for each thing obvious and concealed. The incidents, however, recur repeatedly and new cases attempt to burst out of all topical systematisation. Yet, it is the endeavour of stalwarts (muhaddīsīn) to trap runaway issues by referring them to their origins and by settling them through precedents. (In this endeavour reliance on the governing principles of these issues) will grant a firm grip over them.

The message he is conveying is that it is not possible to record in a book all the cases that human beings face. The method is to study and understand those issues and cases that highlight the vital rules and to connect them with their origins from where they have been derived. Once these governing rules are understood, any new case can be settled and all new situations can be faced. He lets us know, however, that this is something that can be done by stalwarts and not weaklings. The stalwarts are those who have mastered the governing rules and have acquired the ability to derive new rules. It is not something that can be done by people with lesser competence. The fatāwā compilations, in our view, are at variance with the sound advice given by al-Marghinānī. Why then did competent scholars who compiled the fatāwās undertake this work? The only reason we can think of is a deteriorating standards and the inability to acquire the requisite skills. These authors came to the conclusion that the detailed rulings must be compiled to help those who lacked the ability to do so on their own. We are reminded of the excellent example given by Ibn Rushd, the commentator, a genre who had the skills to make shoes for any new customer with the shoe-vendor who must sell the shoes he has in stock and in the case of an absentminded new customer for whom he does not possess the right size he should get it touch with the true cobbler. A weakness that Bidwāt al-Mubtaddi' is directed at the cobblers with the message least...

these rules along with their underlying reasoning and methods and you will be able to provide new rulings when needed. The fatāwā literature, on the other hand, is directed at the vendor with the message: keep these on the shelf and serve your customers, but if the shoe does not fit get in touch with the cobbler in your own city or write to one in a different city.6

Al-Hidayah placed its stamp on most books that came after it. Al-Mukhtār is in reality Bidwāt al-Mubtaddi' in a different syntax. Its commentary al-Ikhtiyār borrows huge chunks from al-Hidayah to explain the issues. Al-Wāqiyah is a summary of the entire al-Hidayah, as its full title conveys. Commentaries on Kanz al-Daqa'iq, such as, Kashf al-Haqiq by al-Afghānī, are based entirely on al-Hidayah. The Fatawa 'Alamgiri openly states that it is following the structure of al-Hidayah, which means taking the basic rulings from it, besides following its general structure. Many of the rulings that have been taken from other authoritative books could easily have been taken from al-Hidayah. The additional matter is, of course, from other authoritative books and fatāwā literature. There is, however, fiqh in al-Hidayah, but in the fatāwā there are only rulings. In short, al-Hidayah became like a primary source book for the work that was done later. It was, therefore, said: al-Hidayah like the Qur'an has abrogated the books that preceded it. This may not be entirely true, but it shows the influence al-Hidayah has had on later developments.

Al-Hidayah is a very difficult book to read, and equally difficult to translate. The advice some friends gave, prior to the commencement of the translation, was that it is impossible to translate. Perhaps they were right. A translation simplifies many things, by reducing the number of options with respect to meaning, but it will still require the complete and concentrated attention of the reader. The real complexity is not in the syntax, but in the legal concepts and reasoning.

God Almighty had given al-Marghinānī extraordinary skills. He is like a tiger hunting down its prey. Reading his arguments is like running with this tiger. Suddenly you find that he has knocked down his prey and you...
are left wondering how he did it. You have to retrace your steps and recreate every move. Each thump of the mighty paw is packed with immense power, and you are not done with one when you can see the next one coming. Like the tiger his moves are all calculated, desired to have the maximum effect. We have never seen a book that had so much planning go into it. It appears that he must have spent days writing down single paragraphs.

Nevertheless, the Author was creating an extremely powerful teaching device designed to draw in both the student and the teacher. The book contains a huge amount of "coded" information. We use the term coded here to mean what people in the computer world would mean. Within this information are "macros"—short statements that pack within them pages of information. The macro needs to be preprocessed before the code can reveal its entire meaning. These macros are to be preprocessed with the help of the teacher or detailed commentaries. A person who is able to study \textit{al-Hidayah} after elaborating these macros is likely to reach the machine-level of the instructions of \textit{fiqh}. The design enables teachers to use the book as an instructional device in short or long courses depending on the level of the audience. It is the teacher who decodes these texts for students in the classroom after the student is given the opportunity to do so himself. The reason for the popularity of the book is, therefore, obvious: it gives immense power to the teacher over his audience, and a unique opportunity to the student to interact with the teacher as well as with the rest of the class. In our view, and this has been the experience of many teachers, anyone who works through the statements in \textit{al-Hidayah} through discussions with a teacher will soon find that the body of rules called \textit{fiqh} is taking hold of his mind. He will soon start seeing patterns in these rules and will be able to trace the links between them. This effort will grant him an ability to answer highly complex questions of \textit{fiqh} without the aid of any source. In short, he will be on his way to becoming a \textit{faqih}. It is for this reason that \textit{al-Hidayah} is used as a primary manual in almost every \textit{madrasah} and institution\footnote{We are not reproducing this list due to shortage of space.} in the world, whatever the school affiliation.

Where the teacher lacks the necessary competence and is not equipped with knowledge that is required to decode the semi-coded statements, \textit{al-Hidayah} will become a very difficult book. After all, the Author took thirteen years to complete the book. We must benefit from his gift to us. In the eight hundred years that followed the completion of the book, a number of commentaries, besides innumerable glosses, have been written on \textit{al-Hidayah}. Some say that the number of commentaries and glosses written on the book run into hundreds and may even be close to a thousand. Consequently, the number of commentaries written on \textit{al-Hidayah} outnumber any book in the Islamic legal system and, perhaps, in any other system. This in itself is sufficient proof of the power of the book. It is said that no book has received so much attention from jurists. In the introduction to Badr al-Din al-'Ayni's commentary, a list of forty-six full commentaries is provided. Many consider the best known commentary to be \textit{Fath al-Qadir}. This commentary was written by Ibn al-Humām, but he could not complete it. Ayni's own commentary, \textit{al-Bināyāh Shārkh al-Hidayah}, is considered to be very good. We have found the comments of the Author of \textit{al-Ināyah} and those of 'Allāmah al-Lakhnawi and al-'Ayni to be extremely powerful and helpful. It is said that some Shāfī'i jurists criticised the author for including traditions that were not very reliable. This led to the writing of several books on the documentation (\textit{takhrij}) of the traditions in \textit{al-Hidayah}. One of the best known is that by al-Zayla'i, which was also summarised by Ibn Ḥajar al-Asqalānī. Here our own bias creeps in, but we would like to pass it on to the reader. It is our considered opinion that Al-Marghinānī was relying on Imám al-Sarakhsi's \textit{al-Mabsūt} as a source book for constructing his arguments. Accordingly, when a problem cannot be fully solved through the commentaries a recourse to \textit{al-Mabsūt} will help. On some occasions, however, the issue discussed will not be found even in \textit{al-Mabsūt}. We also feel that the \textit{matn}, \textit{Bidāyāt al-Mubtadd}, may have been influenced by \textit{al-Kāfī} as incorporated by al-Sarakhsi.

On examining an Urdu translation published in Deoband, we found that the Urdu text did not distinguish between the statements of \textit{Bidāyāt al-Mubtadd} and its commentary, \textit{al-Hidayah}. The same problem exists in \textit{al-'Ayni's} thirteen volume commentary of \textit{al-Hidayah} published from Beirut; one cannot distinguish the \textit{matn} from the \textit{sharh}. This led us to...
think about the manner in which this book is studied today. We consider the merger of the matn with the sharḥ, without distinguishing marks of some kind, to be shocking, an act of gross negligence and callousness.8

In our view, it is not possible to understand the book without separating the matn from the commentary. Further, the matn states the rule. It is like reading the text of a statute and then turning to the commentary for further explanations. Al-Hidayah is not only a teaching manual, it is the most authentic and reliable book for knowing the law. It is used for this purpose all over the world, even by other schools. This fact is also relevant for those who are interested in the ruling for ordering their actions. Our advice to them is: read just the rule, that is, the text of Bidāyat al-Mubtadi'. This is the law. The other opinions mentioned in the commentary are not to be followed. They have been provided to teach you fiqh, that is, legal reasoning. To the student we say: Do not listen to those who teach the law in terms of qāla wa qāla without emphasising the opinion to be followed.9 To those issuing fatwās we would say: It is Bidāyat al-Mubtadi' that you need. Yes, there are additional issues addressed by the Author in the commentary, but the matn is the governing and primary text.

To facilitate this, we have tried to translate the text of Bidāyat al-Mubtadi' in a manner that it can be read independently without reading the commentary. This text is displayed in bold and can be distinguished from the commentary. We have not succeeded all the time in doing so, because complete sentences in the matn are broken down at odd places by the Author for comments, and it is difficult to maintain the required links. Nevertheless, the reader should have very little problem if he wishes to read the matn.

Al-Hidayah is difficult to understand without the help of notes or without the constant attention of the teacher. As mentioned earlier, the process of adding notes to the book has been going on for the last eight

hundred years.10 Accordingly, we have added some notes to the text by relying mostly on well known commentators, but sometimes on the basis of our own research. There is no end to the number of notes that can be added to the text of al-Hidayah, however, we have resisted this temptation out of respect for the wise judgement of the Author. He wanted the book to stay small and precise, the way he wrote it. He wrote a lengthy book himself, but said this: "When I was close to completion, it appeared to be somewhat lengthy, and I feared that recourse to it would be lessened due to its length." If the book is burdened with lengthy commentaries and extensive notes the purpose is lost. It is very difficult to access huge commentaries spread over a dozen or so volumes. They are avoided even by the teachers themselves. The translation itself, we feel, has eliminated the need for many of the notes given in various editions of the book.

In translating this book, our hope is that it will be used by the younger generation to understand Islamic law and the legal reasoning underlying the law. For this purpose, the best course of action for the student is to add his own notes after discussion with the teacher. The exercise will be extremely beneficial. Accordingly, in the first few books our notes are somewhat lengthy. This is intentional. The aim was to keep in view the interest of the general reader, who does not have access to a teacher and to show by example what kind of notes may be added by the student himself. On some pages, we felt, that there was no need for adding notes; in fact, notes on some pages would become a hindrance rather than a help. We hope that the notes, where provided, will be of use to all.

We find that many schools and madāris teach the law from al-Qudārī. It is a wonderful book and needs to be read, however, Bidāyat al-Mubtadi' includes al-Qudārī within it and much more. It is a better organised, more refined and somewhat expanded version of al-Qudārī. An effort will be made to provide the Arabic version of Bidāyat al-Mubtadi' along with the English meanings extracted from this translation. An ideal approach would be, at least for the classroom, to read the smaller text and then turn to al-Hidayah for elaboration.

It is customary with the commentators of al-Hidayah to say something about al-Marghinānī's method and the way he uses certain terms.

—The fault obviously lies with the publishers and not with the authors of these commentaries. It may be argued that an expert will be able to recognize the matn even if it is not distinguished. Yes, but that is not the point under discussion. Further, such an argument can be given only by the arrogant.

—On some occasions this is difficult to determine in the book, and we have addressed this below.
We are reproducing some of these comments, courtesy 'Allāmah al-Lakhnawi, but we have also added a few that we have observed ourselves while translating the book. A few of these may be irrelevant for the translation.

In the text, the Author of al-Hidayah usually refers to:

1. himself as “This feeble servant,” but some of his students later inserted in its place “He (God be pleased with him)”; he rarely uses the personal pronoun out of modesty, a practice followed by most leading jurists and traditionists;34
2. the scholars from Mā Warā’ al-Nahr (Transoxiana), that is, Bukhāra and Samarkand, according to al-Ināyah, by saying “our Shaykhs” (الشافع), but according to some he means by this all those scholars who did not meet the Imam (Abū Hanifah);
3. the cities of Mā Warā’ al-Nahr by using the words ٠٠٠٠٠٠ (in our region);
4. to a verse of the Qur’ān previously cited by saying, “what we recited”; to a rational argument and legal reasoning that has preceded by saying, “what we have stated” or “what we elaborated”; to a tradition that he has previously stated by saying, “what we have related”;
5. the opinion of a Companion as athar and at times he does not distinguish between khabar and athar, referring to both by saying, “what we have related”;
6. legal reasoning by saying, “the fiqh in this issue is”;
7. a disagreement among jurists by using the word “qālū (they said)”;
8. to an interpretation preferred by the scholars of traditions by saying, “This tradition is interpreted as” or “construed to mean”;
9. his own interpretation of a tradition by saying, “we interpret it as”;
10. to an issue and its precedent by using “this” for the issue and “that” for the precedent;
11. to an implied question directly without the preceding, “If it is said,” except on two or three occasions in the entire book;
12. his own legal reasoning by saying, “the takhrij is,” but where it is someone else’s takhrij, he refers to the person’s name;
13. al-asm (الاسم) meaning thereby al-Mabsūt by ‘Imām Muḥammad ibn al-Ḥasan al-Shaybānī;
14. al-Mukhtāsār and he intends thereby the précis written by al-Qudūrī;
15. a statement in al-Jāmi‘ al-Saghir or in al-Muktāsār by saying ḥā (he said), but he does so even when he refers to his own statement in Bidāyat-al-Muḥtādī, perhaps, it is the scribe who does this;
16. a difference between al-Jāmi‘ al-Saghir and al-Qudūrī by specifically naming al-Jāmi‘ al-Saghir;
17. al-kitāb when he means thereby al-Jāmi‘ al-Saghir, but sometimes he is referring to al-Muktāsār when he uses this word.

The list provided above is an excerpt from ‘Allāmah al-Lakhnawi’s text. We list below a few points that we consider important.

(1) The Author states the rule, which is part of the matn of Bidāyat al-Muḥtādī, first. If the rule appears as a single opinion, it is the unanimous view of the school, that is, the view of the Imām and the two disciples.

(2) On occasions, where total unanimity is not found, he states the Zāhir al-Riwayāh first and this is followed by the view of one or more jurists. As far as the matn is concerned, he is stating the stronger opinion first. In such a case, the position is reversed in the commentary; he will provide arguments and support for the stronger opinion at the end of the discussion.
Where two jurists are on one side, the rule according to the two jurists will be stated first. This is usually Abū Ḥanīfa (God bless him) along with one of his companions. In such a case, the view of the other disciple, where it is a reasonably strong opinion, appears within the matn. At other times, a variant narration from a disciple or even from the Imam himself are mentioned in the commentary merely for the purpose of elaboration.\(^3\)

### Statements of Khalīf in the commentary

Conflicting opinions are quoted not for adoption of alternate rules, but to teach fiqh.

(a) If the conflicting or varying opinion is that of one of the three jurists of the school, it is stated first in the commentary or is given preference over other varying opinions that will not be mentioned.

(b) Where a variant view of the three jurists is not available, the disagreement with Zufar (God bless him), if any, is stated.

(c) If the above two are not found, the conflicting opinions, if any, of Imāms Mālik and al-Shāfi‘ī (God bless them) are stated.

It goes without saying that the number of agreements with al-Shāfi‘ī (God bless him) are the maximum. This is followed by Zufar (God bless him) and then Mālik (God bless him). In discussing the disagreements, the texts relied upon by the disagreeing Imam are stated, followed by rational arguments on his behalf. The response of the school is then provided through the texts adopted as well as through rational arguments and responses.

### Parallel and Distinguished Cases

Perhaps, the most difficult sections of the book are where the Author mentions parallel and distinguished cases. The situation becomes extremely complex when in a single sentence two or three cases are distinguished from each other. This is where the fiqh is, however. Most of the time, the fiqh of a totally different category of law has to be recalled along with the governing rules to understand the comparisons and distinctions.

He uses the word *shar* in two different ways: to mean the law, that is, the *shari‘ah* or to mean the texts of the *shari‘ah*, that is, the texts of the Qur‘ān and the Sunnah.

*Al-Quḍūrī’s statements.*—When he reproduces al-Quḍūrī’s text, he is always verifying the statements through Imām Muḥammad’s books. When an error is found, and this is rare, he supports the correction through the statements of the earlier jurists. As stated already, the order of the books in *Bidāyat al-Mubtadi‘* follows the order in *al-Jāmi‘ al-Šaghir*. This affects al-Quḍūrī’s text. In addition to this, the sequence of his statements is also altered sometimes. This usually happens when al-Marghinānī brings in additional material from other sources, whole sections a few times. At other times he may move the statements to another location for the sake of better organisation.

He uses *qīla* (it is said) to refer to weaker opinions.

### Additional Issues

On certain occasions he deals with additional issues that are directly or indirectly related to the issue in the matn. This is what the *fatāwa* compilations do as a major function.

Sometimes groups of cases have been arranged in a particular sequence to highlight the links between them and to indicate the total application of a rule.

We have given brief references for the traditions found in *al-Hidayah* to al-Zayla‘ī’s outstanding work, which should be consulted for the details. A little less than three of the four volumes of this work pertain to the first volume of *al-Hidayah*. The work needs to be translated into English or at least published in a summarised form in English.

Sufficient attention has not been paid to this method from the perspective of a legal system, and it has been dealt with in fragmented form.

After giving the transliteration of an Arabic term and stating its meaning in English once or twice, we have retained the transliteration alone in the following text. This has been done intentionally so that those who...
Codification with reference to Islamic schools means the attempt to bring uniformity into the law out of a mass of available rulings. Such a code, like all statutes, enables the subjects to follow the law with ease, and supports the experts in providing detailed rulings to the subjects (called fatwas).

The effort to bring uniformity into the law began with the mukhtasars and culminated in what are called the fatāwā compilations. The term fatāwā should not lead us to believe that these works are an entirely different class of texts. One of the earliest, and also one of the favorites, is to incline towards the ruling according to what his opinion guides him to. `Abd Allah ibn al-Mubarak has said that he is to adopt the opinion of Imam Abu Hanifah (God bless him) in such a case. There are others who maintain that the mujtahid. The presumptions is that the truth sides with our companions, and they are not to be opposed. His ijtihād cannot reach the level of their ijtihād. He is not to incline towards the opinion of a jurist who has opposed them. Nor is he to accept such a person’s hujjah (proof), because they knew the adillah (evidences) and could distinguish between an evidence that was authentic and established and one that was the opposite of this. (2) If the issue is disputed by our companions, and one of his disciples is siding with Abu Hanifah (God bless him), he is to adopt their view, due to the combination of the conditions of (ijtihād) and the gathering of sound adillah in their view. If both disciples oppose Abu Hanifah (through a common opinion), and if the difference is based upon a change in conditions due to the passage of time, like rendering a verdict on the basis of prima facie moral probity, he is to adopt the ruling of the two disciples, as the condition of the people has changed. Thus, in the case of muzāhir, mut`umulah and similar issues, he is to adopt the view of the two disciples. The basis is the unanimous agreement of the later jurists on these issues. In others issues than these, some have maintained that the mujtahid is to be given an option of choosing (between them) according to what his opinion guides him to. 'Abd Allāh ibn al-Mubarak has said that he is to adopt the opinion of Imām Abu Hanifah (God bless him) in such a case. They discussed the question as to who is a mujtahid. Some said that if a person is asked about ten issues and he gives a sound ruling in eight of these and errs in the rest, he is a mujtahid. There are others who maintain that the mujtahid is one who has necessarily absorbed (memorised) at-Mabstrit, identified the abrogating and abrogated texts, knows the muwān and muwāwāl, and is aware of the practices and customs of the people. (3) If the issue is found in books other than the Zāhir al-Rawīyah, then if it is compatible with the uṣūl (system of interpretation and ijāraḍ) of our companions, he is to act upon it. (4) If there is no narration about the issue from our companions, but the later jurists have agreed about it to some extent, he is to act upon it. If they have disagreed, he is to undertake ijtihād and issue the ruling that appears sound to him. If the mujtahid is a mujtahid, he is to follow the view of the person who has the greatest expertise in fiqh in his view, but he is to attribute the response to such a knowledgeable person. If the most learned person in fiqh in his view, lives in a city other than his, he is to have recourse to him in writing, and is not to work on conjecture for fear of his own decisions.

I have mentioned in this book the issues that occur frequently, for which there is a need, around which the problems of the ummah revolve, and on which is focused the attention of the fjūgahā' and the imāms. These issues are of various kinds and types. Among these are those that have been transmitted from our earlier companions.3 There are those that are transmitted from the later Mashā`ikh (jurists), may Allāh be pleased with them all. I have arranged these issues in the format of the well known books, and where the views of the later jurists were many, I have mentioned one or two, and have given prominence to those views that are more reliable.24
The distinction stated above, therefore, based on two things: the status of the rulings incorporated and the number of rulings incorporated. Accordingly, a fatāwā compilation may be ten times the size of a mukhtasar. What then is the crucial difference between a mukhtasar, like Bidāyat al-Mubtadi', and a fatāwā compilation, such as the Fatāwā 'Ālamgirīyih or Fatāwā Hindiyah as it is called. The difference has been explained by al-Marghinānī himself, and we would like to quote him here. He says:

He favoured the earlier jurists with success so that they were able to frame the issues for each thing obvious and concealed. The incidents, however, recur repeatedly and new cases attempt to burst out of all topical systematisation. Yet, it is the endeavour of stalwarts (mujtahids) to trap runaway issues by referring them to their origins and by settling them through precedents. In this endeavour reliance on the governing principles (of these issues) will grant a firm grip over them.

The message he is conveying is that it is not possible to record in a book all the cases that human beings face. The method is to study and understand those issues and cases that highlight the vital rules and to connect them with their origins from where they have been derived. Once these governing rules are understood, any new case can be settled and all new situations can be faced. He lets us know, however, that this is something that can be done by stalwarts and not weaklings. The stalwarts are those who have mastered the governing rules and have acquired the ability to derive new rules. It is not something that can be done by people with lesser competence. The fatāwā compilations, in our view, are at variance with the sound advice given by al-Marghinānī. Why then did competent scholars, who compiled the fatāwās, undertake this work? The only reason we can think of is deteriorating standards and the inability to acquire the requisite skills. These authors came to the conclusion that the detailed rulings must be compiled to help those who lacked the ability to do so on their own. We are reminded of the excellent example given by Ibn Rushd. He compared a cobbler who had the skills to make shoes for any new customer with the shoe-vendor who must sell the shoes he has in stock and in the case of an absolutely new customer for whom he does not possess the right size he should get in touch with the true cobbler. A mukhtasar like Bidāyat al-Mubtadi' is directed at the cobbler with the message: learn

these rules along with their underlying reasoning and methods and you will be able to provide new rulings when needed. The fatāwā literature, on the other hand, is directed at the vendor with the message: keep these on the shelf and serve your customers, but if the shoe does not fit get in touch with the cobbler in your own city or write to one in a different city.25

Al-Hidayah: the Commentary

Al-Hidayah placed its stamp on most books that came after it. Al-Mukhtār in reality Bidāyat al-Mubtadi in a different syntax. Its commentary al-Ikhtiyār borrows huge chunks from al-Hidayah to explain the issues. Al-Wiqāyah is a summary of the entire al-Hidayah, as its full title conveys. Commentaries on Kanz al-Daqa’iq, such as, Kashf al-Haqiqah by al-Afghānī, are based entirely on al-Hidayah. The Fatāwā ‘Ālamgirī is often stated that it is following the structure of al-Hidayah, which means taking the basic rulings from it, besides following its general structure. Many of the rulings that have been taken from other authoritative books could easily have been taken from al-Hidayah. The additional matter is, of course, from other authoritative books and fatāwā literature. There is, however, fiqh in al-Hidayah, but in the fatāwā there are only rulings. In short, al-Hidayah became like a primary source book for the work that was done later. It was, therefore, said: al-Hidayah like the Qur’ān has abrogated the books that preceded it. This may not be entirely true, but it shows the influence al-Hidayah has had on later developments.

Al-Hidayah is a very difficult book to read, and equally difficult to translate. The advice some friends gave, prior to the commencement of the translation, was that it is impossible to translate. Perhaps they were right. A translation simplifies many things, by reducing the number of options with respect to meaning, but it still requires the complete and concentrated attention of the reader. The real complexity is not in the syntax, but in the legal concepts and reasoning.

God Almighty had given al-Marghinānī extraordinary skills. He is like a tiger hunting down its prey. Reading his arguments is like running with this tiger. Suddenly you find that he has knocked down his prey and you

25 See in footnote above, the advice given by Qādī Khān to the person who does not have the requisite skills.
are left wondering how he did it. You have to retrace your steps and recreate every move. Each thump of the mighty paw is packed with immense power, and you are not done with one when you can see the next one coming. Like the tiger his moves are all calculated, desired to have the maximum effect. We have never seen a book that had so much planning go into it. It appears that he must have spent days writing down single paragraphs.

Nevertheless, the Author was creating an extremely powerful teaching device designed to draw in both the student and the teacher. The book contains a huge amount of “coded” information. We use the term coded here to mean what people in the computer world would mean. Within this information are “macros”—short statements that pack within them pages of information. The macro needs to be preprocessed before the code can reveal its entire meaning. These macros are to be preprocessed with the help of the teacher or detailed commentaries. A person who is able to study al-Hidayah after elaborating these macros is likely to reach the machine-level of the instructions of fiqh. The design enables teachers to use the book as an instructional device in short or long courses depending on the level of the audience. It is the teacher who decodes these texts for students in the classroom after the student is given the opportunity to do so himself. The reason for the popularity of the book is, therefore, obvious: it gives immense power to the teacher over his audience, and a unique opportunity to the student to interact with the teacher as well as with the rest of the class. In our view, and this has been the experience of many teachers, anyone who works through the statements in al-Hidayah through discussions with a teacher will soon find that the body of rules called fiqh is taking hold of his mind. He will soon start seeing patterns in these rules and will be able to trace the links between them. This effort will grant him an ability to answer highly complex questions of fiqh without the aid of any source. In short, he will be on his way to becoming a faqih. It is for this reason that al-Hidayah is used as a primary manual in almost every madrasah and institution in the world, whatever the school affiliation.
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¹⁸See in footnote above, the advice given by Qadi'khân to the person who does not have the requisite skills.
these summaries shows the essential task of a madhab or school of law: the bringing of uniformity into the law by identifying those rules, the sahîr al-risâliyyah, out of a host of rulings, that were to be followed in practice by the school. These early summaries were not very comprehensive, because these were also the early days of the school; it had not acquired sufficient maturity.

The term mukhtasar appears to have been used for a rule book first by al-Muzani (God bless him). He died in 264 A.H., and it is possible that such books were written before his time. His Mukhtasar is usually published with Imam al-Shafi'i's Kitâb al-Umm. In the Hanafi school, therefore, it was natural that al-Muzani's nephew, al-Tahawi, should use the term first. After this, the writing of mukhtasars became a regular feature, whether or not this title was used. Some of the well known mukhtasars of the Hanafi school are the following:

(1) Al-Jami' al-Saghir and al-Siyar al-Saghir by Imam Muhammad al-Shaybani (d. 189 A.H.). These have been described above.

(2) Mukhtasar al-Tahawi by al-Tahawi (d. 321 A.H.). He begins with the statement that the book contains rules that cannot be ignored or whose knowledge must be acquired.

(3) Al-Kafi by Hakim al-Shahid (d. 334 A.H.). In these mukhtasars, the chain of transmission of fiqh coming down from the earlier Imams was maintained. This was the text chosen by Imam al-Sarakhsi (God bless him) for his 30 volume commentary al-Mabsat. Al-Marawazi created this book by summarising Kitâb al-Asl and the two Jami's through the elimination of lengthy narrations and some repetitions.

(4) Mukhtasar al-Karkhi by Imam al-Karkhi (d. 340 A.H.), the famous Hanafi jurist, who is also the author of Usul al-Karkhi. We have not had the opportunity to examine this book, but jurists often quote it in their works.

(5) Mukhtasar al-Jasas by al-Jasas (d. 370 A.H.). He was al-Karkhi's student.

(6) Mukhtasar al-Quduri by al-Quduri. This was the text chosen by al-Marghinani for his own Mukhtasar. Al-Quduri (d. 430 A.H.) ordered the chapters in his book according to al-Tahawi's book and not according to Imam Muhammad's al-Jami' al-Saghir. Al-Quduri is said to have written a commentary on al-Karkhi's Mukhtasar.

(7) Tuhfat al-Fuqahâ' by al-Samarqandi (d. 538 A.H.). He was al-Kasani's teacher and his father-in-law. The book is highly organised and a strict application of the term mukhtasar will exclude this book from this category.

(8) Bidayat al-Mubtadi' by al-Marghinani (d. 593 A.H.). This is the matn of which al-Hidayah is the commentary.

(9) Al-Hawi by Najm al-Din al-Turki (d. 652 A.H.).

(10) Al-Fiqh al-Nag by Nasir al-Din al-Samarqandi. After this there was an abundance of such texts and what we mention below are just a few of the well known texts.

(11) Al-Mukhtar lil-Fatwâ by al-Mawsili (d. 683 A.H.). The commentary on this matn is written by al-Mawsili himself and is called al-Ikkhtiyar. This text is used in al-Azhar.

(12) Majma' al-Bahrayn by al-Sa'ati (d. 694 A.H.)

(13) Kanz al-Daqiq by al-Nasafi (d. 710 A.H.)

(14) Wiqayat al-Riwayah fi al-Hidayah by Burhan al-Sharrah Mahmud ibn Sadr al-Shari'ah (d. 747 A.H.). As the title shows, it was a summary prepared from al-Hidayah itself, not only its matn. Sadr al-Shari'ah al-Thani (d. 747 A.H.), the grandson and student of this author, summarised the summary further, calling it al-Niqayah, and wrote a commentary on it as well.

Some of the texts that are used by the madaris for teaching, referred to as the acknowledged texts (mutûn mu'tabarâh), are those mentioned at (6), (11), (13) and (14). Some add (12) to this list. In the grades mentioned above, these jurists, the authors of the mutûn mu'tabarâh, are referred to as muqallids. They cannot prefer opinions, but have the ability to identify the strong opinions that are to be followed, that is, opinions preferred by those in the higher grades. In our view, preference should be given to...
think about the manner in which this book is studied today. We consider
the merger of the *matn* with the *sharh*, without distinguishing marks of
some kind, to be shocking, an act of gross negligence and callousness.\(^9\)

In our view, it is not possible to understand the book without separat-
ing the *matn* from the commentary. Further, the *matn* states the rule.
It is like reading the text of a statute and then turning to the commentary
for further explanations. *Al-Hidayah* is not only a teaching manual, it is
the most authentic and reliable book for knowing the law. It is used for
this purpose all over the world, even by other schools. This fact is also rel-
vant for those who are interested in the ruling for ordering their actions.
Our advice to them is: read just the rule, that is, the text of *Bidayat
al-Mubtadi‘*. This is the law. The other opinions mentioned in the com-
mentary are not to be followed. They have been provided to teach you
*fiqh*, that is, legal reasoning. To the student we say: Do not listen to those
who teach the law in terms of *qila wa qila* without emphasising the opin-
ion to be followed.\(^10\) To those issuing *fatwas* we would say: It is *Bidayat
al-Mubtadi‘* that you need. Yes, there are additional issues addressed by
the Author in the commentary, but the *matn* is the governing and pri-
mary text.

To facilitate this, we have tried to translate the text of *Bidayat
al-Mubtadi‘* in a manner that it can be read independently without reading
the commentary. This text is displayed in bold and can be distinguished
from the commentary. We have not succeeded all the time in doing so,
because complete sentences in the *matn* are broken down at odd places
by the Author for comments, and it is difficult to maintain the required
links. Nevertheless, the reader should have very little problem if he wishes
to read the *matn*.

*Al-Hidayah* is difficult to understand without the help of notes or
without the constant attention of the teacher. As mentioned earlier, the
process of adding notes to the book has been going on for the last eight
hundred years.\(^3\) Accordingly, we have added some notes to the text by
relying mostly on well known commentators, but sometimes on the basis
of our own research. There is no end to the number of notes that can be
added to the text of *al-Hidayah*, however, we have resisted this tempta-
tion out of respect for the wise judgement of the Author. He wanted the book
to stay small and precise, the way he wrote it. He wrote a lengthy book
himself, but said this: "When I was close to completion, it appeared to
be somewhat lengthy, and I feared that recourse to it would be lessened
due to its length." If the book is burdened with lengthy commentaries
and extensive notes the purpose is lost. It is very difficult to access huge
commentaries spread over a dozen or so volumes. They are avoided even
by the teachers themselves. The translation itself, we feel, has eliminated
the need for many of the notes given in various editions of the book.
In translating this book, our hope is that it will be used by the younger
generation to understand Islamic law and the legal reasoning underly-
ing the law. For this purpose, the best course of action for the student is
to add his own notes after discussion with the teacher. The exercise will
be extremely beneficial. Accordingly, in the first few books our notes are
somewhat lengthy. This is intentional. The aim was to keep in view the
interest of the general reader, who does not have access to a teacher and
to show by example what kind of notes may be added by the student him-
self. On some pages, we felt, that there was no need for adding notes; in
fact, notes on some pages would become a hindrance rather than a help.
We hope that the notes, where provided, will be of use to all.

We find that many schools and *madāris* teach the law from *al-Qudārī*.
It is a wonderful book and needs to be read, however, *Bidayat al-Mubtadi‘*
includes *al-Qudārī* within it and much more. It is a better organised,
more refined and somewhat expanded version of *al-Qudārī*. An effort
will be made to provide the Arabic version of *Bidayat al-Mubtadi‘* along
with the English meanings extracted from this translation. An ideal
approach would be, at least for the classroom, to read the smaller text
and then turn to *al-Hidayah* for elaboration.

It is customary with the commentators of *al-Hidayah* to say some-
thing about al-Marghinānī’s method and the way he uses certain terms.

\(^9\)The fault obviously lies with the publishers and not with the authors of these com-
mentaries. It may be argued that an expert will be able to recognize the *matn* even if
it is not distinguished. Yes, but that is not the point under discussion. Further, such an
argument can be given only by the arrogant.

\(^10\)On some occasions this is difficult to determine in the book, and we have addressed
this below.
We are reproducing some of these comments, courtesy 'Allāmah al-Lakhnawi, but we have also added a few that we have observed ourselves while translating the book. A few of these may be irrelevant for the translation.

In the text, the Author of al-Hidayah usually refers to:

1. himself as “This feeble servant,” but some of his students later inserted in its place “He (God be pleased with him)”; he rarely uses the personal pronoun out of modesty, a practice followed by most leading jurists and traditionists;34

2. the scholars from Mā Warā' al-Nahr (Transoxiana), that is, Bukhāra and Samarqand, according to al-'Ināyah, by saying “our Shaykhs” (شیخان میناء که), but according to some he means by this all those scholars who did not meet the Imam (Abū Hanīfah);

3. the cities of Mā Warā' al-Nahr by using the words ابا (in our region);

4. to a verse of the Qur'an previously cited by saying, “what we recited”; to a rational argument and legal reasoning that has preceded by saying, “what we have stated” or “what we elaborated”; to a tradition that he has previously stated by saying, “what we have related”;

5. the opinion of a Companion as athar and at times he does not distinguish between khabar and athar, referring to both by saying, “what we have related”;

6. legal reasoning by saying, “the fiqh in this issue is”;

7. a disagreement among jurists by using the word “qālū (they said)”;

8. to an interpretation preferred by the scholars of traditions by saying, “This tradition is interpreted as” or “construed to mean”;

9. his own interpretation of a tradition by saying, “we interpret it as”;

34It has been noticed in the text, however, that the statement “this feeble servant” usually appears when he is correcting an error in al-Qudūrī’s text.

The list provided above is an excerpt from 'Allāmah al-Lakhnawi’s text. We list below a few points that we consider important.

1. The Author states the rule, which is part of the mān of Bidāyat al-Mubtadi', first. If the rule appears as a single opinion, it is the unanimous view of the school, that is, the view of the Imam and the two disciples.

2. On occasions, where total unanimity is not found, he states the Zāhir al-Riwayāh first and this is followed by the view of one or more jurists. As far as the mān is concerned, he is stating the stronger opinion first. In such a case, the position is reversed in the commentary; he will provide arguments and support for the stronger opinion at the end of the discussion.
Where two jurists are on one side, the rule according to the two jurists will be stated first. This is usually Abu Hanifah (God bless him) along with one of his companions. In such a case, the view of the other disciple, where it is a reasonably strong opinion, appears within the matn. At other times, a variant narration from a disciple or even from the Imam himself are mentioned in the commentary merely for the purpose of elaboration.35

Statements of khalaf in the commentary.—Conflicting opinions are quoted not for adoption of alternate rules, but to teach fiqh.

(a) If the conflicting or varying opinion is that of one of the three jurists of the school, it is stated first in the commentary or is given preference over other varying opinions that will not be mentioned.

(b) Where a variant view of the three jurists is not available, the disagreement with Zufar (God bless him), if any, is stated.

(c) If the above two are not found, the conflicting opinions, if any, of Imāms Malik and al-Shafi`i (God bless them) are stated.

It goes without saying that the number of agreements with al-Shafi`i (God bless him) are the maximum. This is followed by Zufar (God bless him) and then Malik (God bless him). In discussing the disagreements, the texts relied upon by the disagreeing Imam are stated, followed by rational arguments on his behalf. The response of the school is then provided through the texts adopted as well as through rational arguments and responses.

Parallel and Distinguished Cases.—Perhaps, the most difficult sections of the book are where the Author mentions parallel and distinguished cases. The situation becomes extremely complex when in a single sentence two or three cases are distinguished from each other. This is where the fiqh is, however. Most of the time, the fiqh of a totally different category of law has to be recalled along with the governing rules to understand the comparisons and distinctions.

—that is, the rule depends upon the matn.

(6) He uses the word shar' in two different ways: to mean the law, that is, the shari‘ah or to mean the texts of the shari‘ah, that is, the texts of the Qur‘ān and the Sunnah.

(7) Al-Qudūrī’s statements.—When he reproduces al-Qudūrī’s text, he is always verifying the statements through Imām Muhammad’s books. When an error is found, and this is rare, he supports the correction through the statements of the earlier jurists. As stated already, the order of the books in Bidāyat al-Mubtadi’ follows the order in al-Jam‘ al-Saghir. This affects al-Qudūrī’s text. In addition to this, the sequence of his statements is also altered sometimes. This usually happens when al-Marghinānī brings in additional material from other sources, whole sections a few times. At other times he may move the statements to another location for the sake of better organisation.

(8) He uses qila (it is said) to refer to weaker opinions.

(9) Additional Issues.—On certain occasions he deals with additional issues that are directly or indirectly related to the issue in the matn. This is what the fatāwa compilations do as a major function.

(10) Structure.—Sometimes groups of cases have been arranged in a particular sequence to highlight the links between them and to indicate the total application of a rule.

We have given brief references for the traditions found in al-Hidayah to al-ZaylaTs outstanding work, which should be consulted for the details. A little less than three of the four volumes of this work pertain to the first volume of al-Hidayah. The work needs to be translated into English or at least published in a summarised form in English. One thing we may add here, and that concerns the method of the Hanafis for the adoption of traditions. It is a method that was developed and refined one hundred and fifty years before Imam al-Bukhari (d. 260 A.H.) worked on his Sahih compilation, and is tied closely to their methods in usul. Sufficient attention has not been paid to this method from the perspective of a legal system, and it has been dealt with in fragmented form.

After giving the transliteration of an Arabic term and stating its meaning in English once or twice, we have retained the transliteration alone in the following text. This has been done intentionally so that those who
study this law learn to use the Arabic terms, as many of these terms represent concepts that are difficult to explain in English.

It would not be right if we end this introduction without saying something about the contribution of Charles Hamilton, who translated *al-Hidayah* more than two centuries ago. The translation was published in 1791. There are some critics of the translation; there always are of every translation. Criticism does not lessen in any way the tremendous contribution made by Hamilton in those early days. A translation is always the understanding of one person, and it has to be different from that of another person's translation of the same text. Hamilton translated *al-Hidayah* with sincerity and diligence. As a result, in our view, his translation has had more influence than many writings of the last two hundred years. We would, therefore, like to say that our translation is not better than Hamilton's, but it is naturally different. Hamilton's contribution should never be taken lightly.

The Author of *al-Hidayah* did not divide his book into volumes. All four volumes constitute a single book. The division into volumes is the work of publishers. The text used in the *madaris* ends the first volume after the Book of *Hajj*. We have followed the Beirut edition as that is used by almost everyone today. The first volume, therefore, ends in the middle of the Book of *Talaq*.

I thank Mr. Aftab Malik of the Amal Press, Bristol without whose determination and energetic management this translation would not have been possible. I must thank my wife, who diligently typed out the entire manuscript, and then read it several times making valuable suggestions. Her contribution is gratefully acknowledged. My son Saifullah, my daughter Aamirah, my son Ibrahim, my nephew Sa' d A'zam and my niece Aena read the manuscript and made suggestions for which I would like to thank them profusely.

Imran Ahsan Khan Nyazee
Center for Islamic Law & Legal Heritage

Chapter 1

Author's Preface

Praise be to God, who elevated the paths and guideposts to knowledge, who manifested the rites and injunctions of the *shar'i* (law), who sent Messengers and Prophets—God's blessings be on them all—guiding to the cause of truth, and who made the scholars their successors inviting

1. *Ma'alims.*—The locations of knowledge. Some maintain that he is referring to the sources of the *shari'ah*, while others say that he is referring to the jurists as it is they who become the means for the transmission of knowledge.
2. *Refers to a'lāmin or the mountains, a comparison with the jurists who stand up like lofty mountains. It can also mean the definitive and probable evidences in the texts. The latter appears more likely.*
3. *Either through His khidāb (communication) or through the legal effects of the ahkām.*
4. *The idea is to highlight the distinction between Messengers and Prophets where a Messenger is one who brings a book with him.*
5. *An attribute of the Messengers.*
6. *To highlight the meaning of the tradition that scholars are the heirs of the Prophets.*
to the paths (leading) to their established practices, adopting in what was not transmitted from them the methodology of ijtihad — seeking instruction in this from Him, for He is the Guardian of all instruction.

He favoured the earlier jurists with success so that they were able to frame the issues for each thing obvious and concealed. The incidents,

That is, the practices of Messengers and Prophets.

Methodology of ijtihad. The learned Author has stated that the Ulama' adopted ijtihad for things about which nothing was transmitted from the prophets. It may be concluded from this statement of the Author that ijtihad is used as a methodology in cases that are not mentioned in the texts or in reports from the Prophet (God bless him and grant him peace) and his Companions. This needs to be clarified. Many people believe that ijtihad takes place when there is no text that covers the issue, however, as is well known, ijtihad is based on the extension of the meanings to be found in revelation and reports. Such extension is through literal interpretation of the texts as well as through rational extensions on the bases of qiyas and other forms of legal reasoning. The correct way to understand this statement is that where the text is giving such a clear meaning that there can be no disagreement over such meaning, there is no need for ijtihad, but where the text offers several possibilities ijtihad is required. For example, where the text says that a person guilty of unlawful sexual intercourse is to be awarded no stripes, the meaning of ten is the same for all readers. The meaning of ijtihad (striping), however, is a matter of disagreement and requires ijtihad. This is also the meaning of the qal'ah, la ijtihad ma'al-mas, which means that there is no possibility of ijtihad where the text conveys an explicit single meaning (mas). The word ijtihad does not mean text in the absolute sense, but a grade of meaning according to waal al-fuqah. It is therefore, not proper to assume that ijtihad lies outside the texts or is independent of the texts. In fact, the jurists are the leading authorities on the legal meanings in the Qur'an and the Sunnah.

Indicating the spiritual blessings and special favours granted to those early jurists who derived the laws from the texts.

Abu Hamad, his companions and disciples in particular, and other Imams in general (God bless them all).

Were able to frame the issues for each thing. The statement, "were able to frame the issues for each thing," may appear trivial to some, but it is not so for the Hanafi jurists. What the Author means is the identification and formulation of rules as well as cases that elaborate the rules. This was done by the earlier jurists of the Hanafi school. Instruction through the case method is unique to the Hanafi school and Imam Muhammad al-Shaybani's books are based on this method. It was due to this reason that Imam al-Shafi'i (God bless him) is said to have credited Abu Hamad (God bless him) with three-fourths of the knowledge of the law. Imam al-Sarakhsi narrates the story as follows: "Ibn Surayj (God bless him), who was a leader among the companions of al-Shafi'i (God bless him), has reported that a man criticised Abu Hamad, so al-Shafi'i called him and said to him, 'O so and so, you criticise a person to whom the entire ummah conceives three-fourths of knowledge when he does not concede to them even one-fourth.' The man said, 'And how is that?' He replied, 'Fuqah questions and responses (in the form of cases) and he is

however, recur repeatedly and new cases attempt to burst out of all topical systematization. Yet, it is the endeavour of stalwarts to trap runaway issues by referring them to their origins and by settling them through precedents. (In this endeavour) reliance on the governing principles (of these issues) will grant a firm grip over them.

I resolved, while writing the introduction to Bidayat al-Muhaddithi, that I would, with help from God, the Exalted, write its commentary, which I would call Kifayat al-Muntahai. I commenced work on it, with my resolve being weakened somewhat (by other occupations). When I was close to completion, it appeared to be somewhat lengthy, and I feared that recourse to it would be lessened due to its length. I, therefore, diverted the one who alone formulated the questions, thus, half the knowledge is surrendered to him. Thereafter, he answered all the questions and even his opponents do not say that he erred in all his answers. When that in which they agreed with him is compared with what they disputed with him, three-fourths is surrendered to him (one-half for formulating the governing cases and one-fourth for his decisions with which other jurists are in agreement). The remaining is shared by him with all other jurists. (On hearing this) the person repented on what he had said. When such stories are read, they are usually discarded as school propaganda. In our view, irrespective of the impact of the story, the contribution of the Hanafi school is tremendous in the creation of cases and the elaboration of rules through such cases. One has to read Imam Muhammad's text in al-Kafi or within al-Sarakhsi's al-Mabsut to understand what we are saying. See Islamic Legal Tradition.

The Author uses the word majid of the belt circling the waist.

By this he means those early stalwarts who formulated the first issues and cases, because deriving the law from the texts is not an easy task; it requires the ability to undertake ijtihad.

The sources.

As if clenched with the teeth so that they do not run away anymore.

In this introduction he mentions that when in the early stages, he decided to write a precise yet comprehensive book, he found Mukhtasir al-Qudari to be the most concise and impressive. At the same time, he adds, that he found people encouraging others to memorise al-Jami' al-Saghir, so he decided to combine the two and not go beyond the two unless it became absolutely necessary. He says that he called it Bidayat al-Muhaddithi. He also decided that if he were to write its commentary he would call it Kifayat al-Muntahai.

Size of the commentary. The learned Imam has indicated that he decided to write the commentary called Al-Hidayah for fear that his more lengthy work may never be consulted. His assessment proved to be true: al-Hidayah became the most popular manual in fuqah and very little is known about the Author's other work. Before him, Imam al-Sarakhsi had expressed such a fear on writing al-Mabsut, although he was referring more to the discussion of lengthy issues that have very little fuqah in them. It is a tragedy.
my attention and concern from it towards another commentary that I would call al-Hidāyah. In this I would reconcile, with God’s help, the selected narrations with sound legal reasoning, letting go of the extra details on each topic so as to avoid copiousness. Yet, it will contain the governing topics from which ordered sections emerge.

I beseech God to grant me success in the completion of (both) the works and to bless me, in the hereafter, on their completion, so that he who has a loftier determination may approach the larger and more lengthy work, while he who is pressed for time may restrict himself to the shorter and more concise volume. Human beings have different approaches in seeking what they like, but knowledge in all forms is a blessing.

Some of my brothers asked me thereafter that I dictate to them the second work. I commenced doing so, seeking support from God, the Exalted, to guide my speech and imploring Him to facilitate my task. He makes all difficult things easy for He has power over all things. He it is who provides a suitable response—God is sufficient for us, and the best Guardian.

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that powerful works like al-Sarakhshi’s al-Mabsūṭ and al-Kāsāni’s Badā’i’ al-Šanā’i’ are not used for regular instruction. Such large works are used only rarely by researchers for occasional citations. A work like al-Hidāyah, on the other hand, is sometimes so brief that the entire meaning is difficult to understand except by referring to the larger works. The result is that glosses and comments are then written on such concise works, which increases their size anyway. Perhaps, concise works are more useful for instructional purposes.

This extra detail was later brought back by the fatāwa literature.

In faith.
Al-Hidāyah
BOOK ONE

Ṭahārah
(Purification)

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Chapter 2

The Obligatory Acts of 

God, the Exalted, has said: "O you who believe! when you rise up for prayer, wash your faces, and your hands (and arms) up to the elbows; rub your heads (with water); and (wash) your feet up to the ankles. If you are in a state of ceremonial impurity, bathe your whole body. But if you are ill, or on a journey, or one of you has come from the privy, or you have been in contact with women, and you find no water, then take for yourselves clean earth, and rub therewith your faces and hands."  

1Qur'ān 5:6. The verse of purification.—This verse is the primary evidence for ablation of all types. As it is a matter of ritual obedience, the jurists try to stay as close as is possible to the literal meaning so as to give effect to the intention of the Lawgiver. It is for this reason that we find them arguing over things that may appear trivial to some. Not so according to the jurists; the intention of the Lawgiver must reign supreme and this is verified even for small details, unless such devotion to literal meanings leads to absurd results. In other words, there is a difference between the discovery of the true intention and becoming absolutely literal. For example, a literal reading of the words "rise up for prayer," or prepare for prayer, would imply that minor ablation (wūdū') is required before each prayer, and you cannot offer more than one prayer with one ablation (reading the word "when" as "whenever" in English). This, in fact, is the rule followed by the Zāhirīs. The Ḥanafīs read implied words into the verse to mean "when you rise up for prayer, and you are in a state of ritual impurity...." Carried to its extreme, they argue, the literal meaning would imply that one cannot sit down after having performed ablation, and must proceed directly to prayer.
The definitive obligation for purification, according to this text, is the washing of the three limbs and the rubbing of the head. Washing is the running of water, while rubbing is not the running of water. The limits of the face extend from the hairline (on the forehead) up to the lower jaw, and from earlobe to earlobe, because the meaning of being “face to face” is realised in this, and the term wajh (face) is derived from it.

The elbows and the ankles are included in the washing in our view, but this is opposed by Zufar (God bless him). He says that the object of the words “up to” is not included in its meaning, just like night is not included in the duration of the fast. In our view, the limit (in the

3 The word purification here means “minor ablution”, that is, wudū’. The Author uses the word taharat (purifications) in the title—Book of Purifications—to indicate that purification in the legal sense is of two main types: the removal of actual impurity (najas) and the removal of ritual impurity (hadath). The two sometimes overlap. The word kišāb is usually translated as book. In the technical sense, however, it is a legal convention that accommodates within it a series of related rules and cases. Hence, the Book of Purification, the Book of Prayer and so on. Wudū’ (minor ablution) consists of the two acts of washing and rubbing, that is, ghasl and mash. Ghasl is the running of a liquid on the limbs whereas mash (rubbing) leads to moistening when it pertains to the head. Accordingly, if water is applied to the limbs, like oil is applied to them, it will not amount to ghasl.

Washing of the three limbs and rubbing of the head are the arkān (essential elements) of wudū’. The rukn is the pillar on which a thing stands. If a rukn, like the pillar, is missing the act is not valid.

4 Qa‘idah usūliyyah.—In this paragraph, the Author does not mention that washing is to be undertaken three times. This is based on a qa‘idah usūliyyah. First is the rule that an absolute (unqualified) command gives rise to an obligation, unless another evidence indicates otherwise. Such an obligation is derived for the four acts stated in the verse. Another related rule is that the absolute (unqualified) command does not give rise to repetition, that is, it requires the act only once, unless another evidence indicates otherwise. It is for this reason that the Author does not mention the number of times the four parts have to be washed. He does so later on the basis of an additional evidence. The reader who wishes to “acquire fiqh” must be on the lookout for such rules and the way they are applied. The Author rarely mentions them, assuming that the reader knows the rules. Accordingly, acquiring a knowledge of usūl is essential for understanding fiqh.

5 Vertically.

6 Horizontally.

That is, when the face is turned towards someone, it is the area turned that is intended.

8 Al-Hidayah

BOOK I: PURIFICATION

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3 The concept of bayān represents a fundamental approach in Islamic law, which assumes that the Sunnah is an independent and binding source of law and it is the primary source for all bayān. The Sunnah is to be consulted for the elaboration (bayān) of statement) here is for the exclusion of what is beyond it, because without this the act required would have covered the entire arm. In case of fasting, the limit extends up to the limit as the term in its absolute meaning would apply to fasting for a moment. The ankle is the protruding bone (above the foot), and this is the correct opinion. The word kā‘ib (full and round) is derived from ka‘b.

He said: The required obligation in rubbing is part of the forehead, and this is one-fourth of the head. The rule is based on what was related by al-Mughirah ibn Shu‘bah (God be pleased with him), “The Prophet (God bless him and grant him peace) arrived at a camp of some tribe. He passed water (answering the call of nature), performed ablution, and rubbed his forehead and boots.” The text of the Qur’an is not elaborate (is muṣjal) on this point, and this (tradition) is linked to it as an elaboration (bayān). It serves as a binding evidence against al-Shafi’i (God (God bless him and grant him peace), on reaching the elbows during ablution, poured the water from above them.” This shows that the elbows are included.

The focus is on the word “forehead” here. This tradition is a combination of two traditions, both narrated by al-Mughirah ibn Shu‘bah (God be pleased with him). The first of these is recorded by Ibn Mājah in his Sunan and is considered a sound tradition. Related versions from other narrators are found in al-Bukhari and Muslim. The second tradition is recorded by Muslim. Related traditions are also recorded by Abū Dāwūd, al-Ṭayyib, and Ibn Mājah. Al-Zayla`ī, vol. 1, 168-69.

Of the head.

10 Up to the elbows.—The issue is whether the hands are to be washed up to the elbows or whether the elbows are not to be included in the washing. The significance of the issue may be explained through the example of a person whose arm has been amputated from the joint. Is he to wash the joint? The answer is in the affirmative if the elbows are to be included in the washing. Zufar (God bless him) reads the words “up to the night” in the case of fasting in the same way that he reads the words “up to the elbows” in the case of minor ablution. Read in this way, the elbows are not included in the washing, just like any part of the night is not included in the fast. The other Hanafi jurists argue that in the case of fasting it was necessary to interpret the words to set a limit for the fast. If the word “night” had not been mentioned, the fast would have lasted only a moment, due to the absence of a limit. In the case of the word yud, which already includes the entire arm up to the armpit, the mentioning of the word elbows indicates that the elbow is included, while the part of the upper arm is excluded. The Hanafi jurists argue further that even if the verse is considered as muṣjal (unelaborated), it needs an elaboration (bayān) from the Sunnah of the Prophet (God bless him and grant him peace). The tradition they employ is: It is transmitted from Jābir (God be pleased with him) that “the Prophet of God (God bless him and grant him peace), on reaching the elbows during ablution, poured the water from above them.” This shows that the elbows are included.

11 Of the head.

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The concept of bayān represents a fundamental approach in Islamic law, which assumes that the Sunnah is an independent and binding source of law and it is the primary source for all bayān. The Sunnah is to be consulted for the elaboration (bayān) of
also serves as an evidence against Malik (God bless him), who stipulates (of the school), our companions have stipulated rubbing with three fingers of the hand, because it is the major part of the instrument of rubbing (that is, the hand).\textsuperscript{14}

2.1 THE REQUIRED PRACTICES (\textit{sunan}) OF MINOR ABLUTION

He said: The required practices (\textit{sunan})\textsuperscript{17} of purification\textsuperscript{18} are:

The washing of the hands before they are immersed in the water utensil,\textsuperscript{19} when the person performing ablution wakes up from sleep. This is based on the words of the Prophet (God bless him and grant him peace), “Whoever wakes up from sleep is not to dip his hands into the utensil until he has washed them thrice for he does not know where his hand has spent the night.”\textsuperscript{20} As the hand is the instrument of cleansing, the requirement is to begin with its washing, and this washing is up to the wrist as this is sufficient for (commencing) cleanliness.

(He said): The proclamation of the name of God, the Exalted, at the beginning of the ablution. This is based on the words of the Prophet (God bless him and grant him peace), “There is no (minor) ablution for one who does not proclaim the name of God.”\textsuperscript{21} The meaning here is the legal meanings in the Qur’an, before recourse is had to literal, historical and other sources. This principle is ignored by the jurist at his own peril.

\textsuperscript{14}Al-Shafi‘i (God bless him) is reported to have interpreted rubbing of the head to be the minimum to which the term “rubbing” applies and that is three hairs.

\textsuperscript{15}Imām Mālik (God bless him) relies on a tradition from ‘Abd Allāh ibn Zayd ibn ‘Asīm recorded by him. Al-Ayni, vol. I, 176. The Hanafi jurists rely on the tradition of al-Mughirah ibn Shu‘bah (God be pleased with him) mentioned above.

\textsuperscript{16}This is a narration from Muhammad (God bless him) recorded in his \textit{al-Nawādir}. The word \textit{sunnah} used in Hanafi \textit{fiqh}, as distinguished from \textit{usul}, refers to the emphatic form, that is, \textit{sunnah mu‘akkadah}, which is an act performed persistently by the Prophet (God bless him and grant him peace).

\textsuperscript{17}Wudu’ (minor ablution).

\textsuperscript{18}The utensil is mentioned as they used to perform \textit{wudu’} from out of the utensil. This tradition has been recorded by all the six sound compilations. Al-Zayla‘i, vol. 1, 176.

\textsuperscript{19}This tradition has been related from six Companions (God be pleased with them) among whom is Abū Hurayrah (God be pleased with him). The tradition of Abū Hurayrah (God be pleased with him) has been recorded by Abū Dāwūd and Ibn Mājah. It is also transmitted by al-Hākim in \textit{al-Mustadrak}, and he said that it is a tradition with sound \textit{isnād}. Al-Zayla‘i, vol. 1, 3; Al-Ayni, vol. 1, 187.

\textsuperscript{20}It is recorded by al-Bukhārī, Muslim, Abū Dāwūd and others. Al-Zayla‘i, vol. 1, 8; Al-Ayni, vol. 1, 199.

\textsuperscript{21}This is gharīb. There are some traditions mentioned by al-Zayla‘i that do convey the meaning. Al-Zayla‘i, vol. 1, 9. There is a tradition in Ahmad, \textit{Musnad}. Al-Ayni, vol. 1, 206-207.

\textsuperscript{22}It is recorded by Abū Dāwūd. Al-Zayla‘i, vol. 1, 17.

\textsuperscript{23}This is related from eight Companions (God be pleased with them all). The best known \textit{isnād} are from Abū Amāmah (God be pleased with him). Al-Ayni, vol. 1, 214. It is recorded by Abū Dāwūd, al-Tirmidhi and al-Nasā‘i. Al-Zayla‘i, vol. 1, 18.

The Siwāk (or the brushing of the teeth with the stick) is required, because the Prophet (God bless him and grant him peace) performed this persistently.\textsuperscript{22} When the siwāk is not available, the fingers are to be used as the Prophet (God bless him and grant him peace) did this.\textsuperscript{23} The correct view is that it is \textit{mustahabb}.

\textit{Madmndah} and \textit{istinshāq} (rinsing the mouth and drawing water into the nostrils) is required, because the Prophet (God bless him and grant him peace) performed both acts persistently. The manner of doing this is to rinse the mouth thrice taking fresh water each time. The drawing of water into the nostrils is done the same way. All this is related about the ablution performed by the Prophet (God bless him and grant him peace).\textsuperscript{24}

\textit{Mash} (rubbing) of the ears is required. It is a \textit{sunnah} to do so with the water used for the head, in our view, although al-Shafi‘i (God bless him) disagrees. The basis of his opinion is the saying of the Prophet (God bless him and grant him peace), “The ears are part of the head.”\textsuperscript{25} The purpose here (in this saying) was to elaborate the legal rule and not to describe the anatomy.

He said: \textit{Takhil} of the beard (passing fingers through the beard) is required. The legal basis is that Jibril passed on the command for doing
so to the Prophet (God bless him and grant him peace). It is said that it is a *sunnah* according to Abū Yusuf (God bless him), and it is permissible (*ja'iz*) according to Abū Hanīfah and Muhammad (God bless them). The legal basis is that the *sunnah* is meant for the completion of the definitive obligation (*fard*) with respect to its object and (purifying) what is within the (hair of the) beard is not part of the object of the obligation.28

He said: *Takhlih* of the fingers (passing fingers through the fingers of the opposite hand) (is a *sunnah*), because of the words of the Prophet (God bless him and grant him peace), “Run your fingers through your fingers lest the fire of hell run through them.”29 The reason is that this amounts to the completion of the definitive obligation (*fard*) with respect to its object.

He said: The repetition of washing up to three times.30 The legal basis is that the Prophet (God bless him and grant him peace) performed the acts of ablution once and said, “This is the ablution (*wudu'a*) without which God does not accept *salāt* (ritual prayer).” He then performed each act of the ablution twice saying, “This is the ablution of the person whom God grants a double reward.” He thereafter performed each act thrice and said, “This is my ablution and the ablution of the Prophets before me. He who exceeds this, or falls short of it, is guilty of transgression and injustice.”31 The warning (here) is against not considering it a *sunnah*.32

It is preferable (*mustahabb*) for the person performing ablution to resolve that he is performing ablution (formulate the *niyyah*). The

It is based on a sound tradition. Al-`yāni, vol. 1, 220; it is recorded by Ibn Abī Shaybah and Ibn Mājah. Al-Zayla`i, vol. 1, 23.

It is said that the function of the *Sunnah*, when related to a definitive obligation, is the completion of the *arkan* of the definitive obligation. This is done through the repetition of the act thrice, the rubbing of the entire head and so on, but the meaning is not found in the *takhlih* of the beard. It may be mentioned, however, that the *Sunnah* is not only for completion; it can lay down the rules independently.

Legal justification for its being *ja'iz*.

In these exact words, it is considered *gharib*. It is recorded by al-Dār‘qutnī. Al-Zayla`i, vol. 1, 265; al-`Aynī, vol. 1, 227–28.

Compare with the obligation and the *qā'idah usūliyyah* mentioned earlier.

The tradition about performance once, twice and thrice, in these exact words, is considered *gharib*. However, the meanings are found in other traditions. Al-Zayla`i, vol. 1, 27–32.

He mentions this as the words of the tradition “transgression and injustice” would convey the obligation of washing thrice.

niyyah (intention) in ablution is an obligation in our view (that is, it is a *sunnah*), while it is an obligation according to al-Shāfi‘ī (God bless him), because (in his view) it is an act of worship, which is not valid without intention, as in the case of *tayammum* (substitute ablution with clean soil). Our argument is that nearness to God (by an act of worship) is not attained except by intention, but the act of ablution (even without the intention of ablution) does amount to a key for *salāt* (fulfilling the requisite condition), because it is purification that has been undertaken with a purifying substance33 as against *tayammum* (which does not purify in the physical sense). The basis is that soil does not (actually) purify except when the intention is to pray and the act has to be legally constructed upon such intention.

The entire head has to be subjected to rubbing (*mash*).34 This is recommended (as a *sunnah*). Al-Shāfi‘ī (God bless him) maintains that the *sunnah* is to do so thrice with water renewed each time, in view of the fact that this is done in parts that are washed. Our argument is that Anas (God be pleased with him) performed each act of ablution thrice, but performed *mash* of the head a single time. He then said, “This is the ablution of the Messenger of God (God bless him and grant him peace).”35 The (other) report about rubbing thrice36 is to be interpreted in the light of this tradition to mean “with a single helping of water” and this is legal according to what is reported by al-Hasan from Abū Hanīfah (God bless him). The reason is that the obligation is to perform *mash* and by repetition (with renewed water) the act is altered to mean washing, which no longer conforms with the *sunnah*. In the light of this, it is more like the *mash* on boots and not washing, as that is not affected by repetition (rubbing of boots).37

30The substance purifies in the actual and legal senses irrespective of intention.

31Compare with the obligation of rubbing: As a *sunnah*, its purpose is the completion of the definitive obligation (*fard*).

32Al-Zayla`i calls this tradition *gharib*, however, the same tradition is found in the two *sahih* compilations from `Abd Allāh ibn Zayd. Al-`Aynī expresses surprise over the use of a *gharib* tradition when sound traditions exist. Al-`Aynī, vol. 1, 241. See also al-Zayla`i, vol. 1, 30.


34*Mash* is annulled by repetition and turns into washing. This is not the case with *mash* over boots as that is not affected by the number of times *mash* is undertaken.
2.2 Factors Annulling Minor Ablution

The factors annulling minor ablution include anything that passes through the two passages, because of the words of the Exalted, "Or one of you has come from the privy." It was said to the Messenger of God (God bless him and grant him peace), "What is hadath?" He said, "What comes out of the two passages." The word "mā (what)" conveys a general meaning here and includes the usual excretions and all others besides them as well.

And like blood or pus—when they ooze out from the body and move on to a part of the body that is subject to the rule of purification—and vomiting that is a mouthful. Al-Shafi'i (God bless him) maintained that whatever comes out of the body, other than the two passages, does not nullify minor ablution. He relies on the report that the Prophet (God bless him and grant him peace) vomited, but did not perform ablution, and also on the rule that washing of a part that is not affected is a matter of ritual obedience (and it cannot be rationalised), thus, the rule has to be restricted to what is spelled out by the shar'a (texts), and that means the usual passages. Our reasoning is based on the words of the Prophet (God bless him and grant him peace), "Ablution (wudu') occurs due to each type of flowing blood," as well as on his words, "One who vomits or has a nosebleed should move away (from his prayer) and perform ablution and he should continue his prayer as long as he has not uttered any words." Another (rational) reason is that the emergence of impurity (from the body) is effective in doing away with purification. This element is rational in the original rule (for purposes of analogy), while the element of confining purification to the four parts of the body is non-rational, but the (latter) rule has been extended on the same basis due to which the first was extended. Excretion (or oozing out) is realised

40 Al-Zayla'i says that this tradition is gharib in the absolute sense. Al-Zayla'i, vol. 1, 37.
41 According to al-'Ayni, this tradition is a mursal, and such traditions are acceptable according to the Hanafi usul. Al-'Ayni, vol. 1, 262; Al-Zayla'i, vol. 1, 37.
42 The report from 'A'ishah (God be pleased with her) is sahih, according to al-Zayla'i. It is recorded by Ibn Majah and al-Darqutni. Al-Zayla'i, vol. 1, 38.
43 Ablution due to flowing blood.—The issue is whether ablution (wudu') is to be performed due to an excretion from the body other than what comes out of the two passages, like blood and pus or even a mouthful of vomiting. Imam al-Shafi'i (God bless him) says that ablution is not required in such a case, while the Hanafis maintain that it is.

Imam al-Shafi'i's argument is that ablution and its related acts are a matter of ritual obedience. You are not to discover underlying reasons for the rules here, because that will not work. He reasons that if we were to identify filth or impurity as the reason for ablution on account of what comes out of the passages then washing of these passages would have been sufficient, yet, the law requires us to wash other body parts that are the object of ablution and that are not affected by the impurity in this case. He means that washing of the parts, mentioned in the verse, during ablution as a result of some excretion that has not come out of these parts is a matter of ritual obedience and its underlying reason is not known to us, so let us confine the annulment of ablution to cases mentioned in the text, that is, the two passages. Let us not, he would say, add more excretions to these two on the basis of analogy as the underlying reason is not known, a reason on the basis of which analogy can be undertaken.

Hanafi reasoning is based on (1) the tradition of flowing blood; (2) the tradition of vomit and nosebleed; (3) that the oozing out of najasah is rationally valid in the loss of purification. This factor (oozing out of filth) in the text is something rational, and can be a basis of analogy; and (4) that restriction with respect to the mentioned
through flowing out to a location to which the rule of purification applies.

Zufar (God bless him) said that there is no difference between a small amount of vomit and a large amount. Likewise, flowing is not a stipulation in his view on the analogy of a normal outlet and also due to the unqualified application of the words of the Prophet (God bless him and grant him peace). "A galas (mouthful of vomit) amounts to hadath." We reason from the words of the Prophet (God bless him and grant him peace), "A drop, or two, of blood does not invoke ablution except when the blood flows." We also reason on the basis of the words of 'Ali (God be pleased with him) when he recounted the causes of hadath as a whole, saying: "Or vomit that fills the mouth." When the reports conflict, we interpret what is related by al-Shafi'i (God bless him) to mean a small amount, and what Zufar (God bless him) has related to mean "more (a mouthful)," and we have already elaborated the distinction between the two methods. If the worshipper vomits in parts so that taken together they amount to a mouthful, then, according to Abu Yusuf (God bless him), the unity of the session (of vomiting) will be taken into account, while according to Muhammad (God bless him), the unity of the cause will be considered and that is nausea. Thereafter, what does not amount to hadath does not amount to najas. This is related from Abu Yusuf (God bless him) and that is correct. The reason is that it is not najas legally insofar as purification (taharah) is not annulled by it.

This is the position if he vomits out gall, food or water, but if he vomits sputum then it does not amount to an annuling factor, according to Abu Hanifa and Muhammad (God bless them). Abu Yusuf (God bless him) said that it is an annulling factor if it is a mouthful. The disagreement is about that which arises from the chest (phlegm). As for that descending from the head (mucus), it is not an annulling factor by agreement, because the head is not a source of impurity (najasah). Abu Yusuf's argument (for the impurity arising from the chest) is that it is impure due to its closeness (to the stomach). The two jurists argue that it is a sticky excretion that is not affected by impurity (najasah), and what is affected is very little, and small amounts in vomiting are not an annulling factor.

If he vomits out blood in the form of a clot, then, a mouthful will be taken into account, because it is black and burned up (oxygenated). It takes the same rule according to Muhammad (God bless him) even if it is in fluid form on the analogy of all the other forms of blood. According to the two jurists (Abu Hanifa and Abu Yusuf) if it flows of its own motion it annuls ablution, even when it is in a small quantity, because the stomach is not the source of blood rather it is from an internal wound.

If it (blood) descends from the head and down into the nostrils, it annuls ablution by agreement as it has reached a location to which the rule of purification applies, thus, excretion is realised.

Sleep, while lying on the side or reclining or leaning on something, where the person will fall if the thing is removed, is a factor of annulment. Reclining on the side (flank) is the cause of the slackening of the joints that does not normally prevent excretion, and what is established in practice is what is relied upon with a certainty. Reclining back (on a pillow for example) does away with alertness or wakefulness due to the

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51Refers to the qi'dah fahiyyah that certainty is not done away with doubt.
52That is, the cause of hadath.
53This statement applies to the worshipper's body and not other things.
54The arguments of the jurists on this issue depend upon the source from where the body fluids emerge, and on whether such a source is a source of impurity.
55Sleep becomes a cause for hadath in some cases. The rule is assigned to the cause rather than the actual hadath, which may not occur during such sleep. This is a method for settling rules in Islamic law. Compare it, for example, with the penalty for drinking khamr insofar as it becomes a cause for qadh.
An attack on the mind through fainting and insanity (is an annulling factor), because it is a degree higher than sleep, while reclining on one side, in causing relaxation. Fainting is hadath under all circumstances, and this is based on analogy constructed upon sleep, however, we recognize sleep as hadath on the basis of reports, and fainting is a degree higher than it, therefore, analogy cannot be constructed for it upon sleep.

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A woman need not open her braids (plaits) during bathing if the water can reach the roots of the hair, due to the words of the Prophet (God bless him and grant him peace) addressed to Umm Salamah (God be pleased with her), "It is sufficient for you if the water reaches the roots of your hair." She is under no obligation to wet the mane of her hair, and this is the sound view, as against the wetting of the beard, because there is no hardship in letting the water enter inside the beard.

He (al-Qudūrī) said: The factors (causes) giving rise to the obligation of bathing are discharge with the gushing of fluid due to carnal desire on the part of a man or a woman during sleep or in a state of wakefulness. According to al-Shāfī‘ī (God bless him) the emergence of seminal fluid, in whatever way this happens, leads to the obligation of bathing, due to the saying of the Prophet (God bless him and grant him peace), "Water is from water," that is, bathing is due to the discharge of semen. Our evidence is that purification is invoked by major impurity, and major impurity (janābah) is the ejaculation of semen through carnal desire. It is said that a man acquires major impurity when such a man has satisfied his carnal appetite with a woman. The tradition is interpreted to mean ejaculation by way of carnal desire. Thereafter, what is given consideration, according to Abū Ḥanīfah and Muḥammad (God bless them), is the separation of semen from its location due to carnal desire, while Abū Yūsuf (God bless him) considers, in addition, its emergence too by considering emergence through separation (from the organ), because bathing is linked to both factors. According to them, as it has become obligatory from one aspect (separation and not gushing forth) precaution lies in making it obligatory.

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72It is recorded by all the sound compilations, except al-Bukhārī. It is, however, a khabar wāḥid. Al-‘Aynī, vol. 1, 333; al-Zayla‘ī, vol. 1, 80.
73He mentions this to counter the report from Abū Ḥanīfah (God bless him) transmitted by al-Ḥasan (God bless him) about the obligation of wetting and squeezing the hair three times. Al-‘Aynī, vol. 1, 333.
74Al-‘Aynī points to an objection that may be raised about desire in a state of sleep. How then has the Author stipulated this as a condition he asks. He maintains that analogy dictates that this should not be a condition, however, the jurists have stipulated on the basis of istinshāq. Al-‘Aynī, vol. 1, 335.
75It is recorded by Muslim and Abū Dāwūd. Al-‘Aynī, vol. 1, 326; al-Zayla‘ī, vol. 1, 80-81.
76That is, "Water is from water.”
77The emergence of semen with carnal desire in addition to ejaculation.
And the meeting of the private parts without discharge, due to the words of the Prophet (God bless him and grant him peace), “When the private parts meet and the penis (glans) disappears, bathing becomes obligatory irrespective of discharge,” and also because it (intercourse) is the cause of discharge and his organ has disappeared from vision. Further, discharge is sometimes not found due to the lack of seminal fluid, thus, penetration is taken as its substitute. Likewise, the insertion of the organ into the rectum due to the completion of the cause. In this case, it is made obligatory for the passive party due to precaution, as distinguished from the case of a beast and what cannot be treated as a sexual opening, because causation is not complete.

He said: And in the case of menstruation, due to the words of the Exalted, ‘‘Till they are clean,” and likewise due to postnatal bleeding, on the basis of ijmā’ (consensus).

He said: The Prophet (God bless him and grant him peace) prescribed the practice of bathing for jumā’ah, the two ‘Īd celebrations, the day of ‘Arafah and the ritual state of ḥiḥrām. He specifically mentioned required practice, although it is said that these four are merely recommended (mustahabb). Muḥammad (God bless him) called bathing on the day of jumā’ah a hasan (good) act in his Kitāb al-Asl. Mālik (God bless him) said that it is obligatory due to the words of the Prophet (God bless him and grant him peace), “He who comes for jumā’ah must bathe.”

Our evidence is the saying of the Prophet (God bless him and grant him peace), “If a person performs wudū’ (minor ablution) on the day of jumā’ah then it is well and good, but if he bathes it is better.” On the basis of this tradition we interpret the one adduced by Mālik as conveying recommendation or as being abrogated. Thereafter, according to Abū Yūsuf (God bless him) this bath is for the prayer, and this is the correct view, as it has precedence over time and the association of purification with it. Al-Ḥasan disagrees with this. The two ‘Īds have the same status as jumā’ah as there is a congregation in them, therefore, bathing is recommended due to the apprehension of offending through smell. As for ‘Arafah and ḥiḥrām, we will elaborate them under the topic of rites, God willing.

He said: There is no obligation of bathing in the case of madhī and wāḍī, however, minor ablution (wudū’) is required, due to the words of the Prophet (God bless and grant him peace), “Each male emits madhī and there is wudū’ for it.” Wāḍī is thicker and is a type of urine that follows the thinner urine, so it is judged accordingly. Mani (semen) is coagulated and white after (the emission of) which erection of the penis is lost. Madhī is thinner tending to be white and it emerges on a man’s fondling his wife. The interpretation is transmitted from ʿA’ishah (God be pleased with her).

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77It is recorded by ʿAbd Allāh ibn Wahb in his Musnad. The tradition is da’īf. Al-ʿAynī, vol. 1, 334; al-Zaylāʾī, vol. 1, 84.
78 Qurʾān 2:222
79There are sound traditions in the Sahih compilations about bathing for these occasions.
80The tradition has been recorded by al-Bukhārī, Muslim, al-Tirmidhī and Ibn Majāh. It is considered a sound tradition. Al-ʿAynī, vol. 1, 339; al-Zaylāʾī, vol. 1, 86.
81This is a sound tradition related from seven Companions (God be pleased with them). It is recorded by ʿAbū Dāwūd, al-Tirmidhī and al-Nāṣaʾī in different versions. Al-ʿAynī, vol. 1, 340; al-Zaylāʾī, vol. 1, 88.
82The presumption is that a command gives rise to an obligation, unless another evidence indicates otherwise. The tradition adopted by Imām Mālik (God bless him) will give rise to an obligation, unless the tradition quoted by the Author can restrict its meaning to convey recommendation.
83Some commentators have related a tradition from ʿA’ishah (God be pleased with her) that supports the idea of abrogation.
84Out of the eleven cases of bathing, five are obligatory as jard, one is wājib, four are mustahabb. Those cases for which it is jard are: the meeting of the private parts; ejaculation; wet dream; menstruation and postnatal bleeding. Those for which it is a sumnah are: Friday prayer; Day of ʿArafah; ḥiḥrām; and the two ‘Īds. Bathing of the deceased is wājib.
85This tradition is found in some manuscripts of al-ʿHidayah. It has been related from three Companions (God be pleased with them). It is recorded by Ahmad, Abū Dāwūd and others. Al-ʿAynī, vol. 1, 347; al-Zaylāʾī, vol. 1, 93.
86It is not established from ʿA’ishah (God be pleased with her). The three types are recorded by Abū al-Razzāq in his compilation. Al-ʿAynī, vol. 1, 351.
Chapter 3

Water With Which Minor Ablution (Wudū') is Permitted and That With Which it is not

Purification from ritual impurities' is permitted with rain water (water from the sky), lakes/ravines, springs, wells and rivers due to the words of the Exalted, “And We send down pure water from the sky,” and also due to the words of the Prophet (God bless him and grant him peace), “Water is pure and is not rendered impure by anything, except a thing that alters its colour, taste or smell.” In addition there are the words of the Prophet (God bless him and grant him peace) with respect to a river, “Its water is pure and the dead things in it are permissible.” The term water in its unqualified (absolute) sense includes these waters.

1Aḥdāth (p. of hadath) as distinguished from najāsah or real impurity.
2See al-Kāsānī, Badā’i’ al-Ṣanā’i’, vol. 1, 65, for the permissibility of wudū’ with snow.
3The words “water from the sky” are used to highlight the words used in the Qur’ān, as such water has been called pure.
4Qur’ān 25:48
5Water is classified into three types: running water, stationary water and water of wells. According to the jurists, the tradition about the alteration of its “colour, taste and smell” applies to running water. It should also apply to a very large pond of water as well.
6The tradition is not established with these words, however, a very similar tradition has been recorded by Ibn Mājah as well as others. Al-‘Aynī, vol. 1, 353; al-Zayla’ī, vol. 1, 94.
7This tradition has been related from eight Companions (God be pleased with them). It is recorded by al-Tirmidhī, al-Nasā’ī, Ibn Mājah and others. Al-‘Aynī, vol. 1, 355; al-Zayla’ī, vol. 1, 95.
He said: It is not permitted with what is squeezed out of a tree or fruit, for it is not absolute water. The command in the absence of absolute water is transferred to tayammum (substitute ablation with clean earth). The duty with respect to the four limbs is that of ritual obedience, therefore it cannot be extended to what is not explicitly mentioned in the text. As for water that trickles from vines, it is permitted to perform wudu' with it because it is water that emerges without treatment. It is mentioned by Abū Yūsuf in his Jawāmi' and in the Book there is a hint about it where squeezing is stipulated.

He said: It is not permitted with water whose characteristics are overshadowed by something else and that moves it out of its natural state, like beverages, vinegar, legume soup, broth, rosewater and tincture. The reason is that these cannot be called absolute water. The meaning of legume soup and others is water that has been altered by cooking. If it is altered without cooking, wudu' is permitted with it.

He said: Purification is permitted with water in which something pure has been mixed and has altered one of its properties, like flood water, and water in which milk, saffron, soap or (saltwort) has been mixed. The Shaykh, the Imam, said: In al-Mukhtasar (by al-Qudūrī) he has deemed tincture similar to broth, while it is reported from Abū Yūsuf (God bless him) that it is similar to saffron water, and this is correct. This is what al-Natifi and Imām al-Sarakhsi have preferred. Al-Shāfi'ī (God bless him) said that it is not permitted to perform wudu' with saffron water and what resembles it, that is, things that are not in the category of

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The word "washing (ghusl)", in the verse of ablution is understood to mean washing with water. Further, in the verse of tayammum, the words used are "when you do not find water." Accordingly, purification is to be undertaken with water and not other liquids like vinegar, juice and milk. Water is considered to be of two types: absolute water and qualified water. Absolute water is one that comes to mind when the term "water" is mentioned, like the water of rivers, springs, wells and water of the sky. Qualified or restricted water is one that does not come to mind when the term "water" is mentioned. When absolute water is not found, the command for purification is transferred to tayammum.

It may be said that even when water is not absolute water, it may still have the property of removing actual impurities, therefore, it should be linked with absolute water and used for purification. The response to this claim is that purification for the four limbs is a matter of ritual obedience and cannot be rationalised, therefore, the purifying medium will be confined to that mentioned in the texts—absolute water.

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The word "less or more." This is directed against Imam Malik's view that if it is more and alters the properties of water, wudu' is not permitted with it.

This is a sound tradition recorded by Abu Dawūd, al-Tirmidhī, al-Nasā'ī and Ibn Mājah. Al-Aynī, vol. 1, 370; al-Zayla`ī, vol. 1, 104.

This is the tradition about washing of the hands. Al-Zayla`ī, vol. 1, 2.

It is recorded by Abu Dawūd with these words and by Ibn Mājah from Abū Hurayrah (God be pleased with him). Al-Aynī, vol. 1, 371; al-Zayla`ī, vol. 1, 112.

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Thus, according to Imām al-Shāfi'ī (God bless him) such water is not absolute water. According to the Hanafis it is.

To this al-Aynī says: God knows best.

Less or more. This is against Imām Mālik's view that it is if it is more and alters the properties of water, wudu' is not permitted with it.

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Notice that it is called saffron water as distinguished from constituents of the soil, because water is usually not free of such constituents. Our argument is that the term water is still valid in the absolute sense. Do you not see that a new name has not been separately assigned to it, and attributing it to saffron is like attributing it to a well or spring. The reason is that mixing in small quantities is not taken into account due to the impossibility of avoiding it as in the case of the constituents of the soil. Thus, the predominant element is given consideration. The predominance is due to the constituents and not colour, which is correct.

If it is altered by cooking after something is mixed with it then ablution is not permitted with it, as it no longer conforms to "water descending from the sky" for the fire has altered it, unless something is cooked in it that is intended to enhance its purity, like saltwort and other things. The deceased is usually bathed with water in which sidr has been boiled. This is what the sunnah has laid down, unless the thing comes to dominate the water and it becomes like a mush (of barley) to which the term water no longer applies.

Wudu' is not permitted with any type of water in which an impurity has fallen, whether this impurity is less or more. Malik (God bless him) said that it is permitted as long as one of the properties of water has not been altered, and this is on the basis of what we have narrated. Al-Shāfi'ī (God bless him) said that it is permitted as long as the quantity of water is up to two qullahs due to the words of the Prophet (God bless him and grant him peace), "When the quantity of water reaches two qullahs it does not bear the impurity." We rely upon the tradition about the person waking up from sleep, as well as the words of the Prophet (God bless him and grant him peace), "No one should ever urinate in water that is stationary nor wash major impurity (janābah) in it," without making
impure either, except by the appearance of the effect of the impurity, as in the case of running water.

He said: The death in water of a thing that does not have blood flowing through its body does not render the water impure, as in the case of a mosquito, fly, wasp, scorpion or the like. According to al-Shāfī (God bless him) it does not pollute it. The reason is that when the prohibition is not due to reverence for the thing, it becomes a sign of impurity as distinguished from larva in a honey-comb or fruit worms, because necessity intervenes here. We rely on the words of the Prophet (God bless him and grant him peace), “This is what is lawful for eating, drinking and for performing ablution.” The reason is that the thing rendering water impure is the mixing of flowing blood with its constituents at the time of death; even the slaughtered animal becomes lawful due to the absence of blood in it, and these things have no blood in them. Further, the prohibition of a thing does not necessarily give rise to impurity, as in the case of mud.

The death in water of a thing that lives in it does not pollute it, like a fish, frog or crab/lobster. Al-Shāfī (God bless him) said that it does pollute it, except for fish, on the basis of the preceding discussion. Our evidence is that it died in its place of abode, thus it should not be assigned the rule of impurity like the egg turning into blood for there is no blood in such things; warm-blooded things do not reside in water, and in reality, it is blood that is impure. It is said that when these things die out of water (and then fall into water), then things other than fish, pollute it due to the absence of the place of abode. It is also said that they do not pollute it due to the absence of blood, and this is the correct view. A frog living in water or on land has the same rule. It is said that a land frog does pollute due to the presence of blood and absence of the place of abode. A thing that lives in water is one that is born there and its habitation is in the water. A creature that lives in water, but is not born in it, does pollute the water.
He said: Previously used water does not purify ritual impurities. Mālik and al-Shāfi‘i (God bless them both) disagree. They maintain that tūhir is something that purifies another thing time and again as in qutūa (cutting again and again). Zufar (God bless him) said, and it is also one opinion from al-Shāfi‘i (God bless him) that if the water has been used previously for minor ablution (wudu‘) then it is tūhir, but if it is used for the removal of actual impurity, then it is tahīr (one that purifies once) and not tūhir (one that purifies again and again). The reason is that the limbs (of ablution) are clean in actual fact and taking this into account the water used should be tahīr, but the limbs are impure in the legal sense and taking this into account the water used should be impure. We, therefore, upheld the absence of tuhur when the person is in a pure state. Muhammad (God bless him) said, and it is also narrated from Abu Ḥanīfah (God bless him) that it is tahīr and not tūhir. The reason is that the meeting of a pure thing with a pure thing does not give rise to impurity, however, through such a meeting an act of attaining nearness to God has been performed with it and this alters its attributes as in the case of wealth of ṣadaqah (zakāt). Abū Ḥanīfah and Abū Yūsuf (God bless them both) said that such water is impure due to the words of the Prophet (God bless him and grant him peace), “None of you should urinate in stationary water.” Further, it is water with which legal impurity has been removed and it is to be treated as water with which actual impurity has been removed. Thereafter, in a narration of al-Ḥasan from Abū Ḥanīfah (God bless him) it is impure bearing an enhanced impurity when judged on the basis of water used for removing actual (physical) impurity. In a narration by Abū Yūsuf from him (Abū Ḥanīfah) (God bless them both) he maintained that it is impure, bearing light impurity, as there is a disagreement about it.

He said: Previously used water is water with which ritual impurity (ḥadath) has been removed or that has been used on the body by way of attaining nearness to God. He (the Author) (God be pleased with him) said: This is so according to Abū Yūsuf (God bless him) and it is said that it is Abū Ḥanīfah's view as well (God bless him). Muhammad (God bless him) said: It does not become used except by the undertaking of the act of nearness to God, because it becomes used by the transference of the impurity of sins to it and such sins are removed through an act of nearness to God. Abū Yūṣuf (God bless him) says that the discharge of a definitive obligation is effective here as well. Thus, the pollution occurs due to both factors. When does the water actually become used? The correct view is that as soon as it separates from the body it becomes used. The reason is that the suspension of the rule of being used prior to separation is due to necessity and there is no such necessity once it separates. If a person with major ablution immerses himself into the well in search of the bucket then according to Abū Yūṣuf (God bless him) this person retains his state of impurity due to the absence of "pouring," which is a condition in his view for discharging the obligation, and the water retains its state (of purity) as well due to the absence of both factors. According to Muhammad (God bless him) both are pure: the person due to the non-stipulation of pouring and the water due to the absence of the resolve (niyyah) of attaining nearness to God. According to Abū Ḥanīfah (God bless him) both are impure: the water due to the discharge of the obligation in part upon the first contact (of the water with the body) and the person due to the continuing impurity of the remaining limbs. It is also said that in his view the person retains impurity due to the impurity of the used water. It is further reported from him that the person is pure, because the water is not assigned the rule of being used prior to separation (from the body). This is the most compatible narration from him (the Imam).

He said: Each (part of the) fresh skin that is subjected to tanning becomes pure and it is permitted to pray in it (by wearing it) and to perform wudu‘ with it (when used as a bucket or scoop), except for pigskin and the skin of a human, due to the words of the Prophet (God bless him)
and grant him peace), “Any skin that is tanned becomes pure.”\textsuperscript{29} This tradition, due to its generality, acts as a proof against Mālik (God bless him) in the case of the skin of a carcass (maytah).\textsuperscript{30} It is not to be opposed by the prohibition laid down about benefiting from carrion, in the case of its skin. That evidence is in the words of the Prophet (God bless him and grant him peace), “Do not benefit from the ihāb of a carcass.”\textsuperscript{31} The reason is that ihāb is the name of all skins that are not tanned. The tradition also works as proof against al-Shafi`i (God bless him) in the case of a dog; the dog is not impure in itself. Do you not see that it is used for guarding and for hunting, as against a pig, which is impure in itself (in its essence) because the pronoun in the words of the Exalted, “It is filth,”\textsuperscript{32} refers to it due to proximity (of reference). The prohibition of benefiting from the parts of a human being is due to his high status (out of reverence). Thus, these two skins are excluded from (the implication of) what we have narrated. Further, what prevents decay and decomposition is tanning even when the skins are dried in the sun or treated with soil, because the objective has been achieved by it and it is not comprehensible to impose further conditions. Thereafter, the animal whose skin is purified through tanning becomes pure through slaughter as that performs the function of tanning in the removal of wet (moist) impurities. Likewise, its meat becomes pure, and this is the sound view, even though it is not edible.\textsuperscript{33}

He said: The hair of a carcass (maytah) and its bones are pure. Al-Shafi`i (God bless him) said that these are impure as they are the constituent parts of the maytah. We maintain that there is no life in them

\textsuperscript{29}The tradition has been related from Ibn `Umar and Ibn `Abbas (God be pleased with them), by al-Nasai, al-Tirmidhi, Ibn Majah as well as al-Dārāqutni. The tradition from Ibn `Umar (God be pleased with both) has been termed hasan sahih. Al-Zayla\textsuperscript{1}, vol. 1, 116.
\textsuperscript{30}He maintains that it is not permitted to pray on it nor to benefit from it even when it is tanned, with the exception of cold-blooded things.
\textsuperscript{31}It is recorded by the compilers of the four Sunan. Al-Tirmidhi calls it hasan. Al-Zayla\textsuperscript{1}, vol. 1, 120.
\textsuperscript{32}Qura\textsuperscript{n} 6:145.
\textsuperscript{33}Masha`ikh. Some have maintained that only the skin is purified and not the meat. It is to counter this view that the Author has made the statement. It is not clear, however, what use can be made of such meat (usable in medicines perhaps). Some commentators of al-Hidayah maintain that the leftover of the animal is impure and this indicates the impurity of the meat. In other words, they uphold the view of the Masha`ikh.

for which reason no pain is felt when they are cut. Thus, death does not affect them for death is the departing of life.

The hair of a human being and his bones are pure. Al-Shafi`i said that they are impure, because it is not permitted to benefit from them nor is it permitted to sell them. Our argument is that not benefiting from them or selling them is due to the high status of man and does not indicate impurity. God knows best.

3.1 ON WELLS

If some impurity falls in a well its water will be drawn out, and the drawing out of water that is present in it is its purification, due to the consensus (ijma`) of the ancestors. The issues of wells are based upon the adoption of reports and not analogy.\textsuperscript{34}

If one or two droppings of camels or goats fall in it, they do not pollute the water on the basis of istihšān. Analogy would imply that it is polluted due to the falling of impurity in a small quantity of water. The basis for istihšān is that the mouths of wells in open country are not covered and cattle drop their dung around them and these are cast into the wells by the wind. A small amount is, therefore, ignored due to necessity though there is no necessity in excessive quantities. Excessive quantity is what one looking at it considers excessive as reported from Abu klanifah (God bless him) and this is the view relied upon. There is no difference between moist and dry, formed or broken, faeces (of horses or mules), dung and droppings, because necessity covers all of them. In the case of a goat that excretes a dropping or two in the milk utensil, it is said that the droppings are cast out and the milk may be consumed due to necessity. A small quantity in the utensil itself, however, is not waived due to the lack of necessity. It is reported from Abū Ḥanīfah (God bless him) that it is the same as a well with respect to a dropping or two.

If pigeon or sparrow droppings\textsuperscript{35} fall in the water, it is not polluted. Al-Shafi`i (God bless him) disagrees and maintains that they become putrid and decompose and become like the droppings of chicken. We rely on the consensus (ijma`) of the Muslims on the accommodation of

\textsuperscript{34}Analogy would dictate that if an impurity falls in a small quantity of water it should not be deemed pure, or it should not be deemed impure at all, like running water.
\textsuperscript{35}They are not impure according to the Ḥanafis.
pigeons in mosques despite the laying down of the command for keeping the mosques clean. Their droppings do not turn smelly and putrid, but are more like sludge.

If a goat urinates in it the entire water is to be drawn out according to Abū Hanifah and Abū Yūsuf (God bless them both). Muhammad (God bless him) said that the water is not to be drawn, unless the urine becomes predominant as compared to the water and it moves out of the category of purifying water. The principle in this is that the urine of an animal whose meat is consumed is pure in his (Muhammad's) view, but is impure in their view. He relies on the evidence that "the Prophet (God bless him and grant him peace) ordered the 'Urniyyin to drink the urine of camels as well as their milk." The two jurists rely on the words of the Prophet (God bless him and grant him peace), "Maintain cleanliness against urine, because most of the torments of the grave are due to it," in which there is no detail (for the type of urine). Further it becomes putrid and decomposed, and becomes like the urine of things whose meat is not consumed. The interpretation of the text he narrates is that the Prophet (God bless him and grant him peace) knew by way of revelation that the remedy of their ailment was in such urine. Further, according to Abū Hanifah (God bless him) the urine of halal animals, and of other animals, is not consumed for medicinal purposes, because there is no certainty about there being a remedy in it, thus, turning away from the prohibition is not proper. According to Abū Yūsuf (God bless him) it is permissible for medicinal use due to the (narrated) case, while according to Muhammad (God bless him) it is permitted for medicinal and other purposes due to its purity in his view.

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34. This tradition is not recorded in any of the well known compilations. It is actually attributed to al-Tahawi (God bless him) like the previous report. Al-Aynī, vol. 1, 448.
35. It is related from 'A'ishah (God be pleased with her) and is recorded by Abū Dāwūd, al-Tirmidhī and Ibn Mājah. Al-Zayla'i, vol. 1, 122.
36. The water of the well.
37. It can, therefore, be compared to ablution with water in which some milk is present.
38. When the milk becomes predominant, the rule will change.
39. Even if a drop falls in the water, it becomes impure.
40. Agreed upon by al-Bukhārī and Muslim, and recorded by all the six sound compilations. Al-Zayla'i, vol. 1, 123.
41. It is reported from three Companions (God be pleased with them) by al-Dār'ūqūnī. Al-Zayla'i, vol. 1, 128.
42. Further, he knew that they would become apostates, and the issue of impurity for the unbelievers has no persuasive force.
43. This report is also attributed to al-Tahawi (God bless him) like the previous report. Al-Aynī, vol. 1, 451.
44. It is reported by al-Ḥasan from Abū Hanifah (God bless him).
45. That is, the quantity fixed for it by the text.
46. Except for a dog, and a swine, nothing is to be done if the animal is taken out alive. Thereafter, the issue will be whether the animal drank from the water, in which case the rules of the leftover of the animal will be taken into account.
47. According to some commentators, these reports are recorded by al-Dār'ūqūnī.
He said: If the well has a spring as the source and it is not possible to
draw out all the water, the people should draw out the quantity of water
it holds (at one time). The way of knowing this is to dig a pit similar to
the water level of the well and to pour the drawn water in it till such time
that it fills up. Another way is to immerse a cane in it and to place a mark
for the level of water. Thereafter, ten buckets, for example, are drawn from
it with the cane being immersed in it once again to note the reduction in
the level. Ten buckets are then to be drawn out for each similar segment
for the rest of the depth. Both methods are reported from Abī Yūsuf
(God bless him). From Muhammad (God bless him) it is reported that
two hundred to three hundred buckets are to be drawn and it appears that
he based his view on what he witnessed in his land. From Abu Hanifah
(God bless him) it is reported in al-Innī` al-Saghir for such a well that
water is to be drawn till (pure) water becomes predominant, but he did
not quantify predominance in any way as is his practice. It is said that
the view of two persons, who have expertise in matters of water, is to be
adopted, and this view is more compatible with fiqh.

He said: If the people find a mouse or something other than that in
the well and it is not known when it fell in it, nor has it become bloated
or burst after bloating, they should repeat the prayers of one day and
one night, if they performed wudū (minor ablution) with this water,
and they should wash everything that came into contact with its water.
If the thing has become bloated or burst thereafter, they should repeat
the prayers of three days and three nights. This is the rule according
to Abu Hanifah (God bless him) while the two disciples said that they
are under no obligation to repeat any prayer until they can verify when
the animal fell in the well. The reason is that certainty is not done away
with doubt, and it becomes like the case of a person who sees impurity
on his dress, but does not know when it was soiled. According to Abu
Hanifah (God bless him) death here has an apparent cause and that is the

3.2 LEFTOVER (WATER) AND OTHER FLUIDS

The sweat of each (living) thing is assigned the legal rule on the basis
of its leftover (saliva infected water). The reason is that they are both
generated from its flesh, thus, one will take the rule of its companion
fluid.

He said: The leftover (water) of a human being and that of an ani-
mal whose meat is eaten is pure, because what is mixed with it is the
saliva, and this is born from meat that is pure, thus, it is pure. In this

animal's falling into the water. The rule thus turns on this, except that
becoming bloated, decomposing in it, is an evidence of the passage of
time, therefore, it is to be limited by three. The non-existence of bloat-
ing and decomposition is evidence of proximity with respect to time and
we limited it with one day and one night. The reason is that what is less
than this cannot be ascertained. As for the issue of impurity (soiling the
dress), it is stated by (Manṣūr al-Rāzī) al-Mu‘allā that this too is dis-
pusted. Accordingly, it is estimated as three for dried up impurity and one
day for relatively fresh impurity. If it is conceded (that there is no dis-
agreement), then, the dress is in his sight most of the time, while the well
is out of his sight. Thus, the two are distinguished.

54 The prima facie cause of death will be taken into account and that is death by falling
into water.
55 When he leaves such matters to the discretion of those facing the problem, why
should the limit of three be imposed here?
56 As they form a single unit of time with respect to obligations.
57 Student of Abu Yūsuf.
58 This is what is called qiyās ma‘ al-fariq or analogy with a distinction, and is con-
sidered weak or defective analogy, therefore, the rule of one cannot be applied to the
other.
59 Leftovers are four, according to the Hanafis: (1) Pure, like the leftover of a human
being; (2) Disapproved (makrūh), like the leftover of a cat; (3) Impure, like the leftover
of swine; and (4) Suspicious (mashlak), like the leftover of a donkey.
60 The exception to purity is the case where the person has consumed wine (khamr).
61 The exception are those camels and cows that feed on garbage.
62 The body of a human being is pure, however, it is not consumed due to reverence
for the high status of man.
response (rule) are included persons with major impurity (junub), the menstruating woman, and an unbeliever.

The leftover (water) of a dog is impure. The utensil that it has licked has to be washed thrice due to the words of the Prophet (God bless him and grant him peace) "The utensil licked by a dog is to be washed thrice." Its tongue has contact with the water and not the utensil, thus, if the utensil has become impure the water must be more so. This tradition conveys impurity and the number of washings. It is a proof against al-Shafi'i (God bless him) with respect to the stipulation of seven times. Further, a thing polluted by its urine is cleaned thrice, therefore, treating what it has left over as lesser is better. The command laid down about washing seven times is to be interpreted as a command issued in the early stages of Islam.

The leftover of a pig is impure, because it is impure in its essence according to what has preceded.

The leftover of predators is impure with al-Shafi'i (God bless him) disagreeing with the exception of swine and dogs, because their meat is impure, and it is from this that their saliva is emitted, being the effective factor in this category.

The leftover of a cat is pure though disapproved (makrūḥ). According to Abu Yusuf (God bless him) it is not even disapproved, because

The other two jurists (the Imam and his disciple) rely on the saying of the Prophet (God bless him and grant him peace), "The cat is a predator," asserting that the purpose of these words is the elaboration of the legal rule and not the nature of the cat and its form, except that the impurity was annulled due to the underlying cause of circumambulation leaving behind disapproval. The tradition he has narrated is interpreted to apply to the period prior to the prohibition. Thereafter, it is said that its disapproval is due to the prohibition of its meat, and it is said that it is due to the lack of its abstaining from impure things. This argument points to mitigated disapproval (tanzih) whereas the first comes closer to prohibition (enhanced disapproval). If it eats a mouse and then immediately drinks water, the water becomes impure, unless it waits for some time, washing its mouth with its saliva. The exception is available through the views of Abu Hanifah and Abu Yusuf (God bless them). The consideration of pouring will be waived on the basis of necessity.

The leftover of a stray chicken is makrūḥ (disapproved) as it ruminates through filth. If it is confined so that the beak does not reach what is below its feet, it is not considered disapproved as it is restrained from rummaging (through garbage).

Likewise the leftover of scavenger birds for they consume dead things and thus resemble the stray chicken. It is related from Abu Yusuf
(God bless him) that if such a bird is restrained and the owner knows that there is no filth on its beak, it is not disapproved. The learned scholars (Masha‘ikh) have preferred this report on the basis of istighā…”

The leftover of creatures that inhabit houses like snakes and mice is disapproved, because the prohibition of their meat leads to the impurity of their leftover, unless where the ruling of impurity is dropped due to the underlying cause of circumambulation leaving behind (simple) disapproval; and the reference here is to the ‘illah (cause) in the case of the cat.

He said: The leftover of a donkey, and a mule, is suspect. It is said that the suspicion is about its purity. The reason is that if such leftover is pure the water would have the ability to purify as long as the saliva does not come to dominate the water. It is also said that the suspicion is about the purifying capacity of the water. The reason is that if the worshipper is (later) able to find absolute water, he is under no obligation to wash his head.89 Likewise, its milk is pure, even though it is not consumed, and its sweat does not prevent the permissibility of prayer even when it flows copiously. The same is the status of its leftover, and this is the sound view. A statement of Muhammad (God bless him) is reported about its purity.90 The basis of suspicion is the conflict of evidences about its purity and prohibition or due to the disagreement of the Companions (God be pleased with them) about its impurity and

94 And issued a fatwa to this effect.
95 The same attributes can be found in a dog, that is, one that is confined to the house, however, the impurity in the case of a dog is clearly indicated by a text.
96 That is, it is not clear whether its leftover is disapproved or pure.
97 After having done mash with the leftover of a donkey.
98 This report is not based on the Zāhir al-Riwayah. It is a report from Muhammad (God bless him). Al-Imāmah.
99 It is said that there are three different reports from Abū Hanīfah (God bless him) about this: pure; light impurity; and enhanced impurity.
100 The report from Muhammad (God bless him) is that if a cloth is dipped in four things it does not become impure, and these are: the leftover of a donkey; water used for ablution; donkey milk; and the urine of animals whose milk is consumed.
101 These are traditions.
102 The opinion of a Companion (God be pleased with him) is like a precedent for the Hanafi school. The tradition about them, however, implies that you are guided whoever among them you follow. Nevertheless, the legal reasoning of the Companions (God be pleased with them) has to be taken into account to ensure consistency in the rules.

purity. It is related from Abū Ḥanīfah that it is impure and gave precedence to prohibition and to impurity.98 A mule is of the same breed as a donkey and is assigned the same legal category.

If he does not find other than these two, he is to perform ablution (wudu‘) with them and then perform substitute ablution (tayammum); and it is permitted to him to give precedence to any of these ablutions. Zufar (God bless him) says it is not permitted unless he gives precedence to wudu‘, because it is water that is to be used as an obligation, thus, it resembles absolute water. Our argument is that one of them has the ability to purify, therefore, combining them is beneficial, not the observance of a sequential order.

The leftover of a horse is pure according to the two jurists, because its meat is lawful. Likewise, in his (Abū Ḥanīfah's) view according to the sound report,99 and its disapproval (of consuming its meat)98 is for acknowledging its noble traits (high status as an animal).

If nothing is found except the mead (nabidh) of dates,101 then, Abū Ḥanīfah (God bless him) says that the person performs wudu‘ with it and does not perform tayammum, due to the tradition of the night of jinn; the Prophet (God bless him and grant him peace) performed wudu‘ with it when he did not find water.101 Abū Yūsuf (God bless him) said that he is to perform tayammum and not use mead for wudu‘. This is also one narration from Abū Ḥanīfah (God bless him). Al-Shāfi‘i (God bless him) also held this opinion acting upon the verse of tayammum,102 because it is a stronger evidence or because the tradition has been abrogated.

94 From among conflicting evidences about its purity.
95 The leftover of a donkey or a mule.
96 There are four reports from Abū Ḥanīfah (God bless him) about the leftover of a horse. The sound report is that it is pure.
97 Although the meat of a horse is lawful, it is disapproved to eat it. Disapproval is stipulated not due to its meat, but out of respect for this noble animal, for it is the instrument of jīhād.
98 The mead of dates has been discussed within the topic of leftovers, because it has a legal similarity with the leftover of donkeys and mules. The reason is that both cases deal with the option of tayammum and its association with wudu‘.
99 The tradition is related from Ibn Mas‘ūd and Ibn ‘Abbas (God be pleased with them). The tradition from Ibn Mas‘ūd (God be pleased with him) is recorded by Abū Dāwūd, al-Tirmidhī and Ibn Mājah. Al-Zayla‘ī, vol. 1, 137-38; al-Ayni, vol. 1, 498. It is the version in al-Tirmidhī that mentions the performance of wudu‘ with it.
100 The verse converts the method of purification to tayammum when absolute water is not found.
by it as the verse is Madani, while the tradition of the jinn is Makki. Muhammad (God bless him) says that he is to perform wudu’ with it then perform tayammum, because there is discussion about the strength of the tradition and knowledge of the dates is uncertain, therefore, it is necessary to combine the two as a matter of precaution. We argue that the tradition of the jinn concerns a recurring case, therefore, the claim of abrogation is not valid. The tradition is mash’har (well known) and was acted upon by the Companions (God be pleased with them), and this tradition is of a type through which an addition over the rule in the Qur’an can be made. As for bathing with it, it is said that it is permitted according to him on the analogy of wudu’, while it is said that it is not permitted because it is (an enhanced form of purification) above wudu’. The meat about which there is disagreement is sweet and thin (easily) flowing over the limbs like water. If this meat starts fermenting and becomes prohibited, it is not to be used for wudu’ even if its state has been altered by fire (heating). As long as it is sweet and thin it remains within the domain of disagreement, even if it has begun to ferment. According to Abū Hanīfah (God bless him) it is permitted to perform wudu’ with it, because it is lawful to drink it in his view. According to Muhammad (God bless him) it is not permitted to perform wudu’ with it due to the prohibition of drinking it in his view. It is also not permitted to perform wudu’ with other kinds of meat giving operation to the process of qiyās (analogy).

Chapter 4

Tayammum (Substitute Ablution with Clean Earth)

One who does not find water, when he is on a journey or outside the city, when between him and the city is (a distance of) approximately one mile or more, he may perform tayammum with clean earth, due to the words of the Exalted, “And you find no water, then take for yourselves clean earth, and perform tayammum with it” and also due to the words of the Prophet (God bless him and grant him peace), “The earth is a purifier for the Muslim even if this continues for ten years, as long as water is not found.” A mile is the preferred distance, because there is hardship.

106Thus, the verse was revealed later and this strengthens the claim of abrogation.
107It is also reported from Abū Ḥanīfah (God bless him).
108The reason is that some versions indicate that Ibn Mas‘ūd (God be pleased with him) witnessed the night of the jinn with the Prophet (God bless him and grant him peace), while other traditions do not.
109It is for this reason that the jurists disagree about the claim of abrogation.
110According to some reports it occurred six times out of which two were witnessed by Ibn Mas‘ūd (God be pleased with him).
111The tradition would imply: “If you do not find water or the mead of dates, perform tayammum.”
112It is reported from al-Awzā’i that all meads can be used on the analogy of the mead of dates.
for the person in entering the city (in search of water) and water is not found in fact. The effective legal factor, however, is the distance and not the apprehension of missing (the prayer) as the negligence (of delaying the prayer) is on his part.

If he finds water, but is ill, and fears that his illness will be aggravated if he uses water, he may perform tayammum, due to the verse we have recited, and also because the harm resulting from the aggravation of the illness is more than the price of water. This makes tayammum lawful and that has greater priority (illness). There is no difference whether illness is aggravated by movement or by the use of water. Al-Shafi'i (God bless him) took into consideration the apprehension of losing life or limb, but he holds that as the disability is established in one of them, and his arms with the other up to the elbows,” due to the reality, therefore, it must be acknowledged. He is to shake off the dust from his hands to the extent that the dust falls off and he is not soiled. In the Zahir al-Riwayah it is held that the limbs are to be rubbed completely so that it acts as a substitute for wudu’ (minor ablution). It is for this reason that the jurists say that he is to perform takhlil of the fingers and take off his ring so that rubbing is complete.

There is no distinction for this between minor and major impurity, and likewise menstruation and postnatal bleeding, due to the report that “a group of people came to the Messenger of God (God bless him and grant him peace) and said, ‘We are a people who reside in the desert for a month or two at a stretch. Among us are those with major impurity and women who menstruate and have had postnatal bleeding.” The Prophet (God bless him and grant him peace) said, ‘For you your land is binding.”

Tayammum is permitted, according to Abu Hanifah and Muhammad (God bless them) with anything that is from the genus “earth,” like soil, sand, stones, gypsum, lime, kohl and arsenic. Abu Yusuf (God bless him) said that it is not permitted except with earth and sand. Al-Shafi’i (God bless him) said that it is only permissible with earth in which things can grow, and this has also been narrated from Abu Yusuf (God bless him) due to the words of the Exalted, “Then take for yourselves clean earth, and perform tayammum with it,” that is, soil used for sowing, which is the view upheld by Ibn ‘Abbas (God bless him). Abu Yusuf (God bless him), however, included sand as well due to the tradition that we have narrated. The other two jurists maintain that sa’ād is a term for the face of the earth and it has been termed as such as it is at a higher level (as compared to the sea). The word tayyib has the probable meaning of pure,
and interpreting it to mean pure is compatible with its use for purification, or it is the meaning on the basis of consensus (ijmāʿ).

Thereafter it is not stipulated that there be dust on the earth, according to Abu Hanifah (God bless him), due to the unqualified meaning of the verse we recited. Likewise, tayammum is permitted with dust even when (dustless) earth is accessible, according to Abu Hanifah and Muhammad (God bless them), because that too is fine earth.

Niyah (resolve) is an obligation for tayammum. Zufar (God bless him) said that it is not obligatory, because it is a substitute for wudu and should not negate its attributes. Our argument is that it arises from intention and, therefore, it cannot be realised without it or it has been deemed a purifying act for a specific case, while water is purifying in itself, as has preceded.

Again if purification is intended or the permissibility of prayer is sought, the spiritual reward is assigned. It is not stipulated that resolve for tayammum be specifically for minor or major impurity, and that is the sound view of the school.

If a Christian performs tayammum intending to convert to Islam, and thereafter he converts to Islam, he is not considered to have performed tayammum according to Abu Hanifah and Muhammad (God bless them). Abu Yusuf (God bless him) said that he has performed tayammum. The reason is that he has intended the desired nearness to God, as against tayammum performed for entering a mosque and touching the mushaf (Qur’an), for these are not objects of attaining nearness to God. The two jurists argue that earth has not been deemed a purifying substance except in the case of a resolve to attain the desired nearness to God, and it is not valid in cases other than purification. Islam on the other hand, is nearness that is valid without purification as against the prostration of recitation, because this is an act of nearness that is not valid without purification.

If he performs wudu not intending conversion to Islam through it, and he then converts to Islam, he is considered to have performed wudu. This is disputed by al-Shafi’i (God bless him) due to his stipulation of a prior resolve (niyyah).

If a Muslim performs tayammum and then turns apostate and then converts to Islam again, he will be considered to have performed (maintained) his tayammum. Zufar (God bless him) said that his tayammum stands annulled, because unbelief negates it, therefore initial invalidity and continuance of validity are the same as in the case of prohibition for purposes of marriage (in certain cases). Our argument is that the state after tayammum is that of purification; and the imposition of unbelief does not negate it, just like its imposition on the state of wudu. Tayammum is not valid initially on the part of an unbeliever due to the absence of a resolve (niyyah) in his case.

Each factor that annuls wudu (minor ablution) annuls tayammum, because it is a substitute for it and takes its rule.

It is also annulled on seeing water with the accompanying ability to use it. Ability to use is what is meant in reality by existence (finding) and limit of purification with earth. A person who is in a state of fear from predators, the enemy and thirst is legally not able to use the water. A person asleep is conceptually able to use it, according to Abu Hanifah.

The earth has been deemed a purifying substance for a limited purpose and it should be confined to it. It should not be extended to other forms of attaining nearness to God.

Because wudu removes hadath in reality and this stays till he converts to Islam.

According to the Hanafi view, intention is not a condition.

For example, a woman and her stepson enter the prohibited category for marriage when the woman marries the young man's father. This prohibition remains even after her divorce.

This is the basis for not considering the tayammum of a Christian valid.

The rule does not extend to niyyah itself, as was claimed by Zufar (God bless him).

The reasoning has preceded.

What actually annuls it is prior hadath, however, it is associated with sighting water.

If he does not have the ability to use it, the existence of water is the same as its non-existence.

As it can continue for ten years according to a tradition mentioned earlier.
There is a quantity of water that is sufficient for wudu, because what is less than this is not taken into account initially, therefore, in this case too.

*Tayammum* is not performed with earth that is not pure, because the word *tayyb* (good) in the text means pure, and also because it is an instrument of purification and must be pure in itself as is the case with water.46

It is recommended for one not finding water, when he hopes to find it, to delay prayer till its last timing. If he finds water, he performs *wudu*, otherwise he performs *tayammum* and prays, so that the performance is undertaken with the most perfect of the two forms of purification, like the person who is eager to pray with a group waits for the congregation. It is reported from Abii Hanifah and Abu litsuf (God bless them both), in a narration other than the principal sources, that delay is necessary, because preponderant conviction (about finding water) has persuasive force. The meaning of the narration from the principal sources is that inability (to find water) stands established and this (certainty) cannot be done away with, with respect to its rule, except by a similar certainty.49

The worshipper may offer with his single *tayammum* as many obligatory and supererogatory prayers as he likes.50 According to al-Shafi'i (God bless him) he is to perform *tayammum* (afresh) for each obligatory prayer, because it is essential purification.51 Our argument is that he is in a state of purification as long as water is unavailable, thus, he can perform his duty as long as its condition is valid.

A person in a state of good health may perform *tayammum* within the city when he arrives for the funeral prayer, with the wali (of the deceased) being somebody else,52 and he is afraid that he will miss the prayer if he becomes occupied with ablution (with water). As the prayer is not offered by way of qadā (delayed performance), an inability (to perform ablution with water) is established. Likewise, when a person arrives for the *id* prayer and he fears that if he becomes occupied with purification (with water) he will lose the prayer, he may perform *tayammum*, because it is not repeated. His statement, "with the wali being someone else" is an indication that this is not permitted to the wali. This is a narration of al-Hasan ibn Ziyad from Abū Ḥanīfah (God bless him) and it is the sound view.53 The reason is that the wali has a right of re-performance of the prayer, therefore, there is no losing of prayer for him.

If the imām, or the follower, acquires ritual impurity during the *id* prayer, he is to perform *tayammum* and continue the prayer according to Abū Ḥanīfah (God bless him), while the two disciples say that he is not to perform *tayammum*, because the follower (commencing the prayer with the imām) can pray after the imām's prayer is over,54 thus, there is no fear of losing the prayer. The Imam (God bless him) maintains that such fear exists as it is a day of rush and he may face an obstacle that may invalidate his prayer. The disagreement pertains to the situation where prayer was commenced with *wudu*, but where prayer was commenced with *tayammum*, he is to perform *tayammum* and continue the prayer by agreement. The reason is that if we make *wudu* obligatory, the worshipper will become a "seeker of water" during his prayer and this will invalidate his prayer.

The worshopper is not to perform *tayammum* for *jumu'ah* even if he fears losing the prayer if he performs *wudu*. If he can catch the Friday prayer, he performs it, otherwise he offers four rak'ahs of *zuhr*, because the Friday prayer is lost in favour of its substitute,55 which is *zuhr*, as distinguished from the *id* prayer. Likewise, if he fears the loss of a prayer timing, if he seeks to perform *wudu*, he is not to perform *tayammum*;56 he should perform *wudu* and offer the prayer lost, because loss leads to its substitute, and that is delayed performance (qadā).

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46 At a single timing or multiple timings.
47 As the need for fresh purification is renewed with each obligatory act.
48 It is not allowed for the wali.
49 This is to counter the view of the Zāhir al-Riwayah that it is permitted for the wali as well, because delay is disapproved.
50 This is the rule for congregational prayer.
51 It is said that this is not a true substitute, because four is not a substitute for two.
52 This reaffirms what he said at the beginning of the chapter that the deciding factor is the distance and not the fear of losing prayer.
If the traveller forgets water during his journey, performs *tayammum* and prays but later remembers that he has water, he is not to repeat the prayer according to Abu Hanifah and Muhammad (God bless them both), while Abu Yusuf (God bless him) held that he is to repeat it. The disagreement pertains to the situation where he placed the water himself, or someone did so at his command, and remembering at the time of the prayer or thereafter is the same. Abu Yusuf maintains that he is "the seeker of water" and he would be like one who carries a dress on his journey, but forgets it. On a journey a traveller is usually prepared with respect to water and looking for it is required of him. The two jurists argue that there is no such ability without knowledge and that is the meaning of existence (finding), and the water on a journey is readied for drinking not for (other) use. The issue about the dress is disputed, and even if it was agreed upon, the obligation of covering private parts is not converted to a substitute, whereas purification with water is converted to its substitute, which is *tayammum*.

The person performing *tayammum* is under no obligation to seek water, unless he is convinced that water is available nearby. The reason is that the conviction is about the lack of water in the wilderness, while there is no evidence of its existence, therefore, the person is not a seeker of water.

If he becomes convinced that there is water nearby it is not permitted to him to perform *tayammum*, unless he has searched for water. The reason is that he is seeking water on the basis of an evidence. Thereafter, he is to seek it up to an arrow shot and is not to exceed one mile so that he does not become separated from his fellow travellers.

If one of his companions has water, he is to ask him for it prior to performing *tayammum* due to the usual absence of denial. If he refuses to give it to him, he is to perform *tayammum* due to the realisation of inability (to find it). If he performs *tayammum* before making such a demand, it is valid according to Abu Hanifah (God bless him) because it is not binding on him to make such a demand on another person's property. The two disciples maintain that he does not get the reward, because water is usually given. If the owner refuses to give it to him except for a reasonable price, and he has such a price, *tayammum* is not permitted to him due to the realisation of the ability. He is, however, not obliged to bear an exorbitant burden as apprehension of injury waives the requirement. God knows best.
Chapter 5

Mash (Rubbing) on Boots

Mash (rubbing) on boots is permitted by the Sunnah. The reports on this issue reach the level of mustafid, so much so that it is said: One who does not uphold this (the permissibility of rubbing over boots) is indulging in innovation, but one who upholds it yet does not rub his boots following the general rule of its imposition will be considered rewarded.

It is permitted for each state of ritual impurity that leads to wudu (minor ablution) in case the worshipper wore the boots in a state of complete purification and then acquired ritual impurity. He (al-Quduri) qualified it with ritual impurity leading to wudu, because there is no rubbing on boots after major impurity, as we will explain, God willing. He further qualified it with the acquisition of impurity subsequent to wearing because boots are a legal protection during the period of mash. If we permitted it with prior impurity—as in the case of a woman with irregular bleeding, who wears them when the blood is flowing and then the time passes, as well as when the person who has performed tayammum puts them on and then sees water—the boots would (be something that does not prevent impurity, but something that) lead(s) to the elimination of impurity. His statement, “wore the boots in a state of complete purification” does not convey the stipulation of “completeness” at the time of

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1 Made of light leather without heels.
2 To both men and women.
3 Ahad—individual reports—reaching the level of mash'hur in great numbers.
4 Mash over boots is related from about forty Companions (God be pleased with them) according to some, and from seventy according to others. Al-Zayla'i, vol. 1, 162.
wearing, but at the time of acquiring (subsequent) impurity, and that is the opinion in our view, so that if he washes his feet, wears the boots, then completes purification and subsequently acquires ritual impurity he is to be rewarded for the rubbing (mash). The reason is that boots prevent the soiling of the feet by hadath, therefore, completion of purification at the time of prevention is taken into account, so much so that if purification was deficient at this time, the boots would become a purifier of hadath.

It (mash over boots) is permitted to the resident for one day and one night, and to the traveller for three days and three nights, due to the words of the Prophet (God bless him and grant him peace), “The resident may rub over boots for one day and one night, while the traveller may do so for three days and three nights.”

He said: The period commences after the acquisition of ritual impurity. The reason is that boots prevent the spreading of hadath, therefore, the period is reckoned from the time of the (first) prevention.

Mash is done on the outer part of the boots in lines drawn by the fingers beginning from the fingers towards the calf, due to the tradition of al-Mughirah (God be pleased with him) that “the Prophet (God bless him and grant him peace) placed his hands over his boots and traced them from the fingers towards the top in a single stroke of rubbing, and it was as if I could feel the effect of the rubbing on the boots of the Messenger of God (God bless him and grant him peace) in lines drawn with the fingers.” Thereafter, rubbing over the upper surface is certain (obligatory), so much so that it is not permitted (as an obligation) on the lower part, towards the back and the part covering the calf. As it goes against the requirements of analogy (qiyas), all that has been explicitly stated by the shar' (texts) will be adopted. Beginning from the tips of the fingers is recommended relying on a base and that is washing.

The extent of the obligation of rubbing over boots is with three fingers of the hand. Al-Karkhi (God bless him) said that this pertains to the fingers of the foot. The first view, however, is sound taking into account the instrument of rubbing.

Mash is not permitted on a boot in which there is a large tear through which three fingers of the foot are exposed. If it is less than this, rubbing is permitted. Zufar and al-Shafi'i (God bless them both) say that rubbing is not permitted even if it is less than three fingers, because the obligation of washing the exposed part makes the washing of the rest obligatory. Our argument is that boots are usually not free of minor tears and the people will face hardship in taking them off, but the boots are free of large tears and there is no hardship here. A large tear is one that uncovers up to three small fingers of the foot, which is correct. The reason is that the principle for the foot pertains to the fingers and three are a major part of it, thus they are treated as the whole. The consideration of the smaller fingers is by way of precaution, while the phalanges are not taken into account if they do not open up during walking. This extent of the fingers is taken into account separately for each foot with the tears in one boot being added, but the tears in both boots are not added. The reason is that tears in one of them do not prevent travelling with the other foot as distinguished from multiple impurities, because the person wearing the boots is bearing all of them. The uncovering of the private parts is a case parallel to that of impurity (in terms of adding up).

Mash over boots is not permitted for the person who is under an obligation to bathe, due to the tradition of Safwan ibn 'Assal (God be pleased with him) who said, “The Messenger of God (God bless him and grant him peace) used to order us when we were travelling, that we should not take off our boots for three days and then nights due to the call of nature (urinating and defecating) or sleep, except in the case of

3 Time for the period of mash commences here.
4 Most jurists have said that the period of mash is fixed, however, Malik (God bless him) said that it is not fixed.
5 It is recorded by Muslim in his Sahih. Al-Zayla'i, vol. 1, 174.
6 It does not commence from the time of wearing the boots, which is prior to the acquisition of ritual impurity.
7 After they were worn with complete purification.
8 This tradition is gharih, however, the traditions that come close to it are reported by Ibn. Abi Shaybah and Ibn Majah. Another tradition is recorded by Abu Dawud. Al-Zayla'i, vol. 1, 180-81.
9 Al-Shafi'i and Malik (God bless them) maintain, on the basis of a tradition recorded by Malik (God bless him), that rubbing on the lower part as well as the upper part is a Sunnah.
10 It is reported that 'Ali (God be pleased with him) said that if din were to be based upon ra'y, the lower part of the boots would be in greater need of mash.
11 He places the fingers of his right hand at the front of the right foot, and of the left hand for the left foot, and brings them up towards the calf close to the ankles.
12 The reason is that janabah entails the washing of the entire body, and impurity from the body has travelled to the feet. See, however, the note above on the same issue.
He said: If a person wears jurmāqū' over the boots, he is to perform mashū' over them. Al-Shāfiʿī (God bless him) disagrees saying: A substitute cannot have another substitute. Our evidence is that “the Prophet (God bless him and grant him peace) performed mashū' over jurmāqū'” and because they are a follow-up for boots in use and purpose, therefore, they become like boots with two layers, which is a substitute of the foot and not of boots. This is different from the case where he wears the jurmāqū' after acquiring minor impurity, because the hadāth has spread on to the boot and cannot spread to another thing. If the jurmāqū' are made of kirbās, it is not permitted to do mashū' over them, because they do not amount to a substitute for the foot, unless the moisture has spread to the boots.

It is not permitted to perform mashū' over socks (jawrabayn) according to Abū Hanifah (God bless him) unless they are made of leather or are shod. The two jurisists said that it is permitted if they are of a thick material and not porous, due to the report that “the Prophet (God bless him and grant him peace) performed mashū' over his socks,” and because it is possible to walk in them if they are thick, and this is a sock that sticks to the calf without being tied to it with anything, thus, it resembles the boots. The Imam (Abū Hanifah) argues that they are not the same as boots, because it is not possible to walk continuously in them, unless they have soles, and that is the interpreted implication of the tradition. It is also reported that he retracted his opinion in favour of their view, and the fatwā today is on this.

It is not permitted to perform mashū' over a turban ('imāmāh), hood/cap (qalansuwah), veil (burqu') and gloves (quffāz), because there is no hardship in taking off these things and the exemption has been granted to avoid hardship.

— Regular boots worn over light leather boots that do not have heels.
— White cotton fabric.
— Some of our jurists have stated that it is not permitted to perform mashū' over slippers (nā'la'yin).
— Like the khuffāyin (boots).
— It is related from al-Mughirah ibn Shu'bah, Abū Mūsā and Bilāl (God be pleased with them). The tradition by al-Mughirah ibn Shu'bah (God be pleased with him) is recorded by the compilers of the four Sunan. Al-Zayla'ī, vol. 1, 184.
It is permitted to do mash' over plaster/splint (jaba'ir) even when it has been tied without prior wudu'. The reason is that the Prophet (God bless him and grant him peace) did so and ordered Ali (God be pleased with him) to do so too. Further, the hardship in this case is greater than the hardship in removing boots. It is, therefore, better to legislate mash' deeming rubbing of a greater part of it as sufficient. This is stated by al-Hasan (God bless him) and he did not limit it with time as no text is related with respect to time.

If the splint falls off without proper healing mash' is not annulled, because the cause is present and mash' is like washing for what is beneath it as long as the cause is present. If the splint falls off without healing, mash' is annulled due to the passing away of the cause. If this happens during prayer he is to pray again as he is now able to offer the principal act prior to the attainment of the objective through a substitute. God knows best.

Chapter 6

Menstruation and Extended/Irregular Bleeding

The minimum period for menses (hayd) is three days and their nights. Whatever is less than this is irregular bleeding (istihādah). This is based upon the words of the Prophet (God bless him and grant him peace), "The minimum period for hayd in the case of a virgin girl or deflowered woman is three days and accompanying nights, while the maximum is ten days." This is proof against al-Shāfi‘ī (God bless him) who fixes it at one day and night. From Abū Yūsuf (God bless him) it is reported that it is two days, and the excess of the third day amounts to treating the major part (two days plus) in place of the whole. We would say that this amounts to reducing a number stated in the shar' (texts).

The maximum period for it is ten days and their nights, while the excess is extended bleeding (istihādah), due to what we have related and it is proof against al-Shāfi‘ī (God bless him) in determining the maximum to be fifteen days. Thereafter the excess and less (than three days and nights) amounts to istihādah (extended/irregular bleeding), because the numbers in the shar' (texts) do not permit the association of other numbers with them.

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[1] These are two traditions. The tradition about mash' by the Prophet (God bless him and grant him peace) is recorded by al-Dār’ūqūnī. Al-Zayla’i, vol. 1, 186.

[2] The difference between mash' over boots and jaba'ir is that there is no fixed time for the jaba'ir.
The red, yellow dark coloured fluid that a woman sees during the period of menses is menstruation, until she sees pure white. Abu Yusuf (God bless him) said that the dark coloured fluid is not menstruation, except when it follows blood. The reason is that if it had been from the uterus, the emergence of the dark colour would have come after the clear water. The two jurists rely on the report "that A'ishah (God be pleased with her) deemed whatever was other than pure white as menses." This is not known except through reports. The mouth of the uterus is inverted therefore, the murky fluid comes out first like a pitcher that has a hole at the bottom. As for the greenish fluid, the correct view is that if the woman is old (beyond the age of menses) and does not see other than the greenish fluid, it is to be deemed to be due to disturbance in the uterus, and not menstruation.

Menstruation extinguishes the liability of the menstruating woman for prayer, and prohibits fasting for her. She is to fast by way of qadā' (delayed performance), but is not to offer prayer as qadā'. This is based on the report of A'ishah (God be pleased with her) in which she said, "During the period of the Prophet (God bless him and grant him peace) when one of us entered the period of purification after her menses, she would fast by way of qadā' but not salāt," because in offering prayer as qadā' there is hardship as it becomes doubled, while there is no such hardship in fasting by way of qadā'.

She (the menstruating woman) is not to enter the mosque. Likewise, the person who has acquired major impurity (the junub), due to the words of the Prophet (God bless him and grant him peace), "I do not declare the mosque as lawful for the menstruating woman, nor for the menstruating man."

It is recorded by Imam Malik (God bless him). Al-Zayla'i, vol. 1, 193.

The legal effects of hayd are twelve. Eight of these are common with nifās (postnatal bleeding) whereas four are specific to hayd. The eight common effects are the giving up of prayer without qadā'; giving up of fasting with qadā'; prohibition of entering the mosque; prohibition of performing ḥumāf; prohibition of reciting the Qur'ān; prohibition of touching the mushaf without the ghillaf; prohibition of intercourse; and the obligation of bathing upon termination of bleeding. The four that are specific to hayd are: the passing of 'idād; the vacation of the womb; the attainment of puberty (bulugh); and the means for distinguishing between the sunnah and bid'ah forms of divorce.

It is recorded by all the six sound compilations. Al-Zayla'i, vol. 1, 193.

She is not to circumambulate the Bayt (al-Ka'bah). The reason is that the circumambulation is within the mosque.

Her husband is not to have sexual intercourse with her due to the words of the Exalted, "So keep away from women in their courses, and do not approach them until they are clean."

The menstruating woman, the junub and one having postnatal bleeding are not to recite the Qur'ān, due to the words of the Prophet (God bless him and grant him peace). "The menstruating woman and the junub are not to recite anything from the Qur'ān." This is a proof against Malik (God bless him) in the case of the menstruating woman. The tradition in its absolute meaning includes what is lesser than the implication of the verse (like recitation of a single 'ayah) and is, thus, a proof against al-Tahawi in permitting it.

They are not to touch the mushaf (the Qur'ān in a cover), except one wrapped in a ghillaf (wrapper) nor to hold a dirham in which there is a sirah ('ayah: verse) engraved except in a purse. Likewise, a person who has acquired minor impurity is not to hold the mushaf except by its wrapper. This is due to the words of the Prophet (God bless him and grant him peace), "No one besides the person in a state of purification is to touch the Qur'ān." Further, minor impurity and major impurity have both spread to the hand, therefore, they are equal with respect to touching. Janābah, however, has spread to the mouth, but not so hadath, therefore, they differ with respect to recitation. The wrapper is one that encompasses it and is different from what is attached to it, like bound leather, which is the correct meaning. Touching it with the sleeve is considered
disapproved, which is the sound view, as it is subservient to it as distinguished from books on the shari'ah for which an exemption has been created for touching with the sleeve by the owners due to the inherent necessity. There is no harm in delivering the mushaf to minors, because in denying this there is an apprehension of loss with respect to the memorization of the Qur'an. Asking them to maintain purification (all the time) creates hardship for them. This is the sound view.

He said: When bleeding stops after menstruation in a period that is less than ten days, having sexual intercourse with her is not lawful until she has taken a bath. The reason is that the blood flows sometimes and ceases at other times. It is, therefore, necessary to have a bath so that ceasing of the blood is strengthened.  

When she does not take a bath and a minimum time of prayer has passed over her, an amount of time in which she could have taken the bath and pronounced the tahrimah, it is lawful to have intercourse with her. The reason is that prayer has become due from her as a liability, therefore, she has legally attained purification.

If her bleeding ceases in a period that is less than her usual course though more than three days, the husband is not to approach her until the time for her normal course is over even if she has taken a bath. The reason is the flow of blood usually recurs during the normal course, therefore, precaution is better.

If the bleeding ceases after ten days, it is permissible to have sexual intercourse with her before her bath. The reason is that menstruation does not exceed ten days, however, it is not recommended prior to bathing due to the emphatic prohibition of recitation (in the verse that implies bathing).

If a period of purification (cessation of blood) intervenes between two periods of flowing blood within the period of menstruation, then it is treated like the continual flow of blood. He (the Author—God be pleased with him) said: This is one of the two narrations from Abū Hanifah (God bless him). His reasoning is that the continuous flow of blood throughout the period of menstruation is not a condition due to consensus (ijmā'), thus, its commencement and termination is taken into account as in the case of the scale (nisāb) in zakāt. It is reported from Abū Yusuf (God bless him) and it is also the second report from Abū Ḥanifah (God bless him) where it is said that it was his last view (on the issue) that if the intervening period of purity is less than fifteen days, it is not to be separated (from menstruation) and the entire period is treated as the continual flow of blood, for it is a false period of purity and is assigned the rule of blood. The adoption of this opinion provides ease, and its details are available in the Book of Ḥayd (by Ḥāmid Muhammad).  

The minimum period of purity (after menstruation) is fifteen days. This is how it has been transmitted from Ibrahim al-Nakha'i (God be pleased with him), and it cannot be known except by reliance upon texts. There is no limit for the maximum, because it may extend to a year or two years and cannot be determined by estimation, except when blood comes with a regularity, in which case there is a need for fixing the normal course. The details are to be found in the Book of Ḥayd.

Bleeding for a woman with extended bleeding is like a permanent nosebleed, which does not prevent fasting, prayer or sexual intercourse, due to the words of the Prophet (God bless him and grant him peace), “Perform wudū' and pray even if the blood drips on to the mat.” When the rule for prayer has become (known through the tradition), the rule for fasting and sexual intercourse is known (as a consequence) on the basis of ijmā' (consensus).

If the bleeding exceeds ten days and she has a normal course that is less than ten days, she will rely on the days of her normal course, and what is in excess of that is extended bleeding, due to the words of the Prophet (God bless him and grant him peace), “The woman with extended bleeding gives up prayer during the days of her normal
category of the days over and above ten, thus, they are associated with
the normal course." The reason is that the excess over the normal course falls in the
category of menstruation. If she enters puberty with extended bleeding, then her menstrual
period is ten days of each month and the rest is extended bleeding. As we have identified it to be menstruation (on the basis of law) it cannot move
out of this category due to doubt. God knows best.

The woman with extended bleeding, the person with incontinence of urine, a perpetual nosebleed and an ulcerous wound, are to perform wudu' for each prayer timing and are to pray with this wudu' at that
time any of the obligatory and supererogatory prayers they like. Al-Shafi'i (God bless him) said that the woman with extended bleeding is to perform wudu' for each obligatory prayer (makkubdah), due to the words of the Prophet (God bless him and grant him peace), "The woman with extended bleeding is to perform wudu' for each prayer." The reason is that her purification is acknowledged as a necessity for the performance of obligatory prayers and after such performance the purification does not remain. We rely on the words of the Prophet (God bless him and grant him peace), "The woman with extended bleeding is to perform wudu' for each prayer timing," which is the meaning in the first tradition, because the character lám is applied to mean time. When it is said, "I will come to you for (by) the salát of zuhr," it means the time of zuhr. The reason is that time stands in place of performance, therefore, the rule (hukm) turns on it.

When the time of the prayer has passed, then wudu' stands annulled and they are to renew the wudu' for the next prayer. This is the view according to our three companions (God bless them). Zufar (God bless

There are different versions of this tradition. Some are recorded by Abū Dāwūd, al-Tirmidhi, Ibn Mājah and al-Dārī quṭnī. Al-Zayla'i, vol. 1, 201.

This is the same meaning as the previous issue. Al-Zayla'i held this view. In other words, all the jurists held the unanimous view about the
validity of purification till after the passing of the time of zuhr.

This is to counter the view of those jurists who maintain that the time for an obligatory (wājib) prayer has passed.

If they perform wudu' when the sun has risen their act is deemed
valid for the obligation till such time that the time for zuhr has passed
away. This is the view according to Abū Ḥanīfah and Muḥammad (God bless them both). Abū Yūsuf and Zufar (God bless them both) said that this purification is valid till the arrival of the time of zuhr. The result of this disagreement is that the purification of the handicapped person becomes invalid with the passage of the time of prayer, that is, due to prior impurity according to Abū Ḥanīfah and Muḥammad (God bless them) and at the arrival of the prayer time according to Zufar (God bless him). According to Abū Yūsuf (God bless him) it becomes invalid due to either of these reasons. The benefit of the disagreement is not apparent, except in the case of the person who has performed wudu' prior to the declining of the sun, as we have stated, or even prior to the rising of the sun. According to Zufar (God bless him) the legal acceptance of the purification, despite the negating factor, is due to the need for performance. As there is no such need prior to the time, it is not to be accepted as valid. According to Abū Yūsuf (God bless him) such need is confined to the time alone, (from its beginning to its passing) and is not to be deemed valid either before it or after it. The two jurists maintain that it is necessary to validate purification prior to the timing so as to enable performance as soon as the time arrives (especially where time is just sufficient for prayer). The passage of the time is an evidence of the going away of necessity, therefore, the impurity is acknowledged at this time.

The meaning of time here is the time of the obligatory prayer. Thus, if the handicapped person performs wudu' for the 'id prayer, he may pray zuhr with it as well according to the two jurists, which is the sound view, because the 'id prayer is of the same legal status as the duḥa prayer. If such a person performs wudu' once for zuhr at its time and again within its time (zuhr) for 'asr, then according to the two jurists he (she) is not to

There are different versions of this tradition. Some are recorded by Abū Dāwūd, al-Tirmidhi, Ibn Mājah and al-Dārī quṭnī. Al-Zayla'i, vol. 1, 201.

The supererogatory prayers follow these, so there is no separate rule for them.

It is recorded by Ibn Mājah in his Sunan. Al-Zayla'i, vol. 1, 202.

This is ghurib in the absolute sense. Al-Zayla'i quotes al-Ṭahāwī to elaborate the
issue. Al-Zayla'i, vol. 1, 204.

Relied upon by al-Shafi'i (God bless him). That is, this is also the meaning of the
tradition relied upon by him.
prayer with *'asr would be the annulment of the purification with the passage of the prescribed time.\(^3^9\)

The *mustahādah* is a woman who does not pass through any prayer timing without being affected by impurity. Likewise, any person who is affected in the same way, and these are the persons we have mentioned, it includes those who may have disturbed bowel movements and cannot control the passage of wind, and the necessity is established by this. The necessity in the case of the woman with extended bleeding is, therefore, generalised for all.

### 6.2 Nifās (Postnatal Bleeding)

Nifās is the blood\(^a\) that comes out\(^b\) following childbirth. The reason is that it is derived from the meaning of the womb bringing out blood or the meaning of the emergence of life in the sense of a child or blood.

The blood that a pregnant woman sees initially or during childbirth, prior to the emergence of the child, is deemed *istihādah*, even if this is extended. Al-Shāfi‘ī (God bless him) said that it is menstrual blood on the analogy of nifās, as both flow from the uterus. Our argument is that due to pregnancy the mouth of the uterus is sealed, this is nature, and nifās appears after its opening, following the birth of the child. It is for this reason that nifās appears even when part of the child\(^c\) has emerged, according to Abū Hanīfah and Muhammad (God bless them), because the womb is opened and the blood oozes out.

\(^a\)Of *zuhr*. He has formulated the issue to indicate that there is no intervening period of time between the passage of the time of *zuhr* and the beginning of the time of *'asr*; one follows the other immediately. The report of `Asad ibn `Amr from Abū Hanīfah (God bless him) that when the shadow of a thing is equal to the thing itself, the time of *zuhr* has passed away, but the time of *'asr* has not yet begun, is not a sound report.

\(^b\)This would indicate that the emergence of blood is a condition. There are reports from the jurists that the mere delivery of the child is sufficient for this status.

\(^c\)Some commentators maintain that it would have been better if he had used the words "that comes out of the vagina," so that the blood coming out of another place, for some reason, is not included. In both forms, the statement would admit the Caesarian section in which the postnatal bleeding is through the vagina.

\(^3^9\)Reports from Abū Hanīfah (God bless him) vary with some saying "a greater part" and others "one-half" and so on.

The miscarried foetus\(^d\) that shows some (developed) features is a child and the woman is said to be one undergoing nifās. Further, by virtue of it a slave girl is deemed *umm arwalad* and *'iddah* is deemed to terminate due to it.

There is no minimum period\(^e\) for nifās, because the child preceding it is an indication that the blood is emerging from the womb, thus, an extended period (like three days) is not needed to indicate that this is so as is the case with menstruation.

The maximum period for nifās is forty days and what is in excess of this is deemed extended bleeding. This is based on the tradition of Umm Salamah (God be pleased with her) that "the Prophet (God bless him and grant him peace) fixed a limit of forty days for a woman with postnatal bleeding."\(^f\) It is a proof against al-Shāfi‘ī (God bless him) who determines it to be sixty.\(^g\)

If the blood flows for more than forty days, where the woman has given birth before this and her period of nifās is known, the number of days will be deemed to be what is usual for her,\(^h\) as we have explained in the case of menstruation. If her period is not known then her nifās is forty days from the commencement as it is possible to deem all forty as nifās.

If she gives birth to two children through a single pregnancy (twins),\(^i\) then, her nifās is to be reckoned from the birth of the first child, according to Abū Hanīfah and Abū Yūsuf (God bless them) even if there is a gap of forty days between the two births. Muhammad (God bless him) said that it is to be reckoned from the birth of the second child, which is also the opinion of Zuفر (God bless him),\(^j\) because the woman is still pregnant after delivering the first child, therefore, she is not deemed to

\(^3^4\)Undeveloped.

\(^3^5\)This is by agreement of our jurists. If postnatal bleeding ceases, a short while after childbirth, it is obligatory for her to fast and pray after bathing. This has been mentioned expressly by Fakhr al-Islam in his al-*Mabsīs*.

\(^3^6\)It is recorded by Abū Dāwish, al-Tirmidhi and Ibn Mājah. Al-*Zayla`ī*, vol. 1, 204.

\(^3^7\)This is based on a report from al-Awza`ī, who said that there was a woman who witnessed nifās for sixty days.

\(^3^8\)The blood in the remaining days, if any, will be istihādah.

\(^3^9\)Legally, these are two children between whose birth there is a gap of less than six months.

\(^4^0\)Abū Yūsuf (God bless him) is reported to have said that there is no nifās for her due to the second child; she is to bathe when she delivers and pray.
have nifās just as she is not deemed to have menses. It is for this reason that the 'iddah (waiting period) is deemed to terminate with the second child on the basis of consensus. The two jurists maintain that the pregnant woman does not have menses due to the blocking of the mouth of the womb, as we mentioned, and it is now open with the emergence of the first child. As the womb has emitted blood, therefore, the blood is nifās. The waiting period is associated with the delivery of the foetus in addition to nifās, thus it covers both.

Chapter 7

Impurities and their Cleansing

The cleaning of impurities from the body of the worshipper, his dress and the place where he will pray is obligatory due to the words of the Exalted, "And your garments keep free from stain." The Prophet (God bless him and grant him peace), said, "Peel it off, then scratch it and then wash it off with water; the stain does not affect you." If purification of the dress is obligatory, due to what we have related, it becomes obligatory for the body and place of prayer. During prayer utilisation covers all these things.

1. That is the elimination of actual impurities. After dealing with legal impurities (hukmiyyah) and the methods of ablution, he now addresses real najasah, that is, haqiqiyyah and its cleansing. The cleaning of these impurities from the objects of purification is a condition of prayer. The objects of purification are the body of the worshipper, his clothes and the place where prayer will be offered.

2. He uses the words anjas and najasah. Anjas are both legal and real, that is, hukmiyyah and haqiqiyyah, however, here he is concerned with real impurities.

3. The place of prayer essentially means the place where the worshipper will stand. The cleaning of the place where the prostrations will take place is also stipulated in a narration of Muhammad from Abū Hanifah (God bless them), because these are also a ruku of prayer like qiyām. According to a narration from Abū Yūsuf (God bless him) the cleanliness of the place of prostrations is not essential, because prostrations are performed with the nose, and the tip of the nose is less than the size of a dirham. The two jurists maintain that cleanliness is stipulated, because prostrations are made on the forehead. These narrations do not conform with what is narrated in al-Hidayah. In the description of salāt, the two jurists (Muhammad and Abū Yūsuf) maintain that it is not proper to prostrate on the nose alone, except due to an obstacle.

4. Qur'ān 74:4

5. It is gharib with these words, "the stain does not affect you," but a similar tradition is recorded by all the six sound compilations. Al-Zayla'i, vol. 1, 207.
Purification of impurities is permitted with water and with every pure liquid with which they can possibly be removed, like vinegar, pure rose water, and other liquids that ooz out when squeezed. This is so according to Abū Hanifah and Abū Yūsuf (God bless them). Muhammad, Zufar and al-Shāfi’ī (God bless them) said that it is not permitted except with water. The reason is that a liquid becomes impure after first contact with the impurity and an impure substance does not lead to purification, however, this analogy has been given up due to necessity in the case of water. The two jurists argue that a liquid uproots and the ability to purify is due to the ‘illah (underlying cause) of uprooting and removal. Impurity exists due to close contact and when the particles of impurity end the object is left in a state of purification. The response of the Book is that no distinction is to be made between the dress and the body. This is the opinion of Abū Hanifah (God bless him) and one of two views narrated from Abū Yūsuf (God bless him). In another view from him, he distinguishes between them and does not permit purification of the body except with water.

If the boot is soiled with impurity that has a body, like dung, faeces, blood or sperm and dries up, it will become valid if it is rubbed on soil. This is based on istiḥsān. Muhammad (God bless him) said that it is not valid, and this is based on analogy, except in the case of sperm, because something sticking to the boot is not eliminated by dryness and rubbing as distinguished from sperm, as we will mention. The two jurists rely on the words of the Prophet (God bless him and grant him peace), “If there is filth on them, he is to rub them on the soil for the soil is a purifying element for them.” Further, particles of impurity do not penetrate leather due to its density, except a little; they are then absorbed back by the body on drying. Thus, when they are removed, whatever is in them is also removed.

In case of their being moist, it is not permitted, until he (the worshipper) washes it (the boot). The reason is that rubbing on the soil will increase it (the area) and not purify it. It is reported from Abū Yūsuf (God bless him) that if he rubs it on the soil till no effect of impurity is left, it is deemed pure due to widespread need and the unqualified implication of the related report, and this is the view upheld by our jurists (Masha‘ikh, God bless them).

If it is soiled by urine, and it dries up, it is not permitted to use it unless it is washed. Likewise anything that is not solid (has a concrete body), like wine, as the particles are dissolved in it and there is no absorbent that can absorb these particles. It is said that the accompanying sand and ashes provide a body to it.

In the case of a dress, nothing but washing validates it even if it has dried up. The reason is that due to the porous texture of the dress, most of the particles of impurity are absorbed in it and are not taken out except by washing.

Mani (sperm) is an impurity whose washing is obligatory when it is moist. When it dries up on the dress, rubbing it off validates it, due to the words of the Prophet (God bless him and grant him peace) to ‘A‘ishah (God be pleased with her) “Wash it if it is moist and rub it off if it has dried up.” Al-Shāfi’ī (God bless him) said, “Mani is pure.” The proof against him is what we have related. The Prophet (God bless him and grant him peace) said, “The dress is washed due to five things... and among these he mentioned mani.” If it sticks to the body, our jurists (masha‘ikh, God bless them) said that it is purified by rubbing off as widespread necessity is acute in this case. It is narrated from Abū Hanifah (God bless him) that it is not purified except by washing as body heat acts as an absorbent, therefore, the particles do not return to the solidified body (of the fluid). Further, it is not really possible to rub the body.

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14 These words exclude the urine of animals whose meat is consumed.
15 From the substance in which they are borne.
16 On the basis of texts.
17 That is, we agree that it becomes impure on first contact with najaṣah, but when the najaṣah is removed the thing becomes pure.
18 And whatever is in the same meaning.
19 Pure for permissible of prayer.
20 Exemption from the words “not valid.”
21 It is recorded from ‘A‘ishah, Abū Hurayrah and Abū Sa‘īd al-Khūrī (God be pleased with them) by Abū Dāwūd. Al-Zayla‘ī, vol. 1, 207-209.

22 And that is najaṣah.
23 That is, dung, faeces, blood and so on.
24 On the basis of istiḥsān.
25 It is gharib in these words. Al-Dār qumari has recorded a similar tradition. Al-Zayla‘ī, vol. 1, 209.
When impurity affects a mirror or a sword, it is sufficient to rub them (clean). The reason is that impurity does not penetrate them and what is on the surface is eliminated through rubbing.

If impurity affects the ground, it is dried out in the sun and its effect disappears; it is permitted to pray on it. Zufar and al-Shafi'i (God bless them) say that it is not permitted, because the removing factor is not found; and, therefore, it is not permitted to perform tayammum with it. We rely on the words of the Prophet (God bless him and grant him peace), "The purification of land is by its drying up." Tayammum, however, is not permitted with it, because the purity of clean soil is a duty laid down as a condition by the text of the Qur'an (al-Kitab), and it cannot be rendered on the basis of what is laid down by the tradition.

Prayer is permitted with heavy (enhanced) impurity up to the size of a dirham, or what is less than that, like blood, urine, wine, chicken droppings and the urine of donkeys, but it is not permitted if the impurity is in excess of this. Zufar and al-Shafi'i (God bless them) said that impurity whether it is more or less is the same, because the text that has laid this down has not made a distinction. Our argument is that it is not possible to avoid a little impurity and, therefore, it is to be waived. We estimated this to be up to the size of a dirham comparing it to the passage that is the object of istinjā'. Thereafter, the consideration of the size of the dirham is reported to be on the basis of the thickness of the back of the joints on the hand according to the sound report. It is also reported with respect to weight where the larger dirham is a mithqal, therefore, it is impurity up to one mithqal. It is said, after combining these two estimates, that the first is for thin impurity, while the second is for thick impurity. The impurity of these things is treated as enhanced as these were laid down by a definitive evidence.

If the impurity is lighter, like the urine of an animal, whose meat is eaten, prayer is permitted with it unless it exceeds one-fourth of the dress. This is reported from Abū Ḥanīfah (God bless him), because the estimation in this is based on excess that is widespread. A fourth is associated with the whole in certain āhām (rules). It is also reported from him that it is the fourth of the lower dress in which prayer is permitted, like the wrapper/trousers (mi'zar). It is also said that it is the fourth of the part (of the dress) affected, like the tail and hem. According to Abū Yūsuf (God bless him) it is an area equal to the span of the hand by span of the hand. Such impurities are deemed lighter according to Abū Ḥanīfah and Abū Yūsuf (God bless them), due to the occurrence of a disagreement about their being impure or due to conflict of two texts or two principles upheld by both.

If the dress is soiled by faeces of horses or cattle to an extent that is more than a dirham, prayer is not permitted in it, according to Abū Ḥanīfah (God bless him) due to a text that is laid down about its impurity, and this is the report that "the Prophet (God bless him and grant him peace) threw away dung saying this is filth (rijs or rikṣ)." This report was not opposed by another report, which established its enhanced impurity, while light impurity is established through conflict (of texts).

The two jurists maintained that prayer will be deemed valid unless the impurity spreads. The reason is that istihād is valid in this case. This is what establishes its lightness in their view. Further, the reason is that there is a necessity in this as the roads are full of it and this argument is effective as far as light impurity is concerned, as distinguished from the urine of a donkey, which is absorbed by the soil (on the road). We would say that necessity has operated once in the case of sandals with respect to light impurity so that they are purified by rubbing, thus, sufficient burden has been placed upon necessity. There is no difference between

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211. "Between less and more.

212. The basis is the absence of conflict of texts. The Author clarifies this at the end of the next issue, as well as the end of the following paragraph.

213. It is recorded by al-Dārī qūnī in his Sunan. Al-Bukhārī and others have declared it bātūl. Al-Zayla'i, vol. 1, 4.

214. This is in response to the assertion that the necessity in the case of the urine of a donkey is the same as that for its faeces, and you have held this impurity to be heavy.

215. Note the principle: necessity is estimated through its requirement.
animals whose meat is consumed and other animals. Zufar (God bless him) distinguished between them and agreed with Abu Hanifah (God bless him) in the case of animals whose meat is not consumed, while he agreed with the two jurists in the case of animals whose meat is consumed. It is reported from Muhammad (God bless him) that when he entered Rayy and saw the extent to which people were exposed to it, he gave the verdict that even widespread excess will not prevent prayer. The scholars constructed an analogy for the slush in Bukhara on this. It is also reported that he retracted at this time his opinion about boots as well.31

If the dress is soiled by the urine of a horse, it does not affect its purity, unless it is excessive, according to Abu Hanifah and Abu Yusuf (God bless them). According to Muhammad (God bless him), it does not prevent prayer even if it is excessive. The reason is that the urine of an animal whose meat is eaten is pure in his view, while it bears light impurity according to Abu Yusuf (God bless him). The meat of a horse is consumable according to both.32 As for Abu Hanifah (God bless him), the lightness of impurity is due to the conflict of reports on the issue.33 If the dress is soiled by the droppings of birds whose meat is not consumed, to the extent that it is in excess of the size of a dirham, prayer is permitted in it, according to Abu Hanifah and Abu Yusuf (God bless them). Muhammad (God bless him) said that it is not permitted. It is said that the disagreement is about impurity, while it is also said that it is about the extent, which is the sound view. Muhammad (God bless him) says that impurity is deemed light due to necessity and there is no necessity due to the absence of such birds in human habitations, therefore, it is not to be deemed light. The two jurists argue that they send their droppings from the air and it is difficult to adopt preventive means against them, thus, the necessity is established. If the droppings fall in utensils, it is said that the utensils are rendered impure, but it is also said that they are not as it is not possible to protect such utensils from the droppings.

If it is soiled by the blood of fish or the saliva of a mule or a donkey, to an extent that is in excess of the size of a dirham, prayer is deemed valid in it. As for the blood of fish, it is not blood as verified, and is, therefore, not impure. It is reported from Abu Yusuf (God bless him) that he considered it to be impure when it is excessive and spreads all over. The saliva of a mule or donkey is overlooked, because there is a doubt about its impurity and doubt cannot render impure what is pure.

If urine is splashed(sprayed) on to it to the extent of the eye of a needle, then, this is of no consequence. The reason is that it is not possible to prevent this.

He said: Impurity is of two kinds: visible and invisible. The purification of that which is visible is the removal of its substance. The reason is that the impurity has affected the subject-matter to the extent of its substance, and is removed by the removal of this substance. Except that some of its effect may remain and this is difficult to remove. The reason is that hardship is to be repelled. This indicates that washing is not stipulated after the elimination of the substance, though there is a discussion about things that can be eliminated with a single washing.

The purification of invisible impurity is through washing till the person washing is convinced that the object is purified. The reason is that repetition (of washing) is necessary to expel the impurity. The person can never be certain about such elimination, therefore, preponderant conviction is taken into account, as in the case of seeking the qiblah. The jurists limited washing to three, as conviction is attained through this. The outward cause has been made to stand in the place of actual cleansing to create ease. This is strengthened through the tradition about the person waking from his sleep.34 Thereafter it is necessary to squeeze the material with each washing according to the Zahir al-Riwayah, because this is what causes the expulsion of impurity.

### 7.1 Istinjā’

Istinjā’ is a sunnah,35 because the Prophet (God bless him and grant him peace) practised it persistently.36 It is permitted with stones, or with what stands in its place, by rubbing till the object is cleansed. The aim is cleansing, therefore, it is the aim that will be taken into account.

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31 With respect to the well-known narration about boots from him that they are not purified by rubbing on soil.
32 But disapproved due to the high status of the animal, as has preceded.
33 A conflict of reports is the basis for declaring impurity light. When there is no conflict, the impurity is heavy.
34 In which it is mentioned that he is to wash them thrice.
35 According to al-Shafi‘i (God bless him) it is an obligation.
36 There are traditions on the issue and among them are those recorded by al-Bukhari and Muslim. Al-Zayla‘i, vol. 1, 2.10.
There is no specific number prescribed for it. Al-Shafi'i (God bless him) said that three is necessary due to the words of the Prophet (God bless him and grant him peace), “Perform istinja’, with three stones.” We rely on the words of the Prophet (God bless him and grant him peace), “Anyone who uses stones for cleansing should use an odd number. One who does this, does good, but if one does not, then, there is no harm.” The odd number may be one, and the interpretation he has placed on what he has related may be rejected on the face of it, because it is valid if a person performs istinja’ with a stone that has three sides, and this is so by consensus (ijma’).

Washing with water is preferable due to the words of the Exalted, “In it are men who love to be purified, and God loves those who make themselves pure,” that were revealed about people who followed up cleansing by stones with washing with water. Thereafter, it is a recommended practice (adab) and it is said that it is a required practice (sunnah) in our times. Water is to be used (repeatedly) till the person is convinced the location stands purified. This is not to be limited with a number, unless a person is psychologically averse to it, then, in his case it is limited to three; and it is said up to seven times.

If the impurity has spread beyond its outlet, purification is not valid unless it is with water, though in some manuscripts (of the books relied on) the words are, “except with a liquid.” This establishes a difference in reports about the purification of the private parts with things other than water, as we have explained. The reason is that rubbing does not remove it, however, it is deemed sufficient for the location of istinja’, therefore, rubbing is not allowed beyond it. Thereafter, a limit on the number of times is taken into account for a liquid used for the area beyond the location of istinja’ according to Abü Hanifah and Abü Yūsuf (God bless them), due to the consideration of this location ceasing to be effective. According to Muhammed (God bless him), this is done by including the location of the istinja’, as in the case of other locations.

Istinja’ is not to be performed with bones or with dung, because the Prophet (God bless him and grant him peace) proscribed this. If, however, a person does so, it is deemed valid due to the attainment of the aim (of cleansing). The underlying reason for the proscription about dung is impurity, while for bones the reason is that they are food for jinns.

Istinja’ is not to be performed with food, as that amounts to waste and extravagance, nor is it to be performed with the right hand, because the Prophet (God bless him and grant him peace) forbade the performance of istinja’ with the right hand.
Al-Hidāyah
THE GUIDANCE
Chapter 8

Prayer Timings

The first timing of the fajr (morning prayer) is the rising of the second dawn, which is whiteness that spreads horizontally in the horizon, while

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1He has given precedence to the fajr (morning) prayer for discussion. In a tradition, the zuhr prayer has been mentioned first as that is the first prayer during daylight.

2The word mitiat, plural of miqat, has been translated as timings. The term miqat means the determination of something in terms of time and place. Hence, the miqat for hajj.

3The word salat literally means “prayer, supplication.” It is given precedence over all other obligations in Islamic law. It is, therefore, the first obligation to be discussed. Taharah (purification) was discussed before it, because taharah is the key to salat and its conditions. In its technical meaning, in the shari’ah, it is a term used for the well known arkân (elements) and specified acts. Thus, in the shari’ah, the literal meaning stands altered to apply to the arkân and specified acts. The arkân of salat are: qiyam; the last sitting posture to the extent of tashahhud; qirâ’ah (recitation); rukû’ and sujud. As stated earlier a rukn is like a pillar without which a structure cannot stand; without its arkân, salat is not valid. The rule (hukm) for salat is the extinction of the obligation through performance in this world. The cause (sabab) for its obligation are the specified timings, and its conditions are: taharah (purification); covering of the private parts; facing the qiblah; formulation of the niyyah (intention); time as a condition of performance; and the opening takbir. Salat is essentially of four types: fard (by way of definitive obligation); wajib (obligatory); sunnah (required as an emphatic sunnah); and nafis (supererogatory). Fard is of two types: fard ‘ayn (universal obligation) and fard kifaya (communal obligation). Salat that is fard as a universal obligation is also of two types: first the well known five prayers of the night and the day; and second, salat al-jumu'ah or the Friday congregational prayer. When the word salat is mentioned without qualification, it is the five well known daily prayers that come to mind. It is with these five prayers that the Author opens the discussion of salat. The five daily prayers have been prescribed as a definitive obligation. Such obligation is proved through the Qur'an, the Sunnah, jumâ (consensus) and rational proofs. A person who denies the obligation of these five daily prayers is imputed with kufir (unbelief). There a number of
its last timing is till the sun has not risen. The basis is the tradition of Jibril (God's peace and blessings be on him) when he led the Prophet (God bless him and grant him peace) in prayer. He led the Messenger of God (God bless him and grant him peace) in the morning prayer on the first day at the rising of the dawn. He led him on the second day when the whiteness had spread considerably and the sun was almost about to rise. Thereafter, he (Jibril) said, at the end of the tradition, "What is between these two timings, is the time for you and your ummah." The false dawn is not to be taken into account and this is the whiteness that rises vertically, but is followed by darkness due to the words of the Prophet (God bless him and grant him peace), "Let not Bilal's adhān (call for prayer) or the oblong dawn deceive you. Dawn is that which is dispersed in the horizon," that is, widespread.

The first timing of zuhr is when the sun has declined, due to the prayer led by Jibril (God's peace and blessings be on him) on the first day when the sun had declined. The last timing for it, according to Abū Hānīfah (God bless him) is when the shadow of each thing is equal to twice its size excluding the fay' (shadow) of decline. The two jurists said: when the shadow is equal to its size. This is a narration from Abū Hānīfah (God bless him) as well. The shadow of decline is the shadow of things verses in the Qur'an that are taken as the primary evidence for the obligation as well as for the prescribed timings and the number of prayers.

This is the use of the term "the whole sun" to mean its fractional part.

An observation is made that angels are not subject to the obligation of 'ibādat (worship) in the sense that humans are, therefore, the prayer of Jibril was supererogatory (naff), whereas the prayer of the Prophet (God bless him and grant him peace) following him was a definitive obligation (fard), and following by one praying fard behind another praying naff is null and void. One way this has been answered is that when God commanded Jibril to lead the prayer, the prayer became obligatory for him to this extent for two days (al-Lakhnaw).

The tradition of Jibril has been related from a number of Companions (God be pleased with them). It is recorded by Abū Dāwūd, al-Tirmidhī and others. Al-Zayla'i, vol. 1, 221.

The fajr prayer is said to be the first prayer led by Jibril according to a report recorded by al-Dār al-Qadīmin from Ibn 'Umar (God be pleased with him).

According to some it is not followed by darkness, rather it remains till the rise of the dawn.


As in the tradition above.

The first timing for the maghrib (evening) prayer is when the sun sets and its last timing is till the shafāq (dusk—dawn) has not disappeared. Al-Shāfī'i (God bless him) said that it is up to the time in

*That is, when the shadow of a thing is equal to its size.
*That is, the tradition of imāmah and this tradition.
*The timing will not be set aside on the basis of doubt. This is a response to an implied problem: the tradition of making zuhr cool clashes with the tradition of imāmah of Jibril, because he led the 'asr prayer on the first day when the shadow of a thing was equal to it, which indicates that the timing of zuhr was over, whereas the tradition indicates that the timing was not over. The Author's response is that when the traditions conflict, a timing established by way of certainty cannot be given up on the basis of doubt, that is, as long as the timing was established with a certainty. See the note on precaution below as to the timing of 'asr.

He means thereby "whenver the timing is over" depending on which view is followed. The Hanafī jurists have, however, determined that "precaution requires that zuhr be prayed prior to the shadow of a thing becoming equal to its size, and that 'asr be prayed when (after) the shadow becomes equal to twice the size of a thing, so that both prayers are offered within their timings with a certainty. The timing of 'asr be deemed to begin from the time when the shadow is twice the size of a thing, excluding the fay' of decline, and extending up to the setting of the sun." Apparently, unlike the Author, they apply the rule: when traditions conflict, it is obligatory to follow what is less. It may be argued that Abū Hānīfah's view provides facility, and his rule appears to be: when traditions conflict, follow the facility provided. God knows best.

Applying the whole to a part.

There is a discussion about this timing too on the basis of another tradition about the timing extending up to the yellowness (turning pale/soft) of the sun. The view followed, however, is that given by the Author.

*It is recorded by all the six Imāms of the sound compilations. Al-Zayla'i, vol. 1, 228.
which three rak`ahs can be offered, because Iblis (God’s peace and blessings be on him) led the prayer on both days at the same time.\textsuperscript{19} We rely on the words of the Prophet (God bless him and grant him peace), “The first timing for maghrib is when the sun sets, while the last timing is till the disappearance of the evening glow.”\textsuperscript{20} What he has related was for the avoidance of the disapproval.\textsuperscript{21}

Thereafter, the shafaq is the whiteness on the horizon after the redness, according to Abū Ḥanīfah (God bless him), and according to the two jurists it is the redness itself; and this is also one narration from Abū Ḥanīfah (God bless him). Al-Shāfī`i also holds the same opinion due to the words of the Prophet (God bless him and grant him peace), “Shafaq is the redness.”\textsuperscript{22} Abū Ḥanīfah (God bless him) relies on the words of the Prophet (God bless him and grant him peace), “The last time for maghrib is when the horizon becomes dark.”\textsuperscript{23} What he has related is 

\textit{imawqūf} at Ibn `Umar (God be pleased with both), and is recorded by Mālik (God bless him) in \textit{al-Muwatā’}. There is a disagreement among the Companions (God be pleased with them) on the issue.\textsuperscript{24}

The first timing of the \textit{‘isha} is when the shafaq (dusk—evening glow) disappears, while the last timing for it is till the rise of the second dawn, due to the words of the Prophet (God bless him and grant him peace), “The last timing for \textit{‘isha} is till the time of the dawn.”\textsuperscript{25} This is proof against al-Shāfī`i (God bless him) who fixes it at a time when a third of the night has passed.\textsuperscript{26}

\begin{itemize}
  \item [\textsuperscript{15}]\textsuperscript{19}The tradition has preceded, in particular the tradition from Ibn ‘Abbās (God be pleased with both). Al-Zayla`i, vol. 1, 229.
  \item [\textsuperscript{15}]\textsuperscript{20}It is gharib with these words. A tradition in the same meaning has been recorded by Muslim, and another by al-Tirmidhi. Al-Zayla`i, vol. 1, 230.
  \item [\textsuperscript{15}]\textsuperscript{21}That is, what he has related about the \textit{imāmāh} of Iblis is construed to mean the avoidance of the disapproved timing, because delaying \textit{maghrib} till the last timing is disapproved.
  \item [\textsuperscript{15}]\textsuperscript{22}It is recorded by al-Dār`qutni. Al-Zayla`i, vol. 1, 232–33; al-`Ayni, vol. 2, 30.
  \item [\textsuperscript{15}]\textsuperscript{23}It is gharib. It is recorded by Abū Dāwūd in his \textit{Sunan}. Al-Zayla`i, vol. 1, 234; al-`Ayni, vol. 2, 27.
  \item [\textsuperscript{15}]\textsuperscript{24}When there is a disagreement among the Companions (God be pleased with them), it is not proper to seek support from a \textit{manwaj} tradition. Ibn Nujaym says, however, that the fatwā on this issue is based upon the view of the Imam and not that of his disciples.
  \item [\textsuperscript{15}]\textsuperscript{25}This too is gharib, however, al-Ṭahāwī has supported it on the basis of a number of reports in his \textit{Sharh Ma`ānī al-Āthār}. Al-Zayla`i, vol. 1, 234; al-`Ayni, vol. 2, 30.
  \item [\textsuperscript{15}]\textsuperscript{26}Imām al-Shāfī`i (God bless him) relies on the tradition of the \textit{imāmāh} of Iblis. In such a case, it will become an issue similar to one faced with respect to the last timing.
\end{itemize}

8.1 Recommendations About Timings

\textit{Iṣfār} (appearance of whiteness) is recommended\textsuperscript{27} for the \textit{fajr} prayer,\textsuperscript{28} due to the words of the Prophet (God bless him and grant him peace), “Delay \textit{fajr} till whiteness for it fetches the maximum reward.” Al-Shāfī`i (God bless him) said that it is recommended to hasten each prayer.\textsuperscript{29} The proof against him is what we have related and what we will relate.\textsuperscript{30}

He said: The recommendation\textsuperscript{31} is for praying \textit{zuhūr} at a cooler time during summers and to pray it early in winters, on the basis of what we of \textit{zuhūr}, where the Author maintained that a timing established with certainty cannot be given up on the basis of doubt. There are, however, traditions to the effect that the Prophet (God bless him and grant him peace) offered \textit{išā`} in all three parts of the night.\textsuperscript{32}


The reason is that \textit{witr} is practically a definitive obligation in the Imam’s view (God bless him), and when a timing is assigned two prayers it becomes the timing for both. It is a \textit{ṣunnah} of \textit{išā`} according to the two jurists. Thus, if the worshipper intentionally offers \textit{witr} prior to \textit{išā`}, he is to repeat it by agreement of all. If he does it out of forgetfulness, he is not to repeat it according to the Imam, but he is to repeat it according to the two jurists.

\textsuperscript{27}Except for Muzdalifah during \textit{hajj}.

\textsuperscript{28}The meaning in terms of \textit{fajr} is that delaying \textit{fajr} till the last time is permitted without disapproval, whereas a small congregation is something that is not approved, and so also causing a hardship for the people. \textit{Taghlis} (praying when it is dark) leads to one of two things: causing hardship by asking the people to come early or a lesser number in the morning congregation.

\textsuperscript{29}That is, bringing about the conditions of \textit{salāt}, like purification, wearing clothes and the \textit{adhan}, as soon as the time commences. Al-Ṭahāwī (God bless him) said that the worshipper is to commence with \textit{taghlis} and end the prayer with \textit{iṣfār}; he is to combine the two through a lengthy recitation.

\textsuperscript{30}About \textit{zuhūr} being delayed till a cooler time, in the next rule.

\textsuperscript{31}Whether it is prayed with the congregation or alone.
have related as well as the report of Anas (God be pleased with him). He said, "The Messenger of God (God bless him and grant him peace) used to hasten zuhr in winters, but prayed it in a cooler time during summers." 34

The delaying of `asr 35 is recommended in winters as well as summers till such time that the sun has not changed (its bright white colour), as there is the opportunity of increase in supererogatory prayers 36 due to their disapproval after it. What is considered for such change is the disk of the sun and that is when it turns into a state when the eyes do not feel any strain by looking at it. This is the correct view 37 and delaying it till this time 38 is disapproved (makruh).

The hastening of maghrib is recommended, 39 because delaying it is disapproved (makruh) insofar as there is a similarity in it to the act of the Jews. 40 The Prophet (God bless him and grant him peace) said, "My ummah will continue to attain blessings as long as they hasten offering the evening prayer and delay the night prayer." 41

The delaying of 'isha' up to just before the third of the night (is recommended), due to the words of the Prophet (God bless him and grant him peace), "If I were not apprehensive of creating a hardship for my ummah, I would have delayed the 'isha' prayer to just the (end) of the first third of the night." 42 The reason is that this eliminates the proscribed gossiping that follows early performance. It is said that in summers it should be offered early so that the congregation is not lessened. 43 Delaying it up to midnight is deemed mubah (permissible), because the evidence of disapproval, which is the thinning of the congregation, has been opposed by the evidence of recommendation which is the effective elimination of gossip after it, 44 therefore permissibility is established. Delaying it till the second half is considered disapproved (makruh) as that leads to the thinning of the congregation, while gossiping ends before that.

It is recommended in the case of the witr prayer, for one who is in the habit of offering it late, to delay it till the later part of the night. If he is not confident about waking up, he should offer it before sleeping. This is based on the words of the Prophet (God bless him and grant him peace), "One who is afraid that he will not be up late in the night should offer it in the first part, but one who desires to wake up in the later part of the night should offer witr at the end of it." 45

If it is a cloudy day, then, it is recommended to delay fajr, zuhr and maghrib, while 'asr and 'isha' should be offered early. 46 The reason is that in delaying 'isha' there is the likelihood of reducing the congregation in view of rain, while in the case of 'asr there is a suspicion of falling into the disapproved period. 47 There is no such suspicion in the case of fajr as this is an extended period. It is reported from Abū Ḥanīfah (God
bless him), that he held that delay in all prayers is recommended as a precaution. 49 Do you not see that performance is permitted after the (first) timing and not before it.

49 *Combining two *fard* (definitive) obligations in the timing of one, due to an excuse.*

The Author refers to this briefly in the Book of Hajj. We feel that he should have discussed it here. Accordingly, this note is being added. For a cloudy day, Imam Abi Hanifah (God bless him) offers the principle stated by the Author that "delaying all the prayers is recommended." The reasoning underlying this principle is that delay will vacillate between two possibilities: timely performance or *qadha*. Early performance will vacillate between timely performance and invalid performance in the timing of the prior prayer. Today, we follow our watches and clocks (even in remote villages where life is still primitive). The reasoning, however, leads to the conclusion that offering one *fard* in the timing of another is not valid, unless it is by way of *qadha*. The Hanafi jurists, therefore, formulate the rule: It is not permitted to combine two *fard* obligations in prayer in the timing of one, except at 'Arafah and Muzdalifah, where *zuhr* and *'asr* are combined at the time of *zuhr* at Arafah, while *magrib* and *'ishā* are combined at the time of *'ishā* at Muzdalifah. This is not permitted at any other occasion due to the excuse of journey, rain or the like. Al-Shafi'i (God bless him) said that *zuhr* and *'asr* can be combined and so can *magrib* and *'ishā* on the basis of reports from Ibn 'Abbas and Ibn 'Umar (God be pleased with them) about such combination at Arafah and Muzdalifah. He argues that this may be done so that travel is not curtailed or in rain the congregation is not smaller, because people who return to their houses may not be able to return to the mosque due to rain. Thus, combining the prayers is permitted due to these excuses. The Hanafi jurists (God bless them) argue that delaying prayer till another timing is one of the grave offences (*kabār*). They rely on a report from Ibn 'Abbas (God be pleased with both) that the Prophet (God bless him and grant him peace) said, "A person who combines two prayers in the timing of one has brought about a type of the *kabār* (grave sin)."

This tradition has been recorded by al-Tirmidhi, who says that in the chain is a narrator whom Ahmad has considered *da'if*. The tradition has also been recorded by al-Hajjaj, and he maintains that the narrator is not *da'if*. The tradition, however, is supported by a sound, though *mawqif*, report from 'Umar ibn al-Khattab (God be pleased with him). This report is recorded by Abu al-Razzâq. The *issue*, however, revolves around the *usul* preferred by the two schools. The Hanafis maintain that the timings of the prayers have been established through definitive evidences from the Qur'an and the *mutawātir* reports as well as *ijma'*. Consequently, these timings cannot be altered on the basis of legal reasoning or due to a *khabar wahid*, which cannot restrict definitive evidences. Further, the legal reasoning provided by al-Shafi'i (God bless him) is not valid. The reason is that journey and rain have no force whatsoever in permitting loss of a prayer in its prescribed timing. The combining of the prayers at 'Arafah and Muzdalifah was not based on rationally acceptable arguments. They have been established as ritual prescriptions due to the evidence of *ijma'*. It was done by the Prophet (God bless him and grant him peace) as established through *mutawātir* reports, which could restrict the legal meanings in the definitive evidences. In addition to this, the tradition of al-Shafi'i (God bless him) who quoted is *gharib* as it goes against a well known and established practice, and such a report cannot be accepted by us as proof. Thereafter, the report has
something other than him. This is the ending of the circumambulation and the protection of the worship from being lost.\(^{57}\)

It is disapproved to offer supererogatory prayers after the rising of the sun beyond the two rak'ahs of fajr. The reason is that the Messenger of God (God bless him and grant him peace) did not pray more than these two despite his eagerness for prayer.\(^{19}\)

Supererogatory prayers are not to be offered after sunset prior to the offering of the obligatory prayers, because these will lead to delay in the maghrib prayer.

Supererogatory prayers are not to be offered when the imam has risen for the khutbah (sermon) until he has completed his sermon, because this leads to occupation with other matters to the neglect of the sermon.

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\(^{57}\) An exercise for the would-be jurist.—Those who wish to develop their skills as jurists and their legal reasoning may try answering the following question(s): (The first two apply to fard and the rest to nowâfil): (a) Which obligatory prayer (fard) offered in these timings is valid? (b) Which obligatory prayer offered in these timings is not valid? (c) Are the nawâfil offered in these timings valid though disapproved? (d) If a naâl prayer started in such a timing is rendered invalid, will it give rise to qadâ? (e) What is the rule for the timing when the sun is about to set, but has not, when the 'asr prayer has not been offered? (f) What is the rule in this case when the 'asr prayer has been offered, but time is still left for sunset? (g) What is the rule for similar situations for the fajr prayer? (h) What about the time when the sun has set, but maghrib has not been offered as yet? (i) What is the rule with respect to these timings when the cause for the obligation has been brought about by the worshipper himself? (j) Do all these timings come to twelve? If so, how many of these are due to time itself? (k) And finally, separate the rules for different schools of law.

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Chapter 9

Adhān (Call to Prayer)

Adhān' (call to prayer) is a required practice (sunnah) for the five prayers as well as jumu‘ah and not for other prayers besides them, due to mutawātir transmissions about this.

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1In its literal sense, the word means i‘lām (notification). In its technical meaning it is notification in a specific manner at specified times. The term is also applied to mean particular words, and the syntactical order of these words is a sunnah. Accordingly, if the order is changed, it is preferable to repeat the adhān.

2It is a sunnah according to most jurists. Some of our fuqahā’ maintain that it is wajib (obligatory), based on the words of Imām Muḥammad (God bless him) that if the residents of a land agree to give it up we would fight them. Such fighting, however, would be binding due to their negligence and the giving up of their din, just like the giving up of zakāt.

3For men.

4He has mentioned jumu‘ah to take care of the conception that perhaps adhān for it is like the prayers of the two ‘ids, as all these are related to the rules pertaining to the imām as well as the comprehensive city (miṣr jāmi‘), otherwise this prayer is included in the five prayers.

5Like witr, the ‘id prayers, tarāwih, the eclipse prayer, īstisqa’, funeral prayers and other prayers.

6There are well known traditions recorded by Muslim on the issue. Al-Zayla‘ī, vol. 1, 257.

7That is, its mutawātir transmission right from the time of the Prophet (God bless him and grant him peace). Al-‘Aynī, vol. 2, 78.
The description of adhān is well known, and is in accordance with the adhān of the Angel who descended from the sky.

And there is no tarjīn in it, and that is the taking back of his tone and then raising his voice for the two shahādahs after having pronounced them softly. Al-Shāfi`i (God bless him) said that there is tarjīn in it due to the tradition of Abū Maṣṣāh (God be pleased with him) that "the Prophet (God bless him and grant him peace) ordered him to observe tarjīn." Our argument is that tarjīn is not mentioned in the well known traditions. What has related was merely to instruct and he thought it was an order to observe tarjīn.

The origin of the adhān is attributed to different causes, however, the jurists see no clash between them. One report attributes it to the night of ascension (isrā`) and the Angel's adhān. Another report says that Abū Allāh ibn Zayd and ‘Umar ibn al-Khattāb (God be pleased with them) both saw it in their dreams. Another view is that it is based upon the adhān of Abraham (God bless him and grant him peace): "And make the call (adhān) of prayer to me and to your parents."

And make the call (adhān) of prayer to me and to your parents. This is what the Angel descending from the sky did, and this is well known. Thereafter, it is proof against al-Shafi`i (God bless him) when he maintains that iqāmah is to be pronounced with single pronouncements, except the words qad qāmati 's-salāt that are pronounced twice.

He (the mu`addhin) is not to hasten the recitation of adhān and is to adopt rapid recitation for the iqāmah, due to the words of the Prophet (God bless him and grant him peace) to Bilāl, "When you recite the adhān, do it in a relaxed manner," but when you pronounce the iqāmah, do it rapidly." This is an elaboration of (the underlying) recommendation.

He is to face the qiblah while making the calls. The basis is that the Angel descending from the sky made the call for prayer while facing the qiblah. If he does not face the qiblah, it is still valid due to the attainment

The jurists conclude from this that it is musta`fandh (recommended).

It is recorded by Ibn Mājah, Ahmad, al-Bayhaqi and others. Al-Zayla'i, vol. 1, 284-85; al-'Ayni, vol. 2, 82-83.

It is recorded by Abu Dawūd. In Abu Dawūd's report from Mu`ādh ibn Jabal (God be pleased with him), 'Abd Allāh ibn Zayd (God be pleased with him) describes the iqāmah pronounced by the Angel. Al-Zayla'i, vol. 1, 266; al-'Ayni, vol. 2, 83.

Imām al-Shafi`i (God bless him) relies on a report from Anas (God be pleased with him). The Hanafis maintain that the report they rely upon is marah (pronounced by the Angel) and cannot be overturned with the report of a single person.

This is based upon the required practices of adhān. Some of these pertain to the adhān itself, while others refer to the qualifications of the mu`addhin.

For adhān, a space of a few moments is to be given between the statements of the adhān. This is not to be done for the iqāmah.

It is recorded by al-Tirmidhī. Al-Zayla'i, vol. 1, 275; al-'Ayni, vol. 2, 89.

This tradition has preceded as recorded by Abū Dawūd. Al-Zayla'i, vol. 1, 274; al-'Ayni, vol. 2, 90.
of the objective, however, it is deemed disapproved (makruh) due to the opposition of the sunnah.

On pronouncing the word salah (hayya 'ala 's-salah) and the word falah (hayya 'ala 'l-falah), he is to turn his face to the right and then to the left, because these words are addressed to the people, therefore, they are pronounced while facing them.

If he turns (in a circular fashion) on his pedestal, it is valid. He means thereby that (he may do so) if he is not able to turn his face to the right and to the left while keeping his feet planted in their place, as is the sunnah, something that may occur when the pedestal is spacious. If he does so without need, it is not permitted.

It is preferred for the mu'adhdhin to insert his fingers in his ears. This is what the Prophet (God bless him and grant him peace) ordered Bilāl (God be pleased with him) to do, and also because it is the best method of making the call. If he does not do so, it is (still) deemed proper (hasan), because it is not a primary sunnah (opposition to which amounts to innovation).

Tathwīb for the fajr prayer, that is, hayya 'alā 's-salah, hayya 'alā 'l-falah, pronounced twice between adhān and iqāmah is deemed good, because it is the time of sleep and heedlessness. It is disapproved for the remaining prayers. The meaning of (tathwīb) is to return to the notification after having notified (the time for prayer), and it is in accordance

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1. The jurists maintain that it is recommended to pronounce the adhān from a raised platform. In support, they mention reports about the places close to the mosque of the Prophet (God bless him and grant him peace) from where Bilāl (God be pleased with him) used to make the call for prayer.

2. This refers to a tradition agreed upon by al-Bukhārī and Muslim. Al-Zaylā'ī, vol. 1, 276.

3. This is stated in al-Waqiyāt that this refers to a situation where keeping his feet planted and turning may not result in proper "notification."


5. That is, it still does not take away from the proper pronunciation of the adhān. Further, the reason is that it was not mentioned in the tradition of Abd Allāh ibn Zayd (God be pleased with him).

6. The literal meaning of tathwīb is return. The word thawāb is related to it as the benefit of the acts of returns to him. Here it means returning to the notification again and again.

7. For the remaining prayers it is considered an innovation. The Companions (God be pleased with them) are reported to have looked down upon those who attempted to do this, calling it an innovation.

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with what they practised. This tathwīb was initiated by the jurists of Kufa after the period of the Companions (God be pleased with them) due to the changing behaviour of the people. They made it specific to the fajr prayer, as we have mentioned, while the later jurists preferred it for all prayers due to the emergence of laziness with respect to religious matters. Abū Yusuf (God bless him) said that he did not see any harm in the mu'adhdhin saying to the amīr (ruler) in all such blessings, "Peace on you, O amīr, the mercy of God and His blessings, hayya 'alā 's-salah, hayya 'alā 'l-falah, may God have mercy on you." Muhammad (God bless him) disregarded this as the people are all equal in social matters. Abū Yusuf (God bless him) made it exclusive for the rulers due to their preoccupation with affairs of the Muslims so that they may not lose the congregation. The same applies to the qādī and the muftī.

He is to sit down (for a period) between adhān and iqāmah, except in the case of the maghrib prayer. This is the view according to Abū Ḥanīfah (God bless him). The two disciples said that he is to sit for the maghrib prayer as well, for a brief moment, because it is necessary to separate the two and linking both is disapproved. This separation does not occur through silence due to the presence of such silence between the words of adhān. Thus, he is to separate the two by sitting as is done for two consecutive khutbahs (sermons). Abū Ḥanīfah (God bless him) argues that delay is disapproved (makruh), thus, it is sufficient to make the minimum separation to avoid delay. In our issue the place is different and so is the voice, therefore, a separation takes place due to silence, and this is not the case in a khutbah. Al-Shāfīʿi (God bless him) said that he is to implement the separation through two rak'as (prayers) keeping in view the practice for the remaining prayers. The distinction has been mentioned by us. Ya`qūb, (Abū Yusuf) said: "I saw Abū Ḥanīfah, (God bless him) making the call for the maghrib prayer and pronouncing the iqāmah, and not sitting between the adhān and the iqāmah." This conveys what we have

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9. There are two daʿīf traditions on this. One is recorded by al-Tirmidhī and the other by Ibn Mājah. Al-Zaylā'ī, vol. 1, 279.

10. Without specifying the words to be used for it.

11. And, anyone employed in public service.

12. The person and place are the same, therefore, analogy constructed upon the khutbah is not valid.

13. When he said that delay in it is disapproved.
It is recommended that the mu'adhdhin be knowledgeable about the sunnah due to the words of the Prophet (God bless him and grant him peace). "The best of you should make the call for prayer,"

For prayers lost, he is to pronounce the adhān and then the iqāmah. The basis is that the Prophet (God bless him and grant him peace) offered fajr as qadā' (delayed substitute performance) after the night of ta'rīf (dismounting by the traveller late at night) with adhān and iqāmah and this is proof against al-Shāfī’ī (God bless him) who considers iqāmah to be sufficient.

If he has lost a number of prayers, he is to pronounce the adhān for the first and make the iqāmah, on the basis of what we have related. He has a choice with respect to the rest. He may pronounce the adhān and the iqāmah if he likes, so that the qadā' may conform fully to the adā' (timely performance), and if he likes he may restrict himself to the iqāmah, because adhān is for the presence of the people and they are present. He (the Author—God be pleased with him) said: It is narrated from Muḥammad (God bless him), that he is to make the iqāmah for the remaining prayers and is not to make the adhān. The jurists said that it is possible that this is the view of all the jurists.

It is necessary that he make the call to prayer (adhān) and the call for commencement (iqāmah) in a state of purification, but if he does so without minor ablution (wudu'), it is still valid, because it is dhikr (remembrance) and not a prayer, thus, wudu' in this case is recommended as it is in the case of recitation. It is deemed disapproved (makrūh) to make the iqāmah without wudu' insofar as a separation (is created) between iqāmah and salāt (by the performance of wudu').

It is, however, narrated that even iqāmah (without wudu') is not considered disapproved as it is one of the two adhāns. It is also narrated that even adhān (without wudu') is considered disapproved as he is making a call for a state (of purification) that he has himself not answered.

It is deemed disapproved that he makes the call for prayer (adhān) when he is in a state of major impurity (janābah), by unanimous agreement. The interpretation of the distinction in one narration is that the adhān is similar to prayer, therefore, purification from a state of enhanced ritual impurity is stipulated and so also for hadath, just as purification from both is necessary for the validity of salāt, but in another narration, which is the narration of the Zāhir al-Riwayah there is no disapproval for the lighter of the two, acting upon the similarity between adhān and recitation where recitation is allowed without wudu', but not without bathing. (Imām Muḥammad says) in al-Jamr al-Saghir: If he has made the call for prayer and that for commencement without wudu', he is not to repeat them, but in the case of the junub I would prefer that he repeat them. If, however, he does not repeat them, it (salāt is) valid. In the first case, it is due to the lightness of the ritual impurity. As for the second, in repetition due to major ritual impurity there are two narrations. The more plausible of these is that he should repeat the adhān and not the iqāmah, because the repetition of the adhān is lawful but not the iqāmah. His statement that ‘if he does not repeat them, it is valid’ means the the prayer is valid, as it is valid without adhān and iqāmah.

He said: Likewise, the woman makes the call to prayer, meaning thereby that it is recommended that the adhān be repeated in accordance with the sunnah.

The call for a prayer is not to be made before the commencement of its time and it is to be repeated within the time. The reason is that adhān is meant for notification, and doing so before time leads to confusion.

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44 That is, he is not to sit down between the two for maghrīb.
46 That is, it is recommended for lost prayers whether they are offered in a congregation or alone.
48 That is, it is required by way of recommendation as is to be concluded from the rest of the statement.
49 That is, it is valid without an accompanying disapproval.
50 In this case, it is valid, but with an accompanying disapproval.
51 Assuming that the person making the iqāmah has to pray with the congregation.
Abū Yūsuf (God bless him) said, and this is also the opinion of al-Shāfiʿī (God bless him), that it is permitted for the ṣaḥr prayer in the second half of the night, and this is due to inherited transmission from the people of the two Harāms. The proof against all is the statement of the Prophet (God bless him and grant him peace) to Bilāl, “Do not make the call for prayer until the rise of the dawn has become clear to you (like this),” and he spread his hands horizontally.

The person on a journey is to make the call for prayer (adḥān) and for its commencement (iqāmah), due to the saying of the Prophet (God bless him and grant him peace) to the two sons of Abū Mālikah (God be pleased with them), “When you travel, both of you should make the call for prayer and both the call for commencement.”

If both are given up together, it is considered makrīḥ (disapproved), but if iqāmah is deemed sufficient, it is valid, because adḥān is for ensuring the attendance of people who are absent, whereas the travelling companions are present. Iqāmah, however, is for announcing the commencement, and this they need.

If he prays in his house in the city, he is to pray with the adḥān and the iqāmah, so that the performance of the prayer is in the form of a congregation; but if he gives this up, it is valid, due to the saying of Ibn Masʿūd (God be pleased with him), “The adḥān of the locality is sufficient for us.”

Chapter 10

The Conditions that Precede Prayer

It is obligatory for the person praying to give precedence to purification from ritual and actual physical impurities in the manner we indicated in what has preceded. God, the Exalted, has said, “And thy garments keep free from stain!” and he said, “If you are in a state of ceremonial impurity, bathe your whole body.”3 And he is to cover his private parts, due to the words of the Exalted, “Wear your beautiful apparel at every time and place of prayer,”4 that is, what will cover your private parts at the time of each prayer. The Prophet (God bless him and grant him peace) has said, “There is no prayer for a woman who has started menstruating except through a covering,”5 that is, a woman who has attained puberty.

The ‘awrah (private parts) of a man extends from what is below the navel up to his knees, due to the words of the Prophet (God bless him and grant him peace), “The ‘awrah of a man is between his navel and his knees.”6 It is also reported in the words, “What is below the navel up to what is below the knees.”7 This reveals that the navel is not included in the

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45This rule has special relevance where people begin fasting with the adḥān. In such a case, making the call before time during Ramadan is likely to lead to confusion, as the Author states.
46It is recorded by Abū Dāwūd, Al-Zayla`i, vol. 1, 283; al-Aynī, vol. 2, 133.
47It is recorded by all the six Imams of the sound compilations. Al-Zayla`i, vol. 1, 290; al-Aynī, vol. 2, 114.
48This tradition is also recorded by al-Dārʾqūṭnī. Al-Zayla`i, vol. 1, 298.
private parts, as against what is maintained by al-Shāfi’ī (God bless him), and the knees are included in the private parts, which is again opposed to his opinion. The word ilā (up to) is to be interpreted as the word ma’ (including), acting on the meaning of the word hattā (untill, until) or by acting upon the words of the Prophet (God bless him and grant him peace). “The knees are included in the private parts.”

The entire body of a freewoman is the ‘awrah, except for her face and the palms of her two hands, due to the words of the Prophet (God bless him and grant him peace), “A woman is a concealed ‘awrah.” The exemption of the areas (parts) is due to the necessity of uncovering them. He (God be pleased with him) said that this is explicit in holding that the feet are also the ‘awrah, but it is related that they are not and that is the correct view.

If she prays when a fourth or third of her calf is uncovered, she is to repeat her prayer, according to Abū Ḥanīfah and Muḥammad (God bless them). If it is less than a fourth, she is not to repeat it. Abū ʿUsfūf (God bless him) said that she is not to repeat it even if less than one-half of the calf is uncovered. The reason is that a thing is described through its major part when what is being compared to it is less than it, for this is how both terms of comparison are used. With respect to one-half, there are two narrations from him. Thus, he considers either exceeding the minimum or not reducing the maximum. The two jurists argue that one-fourth conveys the meaning of the complete limb, as was the case in the rubbing (mash) of the head or shaving the head after ihram. Thus, a person looking at another’s face reports that he has seen it, even though he has not seen more than one of its four sides.

The hair, the front of the torso and thighs are similar, that is, their rules are based on the same disagreement, because each one of them is a separate body part. The meaning is the hair that hangs down from the head, and this is correct. The washing of these was set aside in the case of janabhah due to the hardship involved. The genitals (‘awrah ghalizah) are governed by the same disagreement, although the penis is considered a separate limb and so are the testicles. This is the correct view, that is, not treating them as one.

What is ‘awrah for a man is the ‘awrah for an amah and so is the front of her torso and her back. What is besides this of her body is not part of the ‘awrah. This is based on the words of ‘Umar (God be pleased with him), “Get rid of your veil stinking wretch, do you wish to pass as a freewoman?” Further, she usually goes out on errands for her master in her work clothes, thus, to avoid hardship, her state is judged to be like that of a woman in the prohibited category for all men.

One who does not find anything with which to remove impurity (from his dress), is to pray with it, and is not to repeat it. This is interpreted in two ways. In case one-fourth or more of the dress is pure, he is to pray in it, but if he prays naked, his prayer is not valid, because a fourth of a thing stands in the place of the whole. If less than one-fourth is pure, then, the rule is the same according to Muḥammad (God bless him), and it is also one opinion of al-Shāfi’ī (God bless him). The reason is that praying in it leads to the giving up of one obligation, while praying naked amounts to giving up several obligations. According to Abū Ḥanīfah and Abū ʿUsfūf (God bless them) he has a choice between praying naked and praying in the dress, and the latter is preferable. The reason is that both are obstacles in the way of permissibility of prayer in the case of a choice and are similar in terms of the amount of exemption; thus, they are similar with respect to the hukm of prayer. The giving up of a thing for its substitute does not amount to giving up of the obligation. The preference is created because covering of the private
parts is not specific to prayer alone (being required otherwise too), while purification is specific to it.

A person who does not find a dress is to pray naked in the sitting posture, bowing and prostrating by indication.\(^3\) This is what the Companions of the Prophet (God bless him and grant him peace) did.\(^3\) If he prays in the standing posture, his prayer is valid. The reason is that in the sitting posture the private parts are covered, while in the standing posture he is able to perform the arkān. He may, therefore, incline towards any of the two he likes, except that the first is preferable. The reason is that covering is obligatory due to the claim of prayer and as a right of the public,\(^3\) and also because there is no substitute for it,\(^3\) while indication is a substitute of the arkān.

The worshipper is to form the niyyah (intention)\(^3\) for the prayer that he is about to offer without separating the niyyah from the takhrimah with any act. The legal basis for this are the words of the Prophet (God bless him and grant him peace), “Acts are determined by intentions.”\(^3\) Further, the commencement of prayer is by standing up for it, which is an act that vacillates between normal movement and worship and a distinction cannot be made except through niyyah. The niyyah that precedes takbir is operative when the takbir is pronounced as long as an act is not performed that cuts off such operation; and it is an act that is not compatible with prayer. The niyyah that is formed after the takbir is not to be taken into account,\(^3\) because the acts that precede it are not worship due to the absence of niyyah. In the case of fasting it is permitted due to necessity. Niyyah is resolve and the condition is that the worshipper know his heart as to which prayer it is. Pronouncing it in words is of no legal consequence, but it is considered good insofar as it helps in focusing his resolve. Thereafter, if the prayer is supererogatory, an unqualified niyyah is sufficient likewise if it is a sunnah prayer, according to the sound report. If it is an obligatory prayer, it is necessary to identify the obligation, like zuhr for example, due to the various obligations.

If he is following another in prayer, he formulates the intention for the prayer as well as for following that person. The reason is that invalidity of his prayer\(^3\) is binding on him as well, therefore, it is necessary for him to accept it.

He said: He is to face the direction of the qiblah, due to the words of the Exalted, “Turn then your face in the direction of the Sacred Mosque: Wherever you are, turn your faces in that direction.”\(^29\) Thereafter, the person present in Mecca should fix his eyes on the Ka'bah,\(^30\) and one who is not there should fix them on its direction; this is the sound view. The reason is that obligation is imposed according to ability.

A person in a state of fear\(^31\) may pray in any direction that it is possible for him, due to the realisation of an obstacle and here it resembles the case of the person who does not know the direction of the qiblah.

If the direction of the qiblah has become vague for him and there is no one around him whom he can ask, he is to strive to the best of his ability to find it and pray (in the direction he has determined). The reason is that the Companions (God be pleased with them) undertook an investigation and prayed (in the direction determined), and the Messenger of God (God bless him and grant him peace) did not negate their act.\(^32\) It is obligatory to act on the basis of the apparent evidence when another superior evidence is not available. Seeking information in this case is better than (personal) investigation.

If he comes to know, after he has prayed, that he made a mistake (in determining the direction), he is not to repeat his prayer. Al-Shāfī'i

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\(^{3}\) According to Al-'Aynī, what the author has stated is transmitted from Ibn 'Abbās, Ibn 'Umar, 'Āthīr, Ikrimah, Qatadah, al-Awwāz and Ahmad. Al-Muzani said that he is to pray in the sitting posture alone. Mujāhid, Zufar, Mālik, al-Shāfī'i and Ibn al-Mundhir said that he is to pray standing and also perform ruku and sujud. Al-'Aynī, vol. 2, 136.

\(^{3}\) It is gharib, however, it is recorded by 'Abd al-Razzāq. Al-Zayla'i, vol. 1, 301; Al-'Aynī, vol. 2, 137. See next note, however.

\(^{3}\) Adopting a covering is obligatory otherwise one becomes a public nuisance.

\(^{3}\) For a covering.

\(^{3}\) Most jurists agree that niyyah of the qabīl without the use of words is valid, as the author states below.

\(^{3}\) It is recorded in all the six sound compilations. Al-Zayla'i, vol. 1, 301; Al-'Aynī, vol. 2, 136.

\(^{3}\) Al-Karkhi states that it is acknowledged as long as he is within thāra'. Opinions may vary as to the limit up to which such niyyah is to be acknowledged. The maximum limit in such views is up to the ruku.

\(^{3}\) The imān's prayer.

\(^{3}\) Qur'ān 2:144.

\(^{3}\) There is a tradition from Ibn 'Abbās (God be pleased with both) about this, recorded by al-Bukhārī and Muslim. Another tradition recorded from Abū Hurayrah (God be pleased with him) by al-Tirmidhi talks about fixing the eyes on the direction of the Ka'bah. Al-Zayla'i, vol. 1, 303.

\(^{3}\) From the enemy, predators, drowning or for some other reason.

\(^{3}\) As in a tradition recorded by Abū Dawūd, al-Tirmidhi and Ibn Majah. Al-Zayla'i, vol. 1, 304.
parts is not specific to prayer alone (being required otherwise too), while purification is specific to it.

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22 According to Al-Ayni, what the Author has stated is transmitted from Ibn `Abbas, Ibn `Umar, `Aṭṭā, `Ikrimah, Qatadah, al-Awsāṭi and Ahmad. Al-Muzani said that he is to pray in the sitting posture alone. Mujahid, Zufar, Malik, al-Shafi`i and Ibn al-Mundhir said that the person is to pray standing and also perform ruku and sujud. Al-Ayni, vol. 2, 136.

23 It is ghari b, however, it is recorded by Abū `Abd al-Razzāq. Al-Zayla`i, vol. 1, 303; Al-Ayni, vol. 2, 137. See next note, however.

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25 For a covering.

26 Most jurists agree that niyyah of the qalb without the use of words is valid, as the Author states below.

27 It is recorded in all the six sound compilations. Al-Zayla`i, vol. 1, 301; Al-Ayni, vol. 2, 138.

28 Al-Karkhi states that it is acknowledged as long as he is within thanā. Opinions may vary as to the limit up to which such niyyah is to be acknowledged. The maximum limit in such views is up to the ruku.

29 The ima m's prayer.

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32 From the enemy, predators, drowning or for some other reason.

33 As in a tradition recorded by Abū Dāwūd, al-Tirmidhi and Ibn Mājah. Al-Zayla`i, vol. 1, 304.
(God bless him) said that he is to repeat it if he had his back towards the qiblah, due to the certainty that he made an error. We maintain that the only thing he is capable of is to face the direction he has estimated, and obligation is always qualified with ability. If he comes to know of the error during prayer he is to turn towards the qiblah and continue praying. The reason is that the people of Quba, when they heard about the change of the qiblah, turned towards it away from the direction they were facing. The Prophet (God bless him and grant him peace) deemed this as good. Likewise, if his opinion about the direction changes during prayer he is to turn towards the new direction due to the obligation of acting upon ijtihab in matters of direction without annuling what has been already performed.

He said: If a person leading a group in prayer on a pitch black night, estimates the direction of the qiblah and prays towards the east, while those following him estimate it too and each one of them prays in another direction, when all are praying behind him, not realising what the imam has done, then, their prayer is valid, due to their facing a direction that is estimated. This difference in direction does not act as an obstacle (for validity of prayer). If one of them comes to know about the direction taken by the imam, his prayer is nullified, because he has come to believe that the imam has made a mistake, and likewise for one who is standing in front of the imam, because he has given up the obligation of the place (of standing).

Chapter 11

The Description of Prayer

The definitive obligations (farā'id) of prayer are six: (1) tahrīmah, due to the words of the Exalted. "Proclaim the greatness of your Lord." The meaning is the opening takbir; (2) qiyam, due to the words of the Exalted, "And stand before God in a devout (frame of mind),"; (3) qirā'ah (recitation), due to the words of the Exalted, "Recite what is easy

注:文中提到的页面106，书名Al-Hidayah和Book II: Prayer。
have been prescribed by way of repetition, the first sitting posture, the recitation of the tashahhudd in the final sitting posture, the qunut (supplication), and the witr prayer, the takbiras of the two 'ids, reciting aloud in what requires loud recitation, and silent recitation of what requires silent recitation, for which reason the prostrations of error are obligatory for relinquishing such recitation. This is the sound view. These have been called sunnah in the Book as their obligation has been established by the sunnah.

He said: When the worshipper commences prayer, he is to pronounce the takbir, due to what we have recited. The Prophet (God bless him and grant him peace) said, "Its tahrim is the takbir." Takbir (outside salat) is a condition in our view with al-Shafi'i (God bless him) disagreeing. Thus, whoever pronounces the tahrim for the definitive obligation (fard) may offer the voluntary (supererogatory) prayers with it too, in our view. He (al-Shafi'i) says that what is stipulated for it (the tahrimah) is stipulated for the remaining arkan" and this is a sign of being a rukn (essential element). Our evidence is that God has used it in conjunction with salat in His words, "And remembers the name of his Guardian-Lord, and prays." The implication of the verse is separation, therefore, it is not repeated like the repetition of the arkan. The stipulation of conditions for the tahrim are due to its link with qiyam.

He is to raise his hands with the takbir, and this is a sunnah. The reason is that the Prophet (God bless him and grant him peace) did this persistently. This statement (of al-Quduri) indicates the stipulation of its conjunction and this is reported from Abu Yusuf (God bless him) and

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is narrated from al-Ṭahāwi (God bless him), and the sound view is that he is to raise his hands first and then pronounce the takbir, because his act is the denial of the greatness of all things other than God, the Exalted, and the negation has precedence over affirmation.

He is to raise his hands till his thumbs are parallel to his earlobes. According to al-Shāfiʿi (God bless him) he is to raise them up to his shoulders. The same rule is assigned to the takbir of the qunūt, ʿid and funeral prayers. He relies on the tradition of Abū Ḥumayd al-Sāʿīdī (God be pleased with him) who said, “When the Prophet (God bless him and grant him peace) used to pronounce the takbir, he raised his hands up to his shoulders.”

We rely on the reports of Wālī ibn Ḥajār, al-Barrāʿ and Anas (God be pleased with them) that “the Prophet (God bless him and grant him peace) when he pronounced takbir, used to raise his hands till they were parallel to his ears.” Further, raising of the hands is for notifying the deaf (who cannot hear) and it is as we have stated (up to the ears). What he has related is confined to the case of inability (to do so).

A woman raises her hands up to the shoulders. This is sound as it is compatible with her covering.

If in place of the takbir, he says Allāh Ajall or Aʿzām or al-Rahmān Akbar or là ilāha illa Allāh, or another name of God, the Exalted, his pronunciation is valid according to Abū Ḥanifah and Muḥammad (God bless them). Abū ʿYūsuf (God bless him) said that if he can pronounce the takbir, then it is not valid unless he uses the words Allāhu Akbar or Allāhu al-Akbar or Allāhu al-Kabīr. Abū Ḥanifah (God bless him) said that it is not valid except with the first two phrases (out of the three). Mālik (God bless him) said that it is not valid except with the use of the first phrase, because that is what has been transmitted. The basis for reliance in this is the texts. Abū Ḥanifah (God bless him) maintains that using the definite article “al” in the phrase is more eloquent for purposes of praise and, therefore, stands in place of the word without it. Abū ʿYūsuf (God bless him) maintains that the forms “afāl” and “faʿīl” have the same strength when used for the attributes of God, the Exalted. This is different from the case where the person is not able to pronounce them, for here he is only able to express the meaning. The two jurists (Abū Ḥanifah and Muḥammad) maintain that takbir is the literal expression of greatness and this is achieved (whatever the names used).

If he commences prayer in Farsi or recites it in Farsi or slaughters an animal with a pronouncement in Farsi, when he can pronounce the Arabic form, his acts are deemed valid according to Abū Ḥanifah (God bless him). The two disciples said that only the slaughter is valid, however, if he cannot pronounce in Arabic, his acts are valid. As for the discussion about the commencement of salāt, Muḥammad sides with Abū Ḥanifah (God bless them) with respect to Arabic, while he sides with Abū ʿYūsuf (God bless him) regarding the opinion about Farsi. The reason is that the language of the Arabs has merits that are not to be found in other languages. As for the discussion about recitation, the interpretation of the words of the two jurists is that the Qurʾān is the name for the Arabic syntax as has been stated by the text, however, in case of inability (to pronounce it), it is sufficient to do so in meaning like indications (of bowing and prostrating) in prayer. This is different from the pronouncement of the names as this can be done in each tongue. Abū Ḥanifah (God bless him) relies on the words of the Exalted, “Without doubt it is (announced) in the Books of Books of former peoples” and they did not speak this language. Thus, it is permitted in case of inability. Nevertheless, the person does come to oppose the inherited sunnah. The pronouncements are valid in any language other than Farsi due to what we have recited. The meaning does not differ due to a difference in languages; the disagreement is about reckoning it (Farsi) as equivalent to Arabic in the spiritual sense. There is also no disagreement that it invalidates prayer. It is reported that the Imam reverted to the opinion of the two disciples in the essential issue, and this is what is relied upon. The khutbah and the tasbahhab are governed by the same juristic disagreement. In the case of adhān, the practice of the people is taken into account.
that it is valid, because its meaning is "O God." It is also said that it is not valid as the meaning is "O God grant us your blessings," in which case it becomes a supplication.

He said: He is to place his right hand over his left hand below the navel, due to the words of the Prophet (God bless him and grant him peace), "A part of the sunnah is the placing of the right over the left below the navel." This is proof against Mālik (God bless him), in leaving the hands unfolded, and also against al-Shāfiʿī (God bless him) in folding them over the breast. Further, the reason is that in placing them under the navel there is greater humility (and acknowledging the greatness of God), and that is the purpose. Thereafter, placing one hand over the other is a sunnah that is part of standing up for prayer according to Abū Hanifah and Abu Yusuf (God bless them), so much so that they are not left hanging even during glorification (thana). The rule is that each qaṣīm (performance of prayer), in which a recitation (dhikr) is prescribed by the sunnah, the hands are to be folded, and they are not to be folded for performance in which such recitation is not prescribed. Thus they are to be folded in the state of qunīt (supplication), funeral prayer, but they are to be released during the qawmānah (rising up from ruku) and between the takbīrs of the 'id (in which there is no dhikr or recitation).

Thereafter, he says: subhānāk 'allāhumma ... upto its end. According to Abū Yusuf (God bless him), he is to add to this, "Innī wajjahtu wajhi" (For me, I have set my face, firmly and truly, towards Him ...) up to its end, due to the narration of 'Ali (God be pleased with him) from the Prophet (God bless him and grant him peace), that he used to say this. The two jurists rely on the narration of Anas (God be pleased with him) that "the Prophet (God bless him and grant him peace) on opening the prayer used to pronounce the takbīr and recite, subhānāk 'allāhumma ... up to its end, and did not add anything to this." What Abu Yūṣuf (God bless him) has related is to be interpreted to mean the prayer of tahajjud. His words, "Wa jalla thanā'uka" have not been mentioned in the well known traditions, therefore, they are not to be brought into the definitive obligations (fara'id). It is also better not to bring in the words, "Innī wajjahtu wajhi" prior to the takbīr so that the niyyah gets linked to it, and this is the sound view.

He is to seek refuge with God from the cursed Satan, due to the words of the Exalted, "When you read the Qur'an, seek God's protection from Satan the rejected one." The meaning is: when you decide to recite the Qur'an. It is preferable if the worshipper says, "Astā'dhu billāhī ...", so that his words conform with those in the Qur'an, however, very close to these are, "A'udhu billāhī ..." Thereafter, al-ta'awwudh is associated with recitation and not with thanā, according to Abū Hanifah and Muhammad (God bless them), due to what we have recited, so that it is pronounced by one catching up with the māmā (the masbūq), but not one following him till he catches up (from the start or after catching up). It is to be delayed till after the takbīrs of 'id, but Abū Yūṣuf (God bless him), disagrees with this.

He said: He is (then) to recite bismillāhi 'r-rahmāni 'r-rahim (in the name of God, Most Merciful and Compassionate). This is how it has been transmitted in well known traditions.
He is to pronounce it inaudibly, due to the statement of Ibn Mas'ūd (God be pleased with him) that four pronouncements are to be made inaudibly by the imām; he mentioned among them at-talāwawd, tasmiyyah and āmin.19 Al-Shāfi‘i (God bless him) said that he is to pronounce the tasmiyyah through an audible recitation due to the report that “the Prophet (God bless him and grant him peace) recited the tasmiyyah audibly in his prayer.”20 We say in response to this that it is to be interpreted to mean that it was done for the purpose of instruction, because it was not pronounced audibly.42 Thereafter, according to Abu Hanifah (God bless him), like ta'āwudh he is not to pronounce it in each rak‘ah. It is also reported from him that he permitted this as a precaution,43 which is the view of the two jurists. He is not to recite it, however, between a sūrah and the Fātiḥah,44 except according to Muhammad (God bless him), who maintains that he is to do so in a prayer that is offered inaudibly.45

Thereafter, he is to recite the Fātiḥah al-Kitāb (the Opening) and a sūrah or three verses from any sūrah that he likes. The recitation of al-Fātiḥah is not established as a rukn (essential element) of prayer, and likewise the addition of a sūrah to it. Al-Shāfi‘i (God bless him) disagrees with this to the extent of al-Fātiḥah, while Mālik (God bless him) disagrees with respect to both. He (Mālik) relies on the saying of the Prophet (God bless him and grant him peace), “There is no prayer without the Fātiḥah al-Kitāb and a sūrah with it.”46 Al-Shāfi‘i (God bless him) relies on the words of the Prophet (God bless him and grant him peace), “There is no prayer without the Fātiḥah al-Kitāb.”47 We rely on the words of the Exalted, “Recite what is easy from the Qur’ān.”48 An addition to this (verse) through a khabar wāḥid is not permitted,49 but it still has to be acted upon, therefore, we upheld the obligation (wujūb) of both rules. When the imām says, “Wa lā ‘d-dallīn,” he is then to say āmin (amen), and it is also to be said by the follower. This is based on the words of the Prophet (God bless him and grant him peace), “When the imām pronounces āmin, you should pronounce it too.”50 Mālik (God bless him) cannot adopt the saying of the Prophet (God bless him and grant him peace), “When the imām says wa-lā ‘d-dallīn, then, you should say āmin” insofar as it divides the duty (assigning it only to the follower), because the Prophet (God bless him and grant him peace) says at the end of the tradition, “The imām says it too.”

He said: They are to pronounce it inaudibly, due to the report related by us about the tradition of Ibn Mas'ūd (God be pleased with him),51 because it is a supplication and is, therefore, to be inaudible. The long and short vowel in it are both valid, but the doubling of the character mim is a grave error.

He said: He is then to pronounce the takbir and bow (go into rukū‘).52 It is stated in al-Jāmi‘ al-Saḥīḥ that he is to pronounce the takbir while moving downwards, because the Prophet (God bless him and grant him peace) used to pronounce the takbir while moving downwards and while rising up.53

The takbir is to be pronounced with the short vowel, because stretching it (madd) at the beginning is a mistake from the religious perspective as it turns into a question, and a stretch at the end is a grammatical mistake in the language.

He is to lean with his hands on his knees making a space between his fingers, due to the words of the Prophet (God bless him and grant him peace) to Anas (God be pleased with him), “When you go into a rukū‘, "There is no prayer without the Fātiḥah al-Kitāb."

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19 That is, ta‘āwudh and tasmiyyah.
20 It is gharib, however, a report conveying the same meaning has been recorded by Ibn Abī Shaybah. Al-Zayla‘i, vol. 1, 335.
21 It is recorded by al-Dir‘i‘s and al-Ḥakim. Al-Zayla‘i, vol. 1, 326.
22 It is recorded by Ahmad and al-Nasa‘i, vol. 1, 336.
23 Because this is in greater conformity with the mushaf.
24 Because its location is at the beginning of salat.
25 So as to be in compliance with the mushaf.
26 It is recorded by al-Tirmidhi and also by Ibn Majah conveying the same meaning. Al-Zayla‘i, vol. 1, 363.
27 It is recorded by all the six sound compilations from Ubaydah ibn al-Samit (God be pleased with him). Al-Zayla‘i, vol. 1, 365.
29 Because the text of the Qur’ān here is not mujmal (unelaborated), as stated in an earlier note.
30 It is recorded by al-Nasā‘i in his Sunan. In the tradition recorded by al-Bukhārī and Muslim, the words, “The imām says āmin” are not found at the end, but they are in the tradition recorded by al-Nasa‘i. Al-Zayla‘i, vol. 1, 368.
32 That is, after having recited the Fātiḥah and adding a sūrah to it.
place your hands on your knees and make a space between your fingers.\(^{54}\)

Creating a space is not recommended except in this case so that holding (with the hand) is facilitated, nor is joining the fingers recommended except in the case of prostrations. What is beyond this is left to the normal habit of the person.

He is to keep his back straight, because the Prophet (God bless him and grant him peace) kept his back straight when he was bowing.\(^{55}\)

He is not to raise his head upwards or lower it, because the Prophet (God bless him and grant him peace), “When he used to go into ruku`, did not lower his head nor raise it upwards.”\(^{56}\)

He is to say (in this position), subhāna rabbīya 'l-`azīm (glory be to my Great Lord), three times, and this is the minimum. This is based on the words of the Prophet (God bless him and grant him peace), “When one of you goes into ruku`, he should say, subhāna rabbīya 'l-`azīm, three times, and this is the minimum,”\(^{57}\) that is, the minimum that completes (applies to) plurality.\(^{58}\)

He is then to rise, raising his head, and say, “sami`a 'llāhu li-man hamīdah” (Allāh has heard the one who praises Him), while the follower is to say, “rabbana laka 'l-hamd” (our Lord, for you is all praise). The imām is not to say this (the second phrase) according to Abū Ḥanīfah (God bless him) while the two jurists maintain that he is to say it inwardly (without pronouncing it). This is based on what was repeated by Abū Hurayrah (God be pleased with him), that “the Prophet (God bless him and grant him peace) used to combine the two dhikrs,”\(^{59}\) and because he (the imām) is inducing other persons to say it (by tasmi`) so he should not forget it himself. Abū Ḥanīfah (God bless him) relies on the words of the Prophet (God bless him and grant him peace), “When the

\[\text{imām says \textit{sami`a 'llāhu li-man hamīdah}, then (all of) you should say \textit{rabbana laka 'l-hamd}.}\]

This is a division of duties\(^{60}\) and negates joint obligation. It is for this reason that the follower does not pronounce the tasmi` in our view. Al-Ṣāhī (God bless him) disagrees with this (maintaining that the follower should pronounce both). Further, the act of praising by the imām will occur after the similar act of praise of the follower, and this goes against the function of imāmah.\(^{62}\) The tradition related by him (Abū Hurayrah) is interpreted to apply to the person (praying) alone.\(^{63}\)

The person praying alone combines the two dhikrs, according to the sound report,\(^{64}\) even though it is related that it is sufficient to pronounce the tasmi`, and also that it is sufficient to pronounce the tahmi`. (As for the issue of inducing others), the imām by inducing others to do good is doing it himself in meaning (reality).

He said: Thereafter he stands in the upright position,\(^{65}\) pronounces the takbir and performs the prostration. The legality of the takbir and the prostration is based upon what we have already elaborated. As for standing up erect (after ruku`), it is not a definitive obligation (fard).\(^{66}\) Likewise the sitting posture between two prostrations and so also the calm pause between bowing and prostrations. This is the view according to Abū Ḥanīfah and Muhammad (God bless them). Abū Yūsuf (God bless him) said that all these are definitive obligations, which is also the opinion of al-Ṣāhī (God bless him), due to the words of the Prophet (God bless him and grant him peace), “Stand up and pray for you have not prayed.”\(^{67}\) He said this to a villager who took his prayer lightly. The two jurists maintain that in the literal sense ruku` means inclining forward, and sujud imply lying down prostrate, thus, the essential element is linked to the minimum of such movements and so also moving from one posture to another (with a calm pause) as that is not required. At the

\(^{54}\)It is recorded by ʿAbd Allāh al-Ṭabarānī. Al-Zayla`i, vol. 1, 372.

\(^{55}\)It is recorded by Ibn Mājah in his Sunan, and by others as well. Al-Zayla`i, vol. 1, 374.

\(^{56}\)It is recorded by al-Tirmidhī and others. He calls it hasan saḥīh. Al-Zayla`i, vol. 1, 375.

\(^{57}\)It is recorded by Abū Dāwūd and al-Tirmidhī. Al-Zayla`i, vol. 1, 375.

\(^{58}\)According to some, the minimum to complete the sunnah or to complete the praise.

\(^{59}\)It is recorded by al-Bukhārī and Muslim. Al-Zayla`i, vol. 1, 376.

\(^{60}\)It is recorded, in one version, from Anas (God be pleased with him) by all the six sound compilations. Al-Zayla`i, vol. 1, 377.

\(^{61}\)That is, dividing the pronouncements between the imām and the followers.

\(^{62}\)Because the follower will be saying rabbana wa-laka 'l-hamd when the imām is still saying sami`a 'llāhu li-man hamīdah.

\(^{63}\)That is, it is construed from the act of the Prophet (God bless him and grant him peace) offering the sajd prayers alone.

\(^{64}\)From Abū Ḥanīfah (God bless him), because there are varying reports from him.

\(^{66}\)After saying rabbana laka 'l-hamd.

\(^{67}\)This is what is called the qawmah.

\(^{68}\)It is recorded by Abū Dāwūd, al-Tirmidhī and al-Nasā`ī. Al-Zayla`i, vol. 1, 378.
end of the tradition related, the Prophet (God bless him and grant him peace) called it salāt when he said, "If anything falls short out of this, it falls short from your prayer." Thereafter, the qawmāh (standing posture after ṭuḥt) and the sitting posture (between two prostrations) are sunnah according to the two jurists. Likewise the calm pause in the takhrīj of al-Jurānī (God bless him). In the takhrīj of al-Karkhi (God bless him), it is an obligation (wājib) so that two prostrations of error are obligatory if it is given up by mistake, in his view.

He is to place his hands on the ground, because Wā'il ibn Ḥajar (God be pleased with him) describing the salāt of the Messenger of God (God bless him and grant him peace), rested on his two palms and raised his posterior.

He said: He is to place his face between his two hands with his hands being aligned with his two ears, due to the report that the Prophet (God bless him and grant him peace) did so.

He said: He is to prostrate on his nose and on his forehead, because the Prophet (God bless him and grant him peace) did so persistently. If he confines himself to prostrating on one of these, it is valid according to Ābu Ḥanīfah (God bless him). The two jurists said: It is not proper to prostrate on the nose alone, except due to an obstacle. This is also a narration from him (the imām) on the basis of the words of the Prophet (God bless him and grant him peace), "I have been commanded to prostrate on seven bones," and he counted the forehead in these. Ābu Ḥanīfah (God bless him) (for his separate opinion) relies on the fact that prostration is accomplished by placing part of the face on the ground, and this is what the worshipper has been ordered to do, except that the cheeks and the chin are excluded on the basis of consensus (ijmā'), while

the face is mentioned in the well known traditions. The placing of the two hands and the knees (on the ground) is a sunnah, in our view, because it is possible to prostrate without using them. As for the placing of the two feet, al-Qudūrī (God bless him) has mentioned that it is a definitive obligation for prostrations.

He said: If he makes the prostration on the round band of his turban or on an excess part of his dress, it is valid, because "the Prophet (God bless him and grant him peace) used to prostrate on the round band of his turban," and it is related that "the Prophet (God bless him and grant him peace) used to pray in a single dress preventing with its excess the hotness and coldness of the ground." He is to open up his underarms, due to the words of the Prophet (God bless him and grant him peace), "Open up your underarms." The word stretch, from a different root, is also reported in this tradition, while the first conveys the meaning of revealing.

He is to create a space between his torso and his thighs, because "the Prophet (God bless him and grant him peace) used to prostrate creating so much space (between his torso and thighs) that if a kid (goat) wished it could pass through (this space)." It is said that when one is praying in a row (in a congregation) he is not to do this so as not to harass those next to him.

He is to turn the fingers of his toes towards the qiblah, due to the words of the Prophet (God bless him and grant him peace), "When a believer makes a prostration, each limb in his body makes the prostration, therefore, he should make each limb face the qiblah insofar as he is able to do so."

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68 Referred to above.
69 Ābu Ḥanīfah and Muḥammad (God bless them).
70 Ābu 'Abd Allāh al-Jurānī, the student of Ābu Bakr al-Jassās al-Rāzī.
71 Ābu 'Abd Allah al-Karkhi, the teacher of Ābu Bakr al-Jassās al-Rāzī.
72 Which is a requirement for missing a ṭuḥt or making a mistake in it.
73 Al-Zayla`i calls it gharib as a tradition of Wā'il (God be pleased with him). A similar tradition from al-Barra` ibn 'Aṣib is recorded by others including Ābu Dāwūd. Al-Zayla`i, vol. 1, 381.
74 The acts are found in separate traditions. Thus, one part is recorded in a tradition by Muslim, while the rest is found in another tradition. Al-Zayla`i, vol. 1, 381.
75 It is recorded by al-Bukhārī in his Sahih. Al-Zayla`i, vol. 1, 382.
76 It is recorded by all the six sound compilations. Al-Zayla`i, vol. 1, 383.
In his prostrations, he says, "subhāna rabbīya 'l-a'la'" three times and this is the minimum (number), due to the words of the Prophet (God bless him and grant him peace), "When one of you makes a prostration, he is to say in his prostrations 'subhāna rabbīya 'l-a'la', three times." This is the minimum, that is, the minimum that completes plurality. It is recommended that he exceed the number three in his ruku' and sujud, but ending with an odd number, because "the Prophet (God bless him and grant him peace) used to end at an odd number." If he is the imām, he is not to exceed this in a manner that it becomes tiresome for the people leading to avoidance (of prayer). Thereafter, the glorification during ruku' and sujud is a sunnah, because the text (of the Qur’ān) includes ruku' and sujud and not their glorification, therefore, an excess over the text is not to be made (for deeming them an obligation). A woman is to lower herself in her prostrations and to make her torso touch her thighs, because this provides her with a better covering.

He said: Then he raises his head and pronounces the takbir, due to what we have related, and when he is calm in the sitting posture, he pronounces the takbir and makes the prostration (again), due to the words of the Prophet (God bless him and grant him peace) in the tradition of the villager, "Then raise your head till you become erect in the sitting posture." If he does not adopt the erect sitting posture, pronounces the takbir and makes the second prostration, his prayer is deemed valid according to Abu Hanifah and Muhammad (God bless them) and we have already mentioned this, standing up erect on the (front) soles of his feet without sitting down or leaning with his hands on the ground. Al-Shāfi‘ī (God bless him) said that he is to adopt the sitting posture momentarily and then rise leaning on the ground, due to the report that "the Prophet (God bless him and grant him peace) did so." We rely on the tradition of Abu Hurayrah (God be pleased with him), "that the Prophet (God bless him and grant him peace) used to rise in his prayer on the (front) soles of his feet." What he has related is interpreted to apply to old age. Further, this is a posture of relaxation and salāt has not been prescribed for this (purpose).

He goes through the same acts in the second rak‘ah that he went through in the first rak‘ah, because it is a repetition of the essential elements, except that he does not recite the opening glorification (subhānaaka 'l-lāhumma ...) and the seeking of refuge (a‘dhu billāhi ...), as these have not been prescribed for more than one time.

He is not to raise his hands except for the first takbir with al-Shāfi‘ī (God bless him) disagreeing in the case of going into the ruku‘ and on rising from it. The rule is based on the words of the Prophet (God bless him and grant him peace), "The hands are not to be raised except on seven occasions: the takbir of the opening (glorification); the takbir of qunut (supplication); the takbirs of the two 'ids'; and he mentioned four occasions for the hajj (pilgrimage). The tradition that al-Shāfi‘ī relates for raising of hands (before and after ruku‘) is to be interpreted to apply to the early phase. This is how it has been transmitted from Ibn Zubayr (God be pleased with him).

When he raises his head after the second prostration of the second rak‘ah he is to let his left leg (after straightening the foot) touch the floor
and he is to sit on it, while he is to keep his right foot in the upright position with the toe fingers pointing towards the qiblah. This is how A'ishah (God be pleased with her) described the sitting posture of the Messenger of God (God bless him and grant him peace) during prayer. He is to place his hands over his thighs, flattening his fingers, and is then to perform the tashahhud. This is related in the tradition of Wā'il ibn Ḥaḍr (God be pleased with him), and because in this position the fingers of the hand point towards the qiblah.

In the case of a woman, she is to rest on her left thigh, letting her feet protrude from the right side, because this provides the best cover to her. The tashahhud is: at-tahayyatu al-ntubarakatu as-salawatu at-talutyyatu... up to its end. This is the tashahhud recited by 'Abd Allāh ibn Mas'ūd (God be pleased with him). He said, "The Messenger of God (God bless him and grant him peace) took me by the hand and taught me the tashahhud just as he taught me a sûrah of the Qur'ān, and said, "Say: at-tahayyatu lillahi... up to its end." Adopting this is better than the tashahhud transmitted by Ibn 'Abbās (God be pleased with both) and that is: "at-tahayyatu al-mubarakat as-salawatu at-tayyibatu lillahi salāmun 'alayka ayyuhannabiyyu wa-rahiyatu'lāhī wa-barakātinuh, salāmun alayna... up to its end." The reason is that in the tashahhud of Ibn 'Abbās there is the imperative form ("say") and the imperative has grades (like ُ and *), but the tashahhud has grades like *Lib and ṣanad. This is how it is better, because the former is for renewal of the tashahhud, while the latter is for the renewal of speech. In addition, there is an emphasis on teaching it (making its acceptance more convincing).

He is not to add to this during the first sitting posture, due to the words of Ibn Mas'ūd (God be pleased with him), "The Messenger of God (God bless him and grant him peace) taught me the tashahhud for the middle of the prayer and its end. In the middle of the prayer he got up when he had completed the tashahhud. When it was the end of the prayer, he made supplications for himself as he liked."  

In the last two rak'ahs, he is to recite the Fātilat al-Kitāb alone, due to the tradition of Abū Qatādah (God be pleased with him), that "the Prophet (God bless him and grant him peace) used to recite the Fātilat al-Kitāb in the last two." This (statement of al-Qudūrī) is for elaborating something that is good (but not a sunnah), and it is sound, because recitation is obligatory in two rak'ahs, as will be presented to you in what follows, God willing.

He is to adopt the sitting posture in the last as he did the first time, due to what we related with respect to the traditions of Wā'il and 'A'ishah (God be pleased with them). This posture, however, is tiring for the body, therefore, it is better to adopt the posture of resting on one side (with the feet protruding sideways) towards which Malik (God bless him) was inclined. The narration in which it is reported that the Prophet (God bless him and grant him peace) adopted this resting posture has been declared weak by al-Tahāwī (God bless him), or it is to be interpreted to apply to old age.

He then recites the tashahhud, and it is wājib (obligatory), in our view. Thereafter, he recites prayers and blessings for the Prophet (God bless him and grant him peace), which is not an obligation, in our view, and Muslim. Al-Zaylā'ī, vol. 1, 420.

It is recorded by Ahmad in his al-Musnad. Al-Zaylā'ī, vol. 1, 418.

It is recorded by al-Bukhārī and Muslim. Al-Zaylā'ī, vol. 1, 419.

It is recorded by both of the six sound compilations except al-Bukhārī. Al-Zaylā'ī, vol. 1, 420.
the name of the Prophet (God bless him and grant him peace) is mentioned, as has been preferred by al-Tahawi (God bless him). The burden of the command is sufficient for us, while the word fard reported with reference to tashahhud is for its identification.

He said: He makes supplications as he likes out of those that are based on the words of the Qur'ān and the transmitted supplications, on the basis of what we related with respect to the tradition of Ibn Mas'ūd (God bless him) where the Prophet (God bless him and grant him peace) said to him, "Thereafter, choose a supplication that is the best and most impressive for you." He is to begin with prayers for the Prophet (God bless him and grant him peace) so that it comes closest to being heard.

He is not to make supplications with words that resemble the words used in the speech of humans, as a precaution against invalidity. It is for this reason that he is to use those that are transmitted and preserved. What is not impossible to ask from humans, like the words, "O Lord, make me marry such and such woman," amounts to speech used by humans, and what is impossible to ask from them, like the words, "O Lord, forgive me," does not resemble their speech. The words, "O Lord, feed me," belong to the former category, which is the sound view, insofar as such words are used among humans, just as it is said: the commander fed the army.

He then makes the salutation turning (his face) to the right saying, "as-salāmu 'alaykum wa-raḥmatu 'llāh" and then to the left saying the same, on the basis of what was related by Ibn Mas'ūd (God be pleased with him) that "the Prophet (God bless him and grant him peace) used to offer the salutation to the right when the whiteness of his right cheek could be seen and then to the left till the whiteness of his left cheek could be seen."

He is to intend in his first salutation those on his right from among men, women and guardian angels and likewise on his left, because acts are determined by intentions. In our times, he is not to intend women or those who are not participating in his prayer, and this is the sound view, because a communication is meant for the addressees present.

For the follower it is essential to include his imām in such an intention. If the imām is on the right or the left, he is to include the imām in the niyāh for both sides. If he is in front of the follower, he is to include him in the intention for the first according to Abū Yūsuf (God bless him) due to the preference to be given to the right side. According to Muhammad (God bless him) and in one narration from Abū Hanifah (God bless him) he is to include him in both intentions, because the imām has a share in both sides.

The person praying alone is to include the guardian angels in his intention and no one else, because there is no one with him besides them.

The imām formulates the intention for both salutations (including the people and the guardian angels), which is the sound view. In the case of the angels, a limited number is not to be intended, because the reports about their number have differed and, thus, resemble belief in the prophets (peace and blessings on them). Thereafter, using the word as-salām is obligatory (wājib) in our view, but is not a definitive obligation (fard), with al-Shāfi`ī (God bless him) disagreeing. He adopts the words of the Prophet (God bless him and grant him peace), "Its takbir is the takbir and its tashahhud is the taslim." We rely on the tradition of Ibn Mas'ūd (God be pleased with him). The existence of a choice (when you have said this or done this) negates both the definitive obligation and the wājib, however, we established wujūb on the basis of what is related, by way of precaution. The definitive obligation is not established on the basis of such an evidence.

According to the well known tradition.
11.1 Recitation in Prayer

He is to recite audibly in the *fajr* prayer, in the first two *rak'ahs* of *maghrib* and 'isha', if he is the *imām*, while he is to recite inaudibly in the next two. This is what has been transmitted (from the Prophet (God bless him and grant him peace) and related from the Companions (God be pleased with them)).

If he is praying alone, he has a choice and he may recite audibly to listen to himself, because he is an *imām* for himself. If he likes he may recite inaudibly, because there is no one behind him who can listen to his recitation. It is, however, preferable to recite audibly so that the performance is in the form meant for the congregation.

The *imām* recites inaudibly in the *zuhr* and 'asr prayers even when he is leading the prayers in *'Arafah*, due to the words of the Prophet (God bless him and grant him peace), "Prayer during daylight is dumb,"110 that is, there is no audible recitation in it. In the case of *'Arafah*, Mālik (God bless him) disagrees and the proof against him is what we have related.

He is to recite audibly in the *jumu'ah* and two 'id prayers, due to the reported transmission of the *mustafid* category upholding audible recitation.111 In the supererogatory prayers during daylight, he is to recite inaudibly, while during the night he has a choice on the analogy of the obligatory prayer with respect to the individual. The reason is that the supererogatory prayer is complimentary for the obligatory prayer and is, therefore, subservient to it.

A person who has lost the 'isha' prayer and is offering it after the rising of the sun, as well as leading the prayer,112 is to recite audibly, as did the Prophet (God bless him and grant him peace) when he offered *fajr*.

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110 Al-Zayla'i says that there are two *mursal* traditions on the issue recorded by Abū Dāwūd in his *Marāski* Al-Zayla'i, vol. 2, 1. It is to be noted that a *mursal* tradition is a *hujjah* for the Ḥanafis.
111 Al-Karkhi (God bless him) maintains that he is not to raise his voice to the extent that the *imām* does, because there is no one behind him who is listening. Some jurists maintain that to make his prayer similar to the congregation, there is greater merit if he makes the call (ʿadḥān) as well as the *qāmah*. Al-Aȳnī, vol. 2, 293.
112 It is *gharīb*, and is recorded by 'Abd al-Razzāq. Al-Zayla'i, vol. 2, 1.
113 The reference is to the reasoning given by al-Bayhaqi on the basis of traditions recorded by the sound compilations, except al-Bukhārī. Al-Zayla'i, vol. 2, 2.
114 For those who have missed it likewise.

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114 If he is alone, he is to recite inaudibly decidedly and has no choice in it, and this is the sound view. The reason is that audible recitation is specific to the congregation in general or to time in the case of the individual by way of choice, and in this case none of these rules applies.

A person who recites a *surah* in the first two *rak'ahs* of 'isha', and not the *Fatihah al-Kitāb*, is not to repeat it (in lieu thereof) in the next two *rak'ahs*.114 If he recites the *Fatihah* and does not recite any *surah* besides that,115 he is to recite the *Fatihah* in the remaining two, the *Fatihah* as well as a *surah*, and he is to do so audibly. This is so according to Abū Ḥanīfah and Muhammad (God bless them). Abū Yūsuf (God bless him) said that he is not to recite them by way of *qaḍā*, because the *wājib* that is not performed at its time is not to be performed as *qaḍā*, except on the basis of an evidence.116 The two jurists maintain, and this is the distinction between the two situations, that the recitation of the *Fatihah* is prescribed in a way that the *surah* follows it. Thus, if he were to recite it in lieu of the previous, the recitation of the *Fatihah* would follow the *surah*. This goes against the way it has been laid down. It is different when he does not recite the *surah* as in that case it is possible to recite it by way of *qaḍā* in the manner that is prescribed. Thereafter, he (Imām Muhammad) mentioned something here that indicates *wājib* (obligation) and in Kitāb al-Asl he uses the word recommendation. The reason is that if it is recited later it is not linked to the *Fatihah*, and the observance of its prescribed sequence is not followed.

He is to recite both audibly. This is the correct view, because combining audible and inaudible recitation in a single *rak'ah* is repugnant and the alteration of the supererogatory recitation, which is al-*Fatihah* (into *wājib*) is preferable.117 Thereafter, recitation is inaudible when he can hear through delayed performance (*qaḍā*) in a congregation on the morning after the night of *ta'īs*.118

115 It is reported by Imām Muhammad ibn al-Hasan al-Shaybānī (God bless him), from Ibrahim al-Nakha'i (God bless him), in his Kitāb al-Āthār. It is also recorded by Muslim in his Sunnah, Al-Zayla'i, vol. 2, 3.
116 That is, by way of *qaḍā*. Some jurists say that the recitation of the *Fatihah* is obligatory and should be repeated in the remaining two *rak'ahs* by way of *qaḍā*, if it is missed in the first two.
117 By way of addition.
118 And there is no evidence for this case.
119 As it was to be recited inaudibly in its own place originally, but will now follow the rule of the *surah*, which was originally *wājib*. 
himself, while recitation is audible when other persons can hear him too. This is the position according to the faqih Abū Ja'far al-Hindawānī (God bless him), because the mere movement of the tongue without a sound does not amount to recitation. Al-Karkhī (God bless him) said that the lowest category of audible recitation is that he hear himself and the least category of inaudible recitation is the formation of words, as recitation is an act of the tongue and not that of the ear. In the statement in the Book is an indication of this. It is on this rule\textsuperscript{128} that all that pertains to expressions, like divorce, emancipation and exemption, is determined.\textsuperscript{129}

The minimum recitation that is deemed valid in prayer is one verse, according to Abū Ḥanīfah (God bless him). The two jurists held that it is three short verses or one long verse, because he cannot be deemed a reciter without this as otherwise he would appear to be one reciting what is less than one verse. He (Abū Ḥanīfah) relies upon the verse, “Recite what is easy from the Qur'ān,”\textsuperscript{130} without qualifying it in any way, except that what is less than a verse is excluded (as it does not give a complete meaning), and a verse does not convey (such an incomplete meaning).

During a journey he (the imām) is to recite the Fāṭihat al-Kitāb and any sūrah that he wishes, due to the narration that “the Prophet (God bless him and grant him peace) recited the ma‘ādhatahān\textsuperscript{131} in the fajr prayer during journey.”\textsuperscript{132} Further, journey affects the length of the prayer itself, therefore, it should be more effective in lessening the length of the recitation. This is the case when departure is to be hastened, but when there is calmness and no haste, sūrah is to be recited, while in the maghrib prayer, the qisār al-mufassil are to be recited, in the 'asr and 'isha' prayers, awsāt al-mufassil are to be recited.\textsuperscript{135} The reason is that the maghrib prayer is based on shortage of time and lightening the recitation is more suitable for it. For 'asr and 'isha' prayers delay is recommended and, therefore, by lengthy recitations they are likely to fall within a time period that is not recommended. They are thus to be limited through the awsāt.

When in a settlement, he should recite forty or fifty verses in the two rak‘ahs of fajr besides the Fāṭihat al-Kitāb. It is reported that these are from forty to sixty and from sixty to one hundred, and for each such assertion a report has been recorded from the Companions (God be pleased with them).\textsuperscript{134} The reconciliation is that he should recite one hundred verses with eager followers and forty with those who exhibit laziness, while on the average he is to recite a number that is between fifty and sixty. It is also said that he should take into account the length of the nights and their shortness\textsuperscript{135} and the excess of occupation (with work) and its absence.

He said: During zuhr he is to do the same, due to their similarity in terms of the time available. In Kitāb al-Ąṣī it is stated that he may recite less than that as this is the time of occupation with work, therefore, he is to reduce the recitation in order to avoid irritation. The 'asr and 'isha' prayers are similar and he is to recite the awsāt al-mufassil (from Kuwwirat up to al-Ḍuḥā).

In the maghrib prayer he is to recite even less, and he may recite qisār al-mufassil (from al-Ḍuḥā up to the end of the Qur’ān). The basis (āṣī) for this is the letter of 'Umar (God be pleased with him) to Abū Mūsā al-Āsh'ārī (God be pleased with him) that in fajr and zuhr, tiwal al-mufassil (from al-Ḥijratī to as-sama’u dhat al-Burūj) are to be recited, in the 'asr and 'isha' prayers, awsāt al-mufassil are to be recited, while in the maghrib prayer, the qisār al-mufassil are to be recited.\textsuperscript{136} The reason is that the maghrib prayer is based on shortage of time and lightening the recitation is more suitable for it. For 'asr and 'isha' prayers delay is recommended and, therefore, by lengthy recitations they are likely to fall within a time period that is not recommended. They are thus to be limited through the awsāt.

The first rak‘ah of fajr is to be made longer than the second rak‘ah in order to help the people catch up with the congregation.

He said: The two rak‘ahs of the zuhr are of equal length. This is so according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muhammad (God bless him) said: It is dearer to me that the first rak‘ah in all prayers be made longer than the other rak‘ahs, due to the report that “the Prophet (God bless him and grant him peace) used to lengthen the first rak‘ah as compared to the other rak‘ahs in all prayers.”\textsuperscript{137} The two jurists maintain
that the two rak`ahs are equal with respect to their entitlement to recitation, therefore, they are equal in terms of the length of the recitation as well, as distinguished from the far `id prayer as that is the time of sleep and oblivion. Further the tradition is interpreted to mean lengthening of the glorification with respect to than`ah, tu`awwudh and tusniyyah. In determining the length of the recitation, excess or decrease in what is less than three verses is not to be given consideration due to the impossibility of avoiding this without hardship.

The recitation of a particular surah is not fixed for any of the prayers, in the meaning that prayer is not valid without it, on the basis of the unqualified meaning of what we have recited. It is disapproved to permanently associate something from the Qur`an with a particular prayer insofar as that leads to the avoidance of the rest of it and such a preference cannot be made.

The follower is not to recite behind the im`am, with al-Shafi`i (God bless him) disagreeing in the case of the Entquih. He reasons that recitation is one of the essential elements (rukn) of prayer and the followers must participate in this with the im`am. We rely on the words of the Prophet (God bless him and grant him peace), "For a person who has an im`am, the im`am`s recitation is his recitation," and on this there is the consensus (ijma) of the Companions (God be pleased with them). It is a rukn that is common for them, but the part of the follower is silence and listening. The Prophet (God bless him and grant him peace) said, "Remain silent when the im`am recites." It is preferred by way of precaution (to recite the Fatihah) on the basis of what has been transmitted from Muhammad (God bless him) (by some scholars), but it is disapproved by the two jurists due to the violation of what comes naturally.

He is to listen intently, maintaining silence, even if the im`am is reciting a verse that mentions heaven (targhib) or one that mentions hell

\[\text{(tarhib)}\]

because listening and maintaining silence is a definitive obligation on the basis of the text and recitation, supplications for heaven or seeking refuge from the Fire, are all matters that interfere with this.

The same applies to the khutbah (sermon) as it does to blessings and prayers for the Prophet (God bless him and grant him peace), due to the obligation of listening, unless the person delivering the sermon recites the words of the Exalted, "God and His angels send blessings on the Prophet: O you who believe! Send blessings on him, and salute him with all respect," in which case the listener is to send blessings inwardly (silently). The jurists disagreed about the person who is far removed from the pulpit. The safe thing to do is to maintain silence in order to uphold the obligation of keeping silent. God knows best.

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19 That is, the unqualified meaning of the verse requiring recitation of what is easy. See al-Zayla`i, vol. 2, 6, for a comment on the opposite view.

20 It is related from a number of Companions (God be pleased with them). One tradition from Jabir is recorded by Ibn Majah in his Sunan. Al-Zayla`i, vol. 2, 6-7.

21 Imam Muhammad indicates this in his version of al-Muwatta. Another report is from al-Tahawi. Al-Zayla`i, vol. 2, 12.

22 One version from Abu Músá is recorded by Muslim in his Sahih. Al-Zayla`i, vol. 2, 14.

23 That is, he is not to offer supplications on hearing these verses.

24 There are reports that the verse referred to was revealed with respect to recitation behind the im`am. It is recorded by Imam Ahmad (God bless him) that he said: The people arrived at a consensus that this verse pertains to prayer. Al-Zayla`i, vol. 2, 13.

25 Qur`an 33:56.
Chapter 12

Imāmah (Leading the Prayers)

The congregation is an emphatic sunnah (sunnah mu‘akkadah), due to the words of the Prophet (God bless him and grant him peace), "The congregation is a sunnah from among the sunan al-hudā, which is not given up except by the hypocrite." The best person for the imāmah is one who is the most knowledgeable about the sunnah. It is reported from Abū Yūsuf (God bless him) that he is one who is best in recitation, because recitation is a necessity, while the need for knowledge arises when a legal issue arises. We say that recitation is needed for one essential element (rukūn) of ṣalāt, whereas knowledge is required for all the elements.

If two persons are equal in terms of knowledge, then, the best of them in recitation (is to lead the prayers). This is based on the words of the Prophet (God bless him and grant him peace), "The people are to be led by one who can recite best the Book of God. If they are equal in this, then,

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1We have stated that the term sunnah used in fiqh texts, especially in this book, is used in the sense of sunnah mu‘akkadah, which is an act that the Prophet (God bless him and grant him peace) performed persistently, and gave up only due to an excuse. As compared to this, the word adab (pl. ādāb) is an act that the Prophet (God bless him and grant him peace) performed a few times, but gave up at other times. This is also referred to as ghayr mu‘akkadah by some. If this is the case, the use of the word sunnah here would have been sufficient. The Author, however, is referring specifically to sunnah mu‘akkadah and by this he means sunnat al-hudā. This is an enhanced form of the sunnah that comes very close to the wājib. In fact, the congregation is called a wājib by some of the Hanafi jurists, and as fard kifāyah by others. The distinction should, therefore, be kept in mind.

2It is gharib in this version, however, Muslim has recorded a different version that conveys the same meaning. Al-Zayla‘i, vol. 2, 21.

3This means a person who knows fiqh and the rules of the shari‘ah.
the one who has the best knowledge of the sunnah," 4 The one who used to recite the best (from among the Companions—God be pleased with them) was usually the best in knowledge as well, because they used to receive the Qur'an along with a knowledge of the ahkâm (rules), thus, the best reciters were given priority in the traditions. This is not the case in our times, therefore, we have given priority to the one best in knowledge.

If they are (still) equal, then, the one who is most pious, due to the words of the Prophet (God bless him and grant him peace), "If one has prayed behind a knowledgeable pious imam, it is like praying behind a prophet." 5

If they are equal (in all the above matters), then, the one who is the eldest, due to the words of the Prophet (God bless him and grant him peace) to the two sons of Abû Malikah, "The elder of you is to lead you." 6 Further, giving preference to him leads to an increase in the congregation. Giving priority to a slave is disapproved, as he is not free to devote time to knowledge, and to the villager for most of them lack knowledge, and to the disobedient (fâsiq), as he does not follow the commandments of din, and the blind as he cannot avoid impurities, and the illegitimate person born out of zina, because he does not have a father who can supervise (discipline) him and consequently ignorance overtakes him. Further, in the preference of these persons there is a likelihood of reducing the size of the congregation, for which reason it is disapproved. If, however, they are given preference, the prayer is valid, due to the words of the Prophet (God bless him and grant him peace), "Pray behind every pious and impious person."

The imam is not to prolong the prayer for the followers, due to the words of the Prophet (God bless him and grant him peace) "A person who leads the people in prayer, is to offer the prayer of the weakest among them, for among them are the sick, the old, and those in need." 7

It is disapproved for women to offer prayers in a congregation all by themselves, as this is not devoid of the commission of the prohibited, 8 and that is because the imam stands in their midst in the row, thus, it is disapproved as in the case of the naked.

If they do pray alone, then, the imam stands in their midst, because 'A'ishah (God be pleased with her) did this, 9 while her act has been interpreted to apply to the initial phase of Islam. 10 The reason is that in standing in front there is greater exposure.

A person who prays with a single person makes him stand on his right due to the tradition of Ibn 'Abbás (God be pleased with both) that the Prophet (God bless him and grant him peace) prayed with him and made him stand to his right. 11 He should not stand behind the (line of the) imam. According to Muḥammad (God bless him), he is to place his toe fingers close to the heel of the imam. The first opinion, however, is the stronger opinion. If he does pray behind him or while standing to his left, his prayer is valid, but he is sinning for opposing the dictates of the sunnah.

If the person leads two others, he is to stand in front of them. According to Abû Yusuf, he is to stand in their middle. This has been reported from 'Abd Allâh ibn Mas`ûd (God be pleased with him). 12 We maintain that the Prophet (God bless him and grant him peace) stood ahead of Anas (God be pleased with him) and the orphan when he led them in prayer. 13 This is for the preferred position, while the report from the Companion is evidence of permissibility (that is, the prayer is valid in the middle position).

It is not permitted for men that they be led by a woman or a minor. In the case of a woman, it is due to the words of the Prophet (God bless him and grant him peace), "Move them behind insofar as God has moved them."

4 It is recorded by the six Imams in their sound compilations. Al-Zayla`i, vol. 2, 24.
5 It is ghârîb in this version. Al-Ṭabarânî and al-Hâkim have related somewhat similar traditions. Al-Zayla`i, vol. 2, 26.
6 This has preceded. It has been recorded by all the six Imams of the sound compilations (God bless them all). Al-Zayla`i, vol. 2, 26.
7 It is recorded by al-Dâr`qûnî in his Sunûn. Al-Zayla`i, vol. 2, 26.
8 It is recorded by al-Bukhârî and Muslim from Abû Hurayrah (God bless him).
9 There are other traditions too that convey the same meaning. Al-Zayla`i, vol. 2, 29.
10 That is, the giving up of the Sunnah.
11 It is recorded by al-Hâkim and others too. Al-Zayla`i, vol. 2, 30-31.
12 She was married in Madinah when she was nine and was with the Prophet (God bless him and grant him peace) for another nine years, therefore, this claim appears to be weak.
13 It is recorded by all the six Imams in their sound compilations. Al-Zayla`i, vol. 2, 33.
14 It is recorded by Muslim in his Sunûn. Al-Zayla`i, vol. 2, 33.
15 It is recorded by all the sound compilations, except Ibn Májah. Al-Zayla`i, vol. 2, 35.
them behind." Thus, positioning them in front is not permitted. As for the minor, he is required to offer supererogatory prayers alone and thus cannot lead those under a duty to offer obligatory prayers. The Mashāʾikh of Balkh (God bless them) permitted the imāmah of the minor in the case of tārīwī prāyers and absolute sunan (rawāḥib before and after obligatory prayers), but our Mashāʾikh (God bless them) did not permit it. Among them were those who ascertained a disagreement, about māliq nafl prayers, between Abū Yūsuf and Muḥammad (God bless them). The preferred opinion is that it is not permitted in any of the prayers, because the nafl (supererogatory) prayers of the minor are less than those of the major insofar as the minor is under no duty to offer qadā' when such prayers are rendered invalid, and this is on the basis of consensus (ijmā'). The strong is not to be structured upon the weak as distinguished from the person who is under the impression that he owes a prayer, for such an issue is moot (subject to ijtihād), and the obstacle for such a person is considered non-existent. The case is also distinguished from that of the minor leading the minor for in that case the prayer is uniform (equal in strength).

The saff (row) is to be formed first by men, followed by minors and then by women due to the words of the Prophet (God bless him and grant him peace). "Let those who have attained puberty and are the object

of prohibition (whose prayer can be nullified) stand behind me." Further, mūḥadhdhah invalidates prayer, therefore, women have to be moved behind. If a woman has come to stand by his side (parallel to him), and they are participating in the same prayer, his prayer has become invalid provided the imām included her in his niyyah. Analogy implies that it is not nullified, and that is the opinion of al-Shāhī (God bless him) taking into account her prayer, which is not nullified. The basis for istīshān is what we have related, and it is of the well known category. It is he who is the addressee, and it is he who has given up the obligation of position (to be ahead of her). Accordingly, it is his prayer that has become invalid and not hers, just like that of the follower when he stands ahead of the imām. If the imām did not include her in the niyyah, it does not harm this person for his prayer is not permitted, because without her inclusion participation is not established in our view, with Zufar (God bless him) disagreeing. Do you not see that the imām is bound to order the positions, thus, the matter is dependent on his duty, as in the case of following. The niyyah of imāmah (to include the woman) is stipulated if she is led in the parallel position. If there is no male next to her, then, there are two narrations in this. The distinction on the basis of one of these is that nullification is certain, while on the basis of the second it is probable.

Among the conditions of (the issue of) mūḥadhdhah are: that the prayer be common, that it be absolute, that the woman be one who can be the object of desire, and that there be no curtain between them. As this prayer has been identified as nullified on the basis of a text, as distinguished from analogy, therefore, all that the text has laid down is taken into account.

Attending the congregation is considered disapproved for them (women), that is, the young women due to the apprehension of fitnah. There is no harm if the old women go out (for the congregation) for fajr, maghrib and 'isha'. This is so according to Abī Hanīfah (God bless him). The two jurists said that they can go out for all the prayers, because there is no fitnah in this due to the absence of desire for them. Thus, it is not disapproved, as in the case of 'id. He argues that excessive lust can lead to it, therefore, fitnah can occur, however, the fāsiq persons spread around

18Arising from ijtihād and disagreement.
during zuhr, 'asr and jumu'ah timings. They sleep during fajr and 'ishâ' timings, and at the time of maghrib they are busy with meals. The open spaces are wide, and it is possible for women to remain separated from men, therefore, it is not disapproved (during 'id).

He said: A person in a state of (full) purification is not to pray behind a person whose position is the same as a woman with extended bleedings (mustahâdhah), nor should a woman in a state of purification pray behind a mustahâdhah. The reason is that a person in sound health is in a stronger state as compared to the handicapped; a thing cannot bear the burden of one that is stronger than it. The imâm bears the responsibility of his own salât and that of the person following him.

Nor should a literate person who can read (the Qur'an) pray behind the illiterate person (ummi) or a person wearing clothes behind one who is naked, due to the (differing) strength of their state.

It is, however, permitted that a person who has performed tayammum be the imâm of those who have performed wudu'. This is so according to Abû Hanîfah and Abû Yusuf (God bless them), while Muhammad (God bless him) said that it is not permitted, because tayammum is purification based on necessity and wudu' is the primary purification. The two jurists maintain that tayammum is absolute purification (not qualified), therefore, it is not limited to the case of need.

The person who has performed mash may be the imâm for those who have washed. The reason is that the boot prevents the spreading of hadâth and what has affected the boot is eliminated with mash, as distinguished from the case of the mustahâdhah, because in that case hadâth has not been legally acknowledged despite its existence in reality.

A person standing may pray behind one who is sitting. Muhammad (God bless him) said that it is not permitted and this is based on the analogy (qiyyâs) constructed upon the (stronger) state of the person standing. We gave up this analogy due to the text, and that is the narration that "the Prophet (God bless him and grant him peace) offered his last salât while seated when the people behind him were standing."22

A person who prays through indication may pray behind a person like him, due to the equality of their states, unless the person following prays with indications, while sitting and the imâm adopts the reclining posture. The reason is that the sitting posture has been legally acknowledged and its (comparative) strength is established.

A person who performs ruku' and sujud is not to pray behind one who prays with indication. The reason is that the state of the follower is stronger, however, Zafar (God bless him) disagrees about this.

A person praying obligatory salât is not to follow in prayer the person offering supererogatory prayers.23 The reason is that following is structured (upon a similar prayer) and the imâm here lacks the attributes of the obligatory prayer, thus, the (obligatory) prayer cannot be structured upon something missing.

He said: Nor can the person offering one type of obligatory prayers follow one who is offering a different type of obligatory prayer, because following is participation and capability, therefore, unity (of prayer) is essential. According to al-Shâfi'i (God bless him) it is valid in all these cases (stated above), because following in his view is performance (of acts) by way of compatibility, while in our view the meaning of bearing responsibility (by the imâm) is taken into account.

A person offering supererogatory prayers may offer them following one who is offering obligatory prayers, because the need in his case is for basic salât (that can be offered with an unqualified niyyah) and this is found in the case of the imâm (who is offering basic salât and obligation in addition), thus, the construction is valid.

A person who follows an imâm in prayer and then finds out that the imâm was in an impure state, is to repeat his prayer, due to the words of the Prophet (God bless him and grant him peace), "A person who leads a group and then finds that he was in a state of hadâth or janâbîh is to repeat his prayer and so should the people."24 Al-Shâfi'i (God bless him) has a disagreement with this on the basis of what has preceded, while we consider the responsibility as the basis, and this for permissibility and invalidity.

If a person who cannot read leads in prayer a group of persons, who can read as well as a group of people who cannot read, then, their prayer is not valid according to Abû Hanîfah (God bless him). The two jurists said that the prayer of the imâm and those who cannot read is valid as he...
is handicapped leading a group of handicapped people as well as those who are not handicapped. The situation resembles that of a naked person leading naked persons as well as those who are dressed. Abu Hanifah argues that the \textit{im\={a}m} has relinquished the obligation of recitation when he is able to do so, therefore, his prayer is not valid. The reason is that if he had led those who could recite, the recitation of the reciters would amount to his recitation, as distinguished from this issue (of the naked) and those similar to it as the factors (handicaps) present in the case of the \textit{im\={a}m} are not present in the case of the followers.

If the person who cannot read prays alone while one who can recite prays alone, it is permitted. This is correct as the desire to pray as a congregation is not exhibited by them.

If the \textit{im\={a}m} recites in the first two \textit{rak\={a}hs} and makes an umm\={i} lead in the remaining two, their prayers are invalid. Zufar (God bless him) said that their prayers are not invalidated as the obligation of recitation has been performed. We argue that each \textit{rak\={a}h} amounts to \textit{sa\={l}at}, therefore, it cannot be devoid of recitation either actually or by presumption, and there is no presumption in the case of the umm\={i} due to the lack of ability. The same applies if he makes him lead the \textit{tashahhud}. God, the Exalted, knows best.

Chapter 13

Ritual Impurity (\textit{Hadath}) During Prayer

He who is involuntarily overcome by ritual impurity (\textit{hadath}) during prayer is to move away, and if he is an \textit{im\={a}m} he should delegate the \textit{im\={a}mah}; he is then to perform \textit{wud\={a}} and continue his prayer. Analogy implies that he is to pray afresh. This is the view of al-Shafi`i (God bless him) on the argument that \textit{hadath} negates prayer,\footnote{There is an addition here in the text preferred by al-`Ayni to the effect that “if he coughs and passes wind due to pressure,” but the previous phrase of being overcome by involuntary \textit{hadath} covers this situation. Accordingly, we feel that this addition is not justified and must have been a gloss that crept into the text. See al-`Ayni, vol. 2, 376.} while walking\footnote{Because purification is a condition for the continuation of \textit{sa\={l}at} just as it is a condition for its commencement.} and turning away (from the \textit{qiblah}) both render it invalid. Thus, it is similar to voluntary acquisition of \textit{hadath}.\footnote{Towards ablution.} We rely on the words of the Prophet (God bless him and grant him peace), “A person who vomits, has a nosebleed, or passes mad\={h}i in his prayer is to turn away and perform \textit{wud\={a}}", and he may then continue his prayer as long as he has not spoken." The Prophet (God bless him and grant him peace) said, "If one of you vomits or has a nosebleed, he is to place his hand on his mouth and make another person who is not affected by \textit{hadath} come forward (for leading}
the prayer). The need is in the case of involuntary hadath and not voluntary hadath for which there is no such need. It is, therefore, not to be linked to voluntary hadath.

It is, however, better to renew the prayer in order to avoid the doubt due to a conflict of evidences. It is said that the person praying alone may start anew, while the imam and the follower are to continue their prayer in order to secure the higher benefit of the congregation.

The person praying alone may complete his prayer at his location (where he performs wudu') and if he likes he may return to his earlier position. The follower is to return to his earlier position, unless the imam has already completed the prayer, or when (the imam is not done but) there is some obstacle/barrier between them.

A person who believes that he has acquired hadath and moves out of the mosque, but thereafter he comes to know that he did not acquire hadath, is to renew his prayer. If he did not leave the mosque, he is to complete what remains of the prayer. Analogy, in both cases, implies the renewal of prayer, which is a narration from Muhammad (God bless him) due to the existence of relinquishment of prayer without (valid) excuse.

The basis of istihsan is that he moved away with the intention of correcting an error. Do you not see that if what he believes comes to be realised, he would be continuing his prayer, therefore, the intention to rectify is associated with actual rectification, as long as his location has not changed by coming out (of the mosque).

If he has delegated the (imāmah of the) prayer to another, his prayer has become invalid, as he has undertaken too many acts (like delegation and walking) without an excuse. This differs from the case where he is under the impression that he has commenced prayer without wudu' and then he turns away, but thereafter he comes to know that he is maintaining his wudu', so that his prayer is invalid even when he does not move out of the mosque, because turning away is by way of relinquishment.

Do you not see that if what he believed had turned out to be true he would have renewed his prayer. This is the underlying rule (for understanding the distinction). The location of the rows in a desert is assigned the status of a mosque. If he moves towards the front, then, the limit is the sutrah, but if a sutrah is not there then the limit is equal to the extent of the rows. If he is praying alone, then the limit is the location of his prostration on all sides.

If he has a fit of insanity, or goes to sleep and has a seminal discharge, or has a fit of fainting, he is to renew his prayer, because these incidents are rare and, thus, cannot be included within the implication of the text. Likewise, if he laughs out loud, for that has the status of speech that cuts off prayer.

If the imām is prevented from recitation (due to physical reasons) and he makes another come forward, the prayer of both is valid, according to Abū Ḥanīfah (God bless him), while the two jurists said that their prayer is not valid, because such an occurrence is rare and, therefore, resembles major impurity (janābah) during prayer. He (the Imam) argues that istikhāf (delegation) is due to a (physical) disability that is certain in this case. Further, prevention from recitation is not rare, thus, it cannot be linked to major impurity. If he is able to recite to an extent
that makes prayer valid, it is not permitted to him to delegate his function, on the basis of consensus (ijma’),18 due to the absence of a need for delegation.

If involuntary impurity overcomes him after tashahhud, he is to perform wudū’ and offer the salutation. The reason is that the salutation is essential, therefore, ablution is essential for performing it.

If he intentionally invokes hadath at this stage20 or he talks to someone or does some work that negates prayer, his salat is complete. The reason is that an obstacle has been created for the continuity due to the existence of a happening that cuts it off.21 There is, however, no repetition for him as no ruku (essential element) is left.

If a person who has performed tayammum sees water during his prayer, his prayer stands nullified.22 This discussion has preceded earlier.

If23 he sees it24 after adopting the sitting posture to the extent of the tashahhud, or he had performed mash and the period of mash is over, or he takes off his boots with a slight movement,25 or he is an ummi, but comes to learn that he is a sarah,26 or he is praying naked when he notices a dress,27 or he is praying through indication, but finds the ability for bowing and prostrating, or he remembers a lost prayer that was due from him before this one, or an imam who can recite acquires hadath and delegates the prayer to an ummi, or the sun has risen during fajr, or the time of ‘asr has commenced while he is still praying jumua’ah, or he had performed mash on the splint (plaster) and it falls down due to healing, or he was a person with a disability and the disability goes away, as in the case of the mustahadah and those with the same legal status,28 then, his prayer is nullified according to Abu Hanifah (God bless him). The two jurists said that his prayer is valid. It is said that the rule here is that coming out of prayer through the act of the worshipper is obligatory29 according to Abu Hanifah (God bless him), while it is not obligatory according to the two jurists. Thus, the intervention of these factors at this stage, in his view, is as their same intervention during prayer, while in the view of the two jurists it is like their intervention after the salutation. They rely on what we have related about the tradition of Ibn Mas’ud (God be pleased with him).30 He argues that it is not possible for him to offer another prayer except by emerging from this prayer, and the act without which an obligation cannot be attained becomes an obligation. Further, the meaning of the word “completed” here is that it is close to completion. Delegation, however, is not an invalidating factor so that it is justified on the part of one who recites. The invalidating factor is a necessary requirement of the hukm shar'i, which is the illegibility for imamah.

If a person follows the imam, after the imam has prayed one rak’ah, and the imam then acquires hadath bringing this man forward (by delegation), his imamah/prayer is valid, due to participation in the tahrimah. It is, however, preferable for the imam to delegate it to one who has caught the prayer (right from the start) as he is better able to complete his prayer. It is necessary for this person being brought forward not to advance due to his inability to offer the salutation. If he does advance, then, it is essential for him to start from where the imam left off, as he stands in his place. When he reaches the stage of the salutation, he is to make another person, who caught the prayer (from its start), to advance so that he can offer the salutation. If at the time of completing the salat of the (first) imam, he laughs loudly or intentionally acquires hadath, or talks or walks out of the mosque, his prayer stands nullified, while the prayer of the followers is complete. The reason is that an invalidating factor is found in his case during the prayer, while it affects them only after the performance of all the arkān (elements). If the first imam has

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18That is, delegation of imamah in such a case is not permitted on the basis of ijma’.

19That is, the stage of tashahhud.

20The acts mentioned in the issue.

21The Author mentions this issue here so that it can be compared with cases in which hadath has been acquired during prayer. In the case of tayammum, when water is seen, the hadath existing prior to tayammum takes over and renders void the purification created through tayammum.

22These are the twelve issues in all and are well known. Some jurists have added five additional issues here.

23That is, if he is praying with tayammum and sees water.

24Because excessive movement invalidates prayer.

25That is, recall it after having forgotten it. Some say if he hears it and memorises it with excessive effort.

26Without seeking it.

27Or his imam.

28Take a person with a urine problem or an ulcerous wound.

29That is, the worshipper must himself end his prayer after tashahhud, however, in these cases the prayer has been terminated by other acts or happenings.

30This has preceded. In this tradition of tashahhud where the words are: “Where you have said this or done this your prayer is complete.” Al-Zayla’i, vol. 3, 306.
completed his prayer, his prayer is valid, but if he is not done with his prayer, his prayer is invalid. This is the correct view.

If the first imam does not acquire hadath and takes the sitting posture to the extent of tashahhud, and then laughs loudly, or acquires intentional hadath, the prayer of the person who did not catch the first rak'ah is invalid, according to Abu Hanifah (God bless him). The two jurists said that it is not nullified. If he talks or goes out of the mosque, his prayer is not nullified according to all three jurists. The two jurists argue that the prayer of the follower is dependent upon the prayer of the imam both in terms of validity and invalidity. The prayer of the imam has not become invalid and so also the prayer of the follower; it becomes like salutation and speech (after tashahhud). The Imam argues that laughter is an invalidating factor for the part of the prayer of the imam that it affects and it, therefore, invalidates a similar part of the prayer of the follower, except that the imam does not need to continue his prayer while the person who could not catch the first rak'ah does. Continuing an invalid prayer maintains the invalidity as distinguished from the salutation as it is part of the completion and speech has the same legal status. The wudu' of the imam, however, stands annulled due to existence of laughter within the period (harmah) of prayer.

If a person acquires hadath in his rukū' or in his sujūd, he is to perform wudu' and continue his prayer. The rak'ah (or the prostration) during which he acquired hadath is not to be counted. The reason is that the rukū' is completed by transferring to the next, and with hadath this is not possible, therefore, it is necessary to repeat it. If the person is the imam and he makes another person advance, then, this person is to maintain the rukū', as he is able to complete it by maintaining the posture.

If the worshipper, while bowing or prostrating, remembers that he has missed a prostration and he lowers himself for it from his rukū' or raises his head from his prostration (to perform it) and then performs it, he is to repeat the rukū' as well as the sujūd. This is the explanation of the preferred act so that the acts of prayer are performed in order to an extent possible. If he does not repeat them, his prayer is valid, because

maintaining an order in the acts of prayer is not a condition, while transferring (to the next rukū') in a state of purification is a condition and this is present. According to Abū Yūsuf (God bless him), it is binding on him to repeat the rukū', because rising after the rukū' (qawmah) is an obligation in his view.

He said: If a person leading a single person in prayer acquires hadath and moves out of the mosque, then, the person being led is the imam whether or not he forms an intention for this insofar as this amounts to the securing of the prayer. The identification by the first (imam) is to avoid a clash and there is no clash here. The first imam completes his prayer as the follower of the second person, as if he had actually delegated the imamah to him.

If there is no one behind him except a minor or a woman, it is said that his prayer has become invalid, due to delegation to one who is not eligible for imamah. It is said that it is not invalidated, because lack of delegation is not intentional, and the person following is ineligible. God knows best.

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33For he, being the only follower, becomes identified as the imam.
34Of the person following.
35As there is only one person to be identified.
Chapter 14

Factors Nullifying Prayer and Things Disapproved During Prayer

If a person talks in his *salāt*, intentionally or by mistake, his prayer stands nullified. Al-Shāfī‘ī (God bless him) disagrees in the case of mistake and forgetfulness, and his recourse is to the well known tradition. We rely on the words of the Prophet (God bless him and grant him peace), “In this prayer of ours no part of human speech is valid for it is glorification, the proclamation of God’s greatness and the recitation of the Qur’ān.” What he has related is interpreted to apply to the removal of sin as distinguished from the salutation made in error because it is a form of remembrance. It is treated as *dhikr* in a state of forgetfulness, and as speech when pronounced intentionally insofar as there is substantial speech in it.

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1 Prior to adopting the sitting posture up to the *tashahhud*.
2 This is the tradition that says, “Liability (the Pen) has been lifted from my Ummah in the case of mistake, forgetfulness and what they have been coerced to do.” Al-Zayla‘ī says that the tradition is not found in these words even though the fuqahā’ always refer to it in these words. Similar traditions have been recorded by Ibn Mājah and others. Al-Zayla‘ī, vol. 2, 64.
3 It is recorded by Muslim in his *Ṣaḥīḥ*, and other versions by al-Bukhārī and al-Dār‘qūnī. Al-Zayla‘ī, vol. 2, 66.
4 By way of reconciliation between the two traditions. That is, the rule emerging from the tradition pertains to the next world (*ākhirah*). Will he say the same thing with respect to general exceptions in the criminal law where the tradition is used?
5 Analogy used in support of al-Shāfī‘ī’s argument, that is, just like error is overlooked in salutation made in error. He argues that *salām* resembles human speech. In other words, although analogy dictates that salutation made in error should invalidate prayer, yet we have undertaken *istiḥsān* here insofar as *salām* is more like *dhikr* and not human speech.
If he groans in it, sighs or cries with his cries being loud, then, if this is due to the mentioning of heaven or hell it is not to be treated as cutting off prayer, because it reveals enhanced devotion.

If it is due to pain or distress, then, it does cut it off, because in this case it amounts to an expression of anguish and regret, thus, it is deemed human speech. It is narrated from Abū Yusuf (God bless him) that the worshipper’s saying “aah” does not invalidate it, in both cases but his sigh does. It is said that the rule in his view is that if the word is composed of two characters and these are from among the zawī’d, or one of them is, the prayer is not nullified, but if these are the asl characters, the prayer is invalid. The zawī’d are all gathered in the statement al-yawn’ tansāḥu. This, however, is not a strong argument, because the speech of people is according to their usage and follows the characters used for composition and the communication of meaning, and this can result in all the characters being zawī’d.

If he clears his throat without an excuse when there was no compulsion to do so and this leads to the pronouncing of words, then, in the opinion of the two jurists it is necessary that the prayer be deemed invalid, but where this is due to an excuse it is overlooked like sneezing or burping when these result in words. When a person sneezes and the other blesses him saying “God have mercy on you,” his prayer is invalid, as this is used for communication between people, thus, it will be treated as speech. This is distinguished from the situation where the person sneezing or one who hears it, says, “Praise be to God,” (the prayer is not nullified) according to what some jurists say, because this is not deemed a customary response.

If someone seeks to be prompted (in recitation) and he prompts him while praying, his prayer is nullified. The meaning here is that the person praying prompts someone other than the imām. The reason is that this amounts to teaching and instruction and is, therefore, a category of human speech. Thereafter, he (Muḥammad) stipulated repetition in Kitāb al-Asl as this is not one of the acts of prayer and a minor prompting will be overlooked. He did not stipulate this in al-jami` al-Saghir, because speech, however little, is in itself a factor that cuts off prayer.

If he prompts his imām, it does not amount to invalidating speech, on the basis of istiḥsān, because he is under a compulsion to rectify his prayer. It is, therefore, treated as speech that is an act of prayer in meaning. He is to formulate the niyyah for prompting his imām and not recitation. This is the correct view as it is an exemption provided to him, while recitation on his part is forbidden.

If the imām switches over to (the recitation of) another verse, the prayer of the person who prompted him is rendered invalid and so is the salat of the imām if he follows his prompting (for the different verse) due to the existence of prompting and its acceptance without any necessity for this. It is essential for the follower not to be hasty about prompting, while the imām should not incite the followers to do so, rather he should go into rukū’ if he has already recited the minimum or he should move to another verse.

If a man (praying) says in response to someone, “la ilāha illa ’llāhi,” then, this amounts to invalidating speech according to Abū Ħanīfah and Muḥammad (God bless them), while Abū Yusuf (God bless him) says that it does not invalidate prayer. This disagreement pertains to the situation where he has said this in response to a question raised by someone. According to him (Abū Yusuf) it is glorification in its proper form and its nature is not altered by the intention of the worshipper. The two jurists argue that he uttered the words in the form of a response and it can be interpreted as a response, therefore, it is treated as one. The blessing for

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1. The istihsān is based on reports.
2. The imām.
3. Because some jurists have said that he is to formulate the niyyah of recitation and not of prompting, however, al-Sarakhsi maintains that this is an error.
4. And also according to Malik and Ahmad (God bless them).
5. And also al-Shafi’ī (God bless him). This is what is meant in the previous note. In other words, what we are saying here is that Abū Yusuf’s opinion is stronger here. The opinion is too complicated to follow.
6. That is, if he pronounces these words in response to a question, the prayer is invalid, but if he says this as a notification that he is in the middle of prayer, it is not invalid. It is difficult to distinguish the two when they are in response to a question, otherwise why would this person feel the need for notification? It is possible that in one situation the person asking the question has no way of knowing that the other is praying; this needs notification. In another situation, he can see that the other person is praying; he does not need notification.
7. This negates the idea of validity in case of notification.
sneezing and saying, "To God we belong and to Him is our return" are also governed by the same rule according to the sound view.

If he intends thereby to indicate to another that he is in the process of praying, his prayer is not invalid on the basis of consensus (ijmá').

If a person, after praying one rak'ah of zuhr, commences the asr prayer or a supererogatory prayer, then he has rendered his zuhr prayer invalid, because the commencement of another prayer is valid, therefore, he moves out of the previous prayer. If, however, he commences the zuhr prayer (again) after having prayed a rak'ah, then, it remains the same prayer and his first rak'ah will be valid. The reason is that he formulated the niyyah of the same prayer that he was in, thus, his niyyah becomes superfluous, and the person making the niyyah retains his original state.

If the imám7 reads out his recitation from the mushaf his prayer is invalid according to Abú Ḥanifah (God bless him). The two jurists said that it remains intact, because it is a form of worship that is appended to another form of worship. It is, however, considered disapproved as it resembles the act of the People of the Book.8 According to Abú Ḥanifah (God bless him), the bearing of the mushaf, looking at the pages and turning the leaves amounts to excessive actions (during prayer). Further, the acquiring of the text from the mushaf is like acquiring it from another person. According to this line of reasoning, there is no difference between holding the mushaf and reading from one laid on a stand, but according to the former argument there is a difference. Thus, if one were to look at written text with understanding, the correct view is that his prayer would not be rendered invalid, on the basis of consensus. As distinguished from this, if a person makes a vow that he will not read someone's book, it means that he will break his vow if he understands it, according to Muhammad (God bless him), because the aim there is to understand it. As for the invalidity of prayer, it depends on excessive (extra) acts during prayer, and these are not found in this case.

If a woman passes before a man praying, his prayer is not rendered invalid, due to the words of the Prophet (God bless him and grant him peace), "Prayer is not cut off by anything passing in front." The person passing in front, however, has sinned, due to the words of the Prophet (God bless him and grant him peace), "If only a person passing in front of the person praying knew what burden he is carrying, he would have waited for forty." The person passing in front sins only if he passes over the location of his prostrations, according to what is said, when there is no intervening barrier between them and the limbs of the person passing come to the level of the limbs of the worshipper, if this person is praying on top of a platform.

It is essential for a person praying in an open space to place a covering in front of him, due to the words of the Prophet (God bless him and grant him peace), "If one of you is unable to place a sutrah in front of him, one version is ghālib. A tradition that comes close to it is recorded by Abú Dáwúd. Al-Zayla'i, vol. 2, 76.

9It is related from many Companions (God be pleased with them). One version is recorded by Abú Dáwúd. Al-Zayla'i, vol. 2, 82.

10This refers to a tradition recorded by Abú Dáwúd. Al-Zayla'i, vol. 2, 83.
sūrah of the people, because “the Prophet (God bless him and grant him peace) prayed at Batha‘ of Makk’ah with his staff in front of him, when the people had no sūrah.”

The affixing of the sūrah is acknowledged and not its laying down or the drawing of a line, because the purpose is not attained through these.

He is to keep away the person passing in front when there is no sūrah in front of him or the person is passing between him and the sūrah, due to the words of the Prophet (God bless him and grant him peace), “Keep him away as far as you can.” He is to keep him away by indication (gesture) as was done by the Prophet (God bless him and grant him peace) with the two children of Umm Salamah (God be pleased with her), or he is to keep him away through glorification of God, as was related by us earlier, though combining both methods is disapproved, because one of them is sufficient.

14.1 Disapproved Acts

It is deemed disapproved for the worshipper to play around with his dress or his body (during prayer), due to the words of the Prophet (God bless him and grant him peace), “God has disliked three things for you...,” and within this he mentioned playing around.” The reason is that fooling around outside of prayer is forbidden, then, what would you say about prayer.

He should not play around with pebbles for this too is a type of frivolous playing around, unless it is not possible for him to perform the prostration in which case he is to level them in a single action. This is due to the words of the Prophet (God bless him and grant him peace), “Just once, O Abū Dharr, otherwise let it be,” as in this case it is in the interest of his prayer.

He is not to snap/click his fingers due to the saying of the Prophet (God bless him and grant him peace), “Do not click your fingers while you pray,” and he is not to do takhassar, which is the placing of his arms akimbo, because the Prophet (God bless him and grant him peace) prohibited the placing of one’s arms akimbo during prayer as it leads to the giving up of the prescribed practice.

He is not to turn his head around due to the saying of the Prophet (God bless him and grant him peace) “If only the person praying knew who he is contacting when he turns his head.” If he looks at what is on the left or right from the corners of his eyes without turning his neck, it is not disapproved, because the Prophet (God bless him and grant him peace) used to observe his Companions (God be pleased with them) during his prayer through the inner corner of his eye.

He is not to sit on his haunches or to rest his elbows on the floor, due to the saying of Abu Dharr (God be pleased with him) that “My Khalil (Friend) told me not to do three things: pecking like a hen, sitting on my haunches like a dog and placing my elbows on the floor like a fox.” Iqā‘ is to place one’s hips on the floor and raising one’s knees (towards the chin), and this is the correct view.

He is not to respond to a salutation with his tongue, as this amounts to speech, nor with his hand for this amounts to a response in meaning, thus, if he shakes hands intending a salutation thereby, his prayer is invalid.

He is not to sit with crossed legs (squatting) except due to an excuse, as in this is the giving up of the sunnah about the sitting posture.

He is not to braid his hair over his head, which is the gathering of one’s hair over the crown of the head and tying them with a thread or pasting them so that they stick together. It is related that “the Prophet...”

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25 It is recorded by al-Bukhārī. Al-Zayla`i, vol. 2, 84.
26 This tradition has preceded and has been recorded by Abū Dāwūd. Al-Zayla`i, vol. 2, 84.
27 It is recorded by Ibn Mājah in his Sunan. Al-Zayla`i, vol. 2, 85.
28 This is a mursal tradition. Mursal traditions are employed by the Ḥanafīs as legally binding. Al-Zayla`i, vol. 2, 86.
29 It is gharib in this version, however, a similar tradition has been recorded by Ahmad (God bless him) in his Musnad, while other versions have been recorded in the sound compilations. Al-Zayla`i, vol. 2, 86.
due
bles the worship of forms. The disapproval of doing so is unqualified in
or a sword is suspended in front of him, it is on this basis that disapproval is established.
Kitab al-Asl
prays on a mat that has pictures on it, occasions, used to take Nafi` as a
degradin g the person who is talking,
imam,
platform), which is narrated in the
basis of what we have said,
prostrations are
becomes invalid,
(God bless him and grant him peace) forbade prayer by a man with
braided hair."
He is not to hold up his dress (during ruku' or sujūd) for it is a type
of haughtiness, nor is he to let his dress trail (sādīl), because "the Prophet
(God bless him and grant him peace) forbade sādīl," which is the placing
of one's dress on the head and shoulders and then letting the sides hang
down.
He is not to eat or drink as these are not acts that are part of salāt.
If he does eat or drink, intentionally or out of forgetfulness, his prayer
becomes invalid, as this amounts to excessive acts (during prayer) and
the state of prayer is a constant reminder (therefore forgetfulness cannot
be overlooked).
There is no harm if the imām stands inside the mosque while his
prostrations are inside the prayer niche (mihrāb), but it is disapproved
that he stand inside the mihrāb, as it resembles what the People of the
Book do with respect to the identification of a particular place for the
imām, as against his prostrations being inside the mihrāb.
It is disapproved that the imām pray alone on a raised platform on
the basis of what we have said, and so also the opposite (imām on a lower
platform), which is narrated in the Zāhir al-Riwayāh as this amounts to
degrading the imām. There is no harm if he prays towards the back of
a person who is talking, because Ibn 'Umar (God be pleased with him), on
occasions, used to take Nāfi` as a sutrah on some of his journeys.37
There is no harm when he prays while a copy of the Qur`ān (mushaf)
or a sword is suspended in front of him, as these are not worshipped,
and it is on this basis that disapproval is established. There is no harm if he
prays on a mat that has pictures on it, as that amounts to degrading the
pictures, however he is not to prostrate on the pictures, as that resembles
the worship of forms.38 The disapproval of doing so is unqualified in
Kitāb al-Asl as the place of prayer is to be respected.
It is considered disapproved that there be pictures or suspended
forms above his head, on the roof, or in front of him or next to him,
due to the tradition of Jibril: We do not enter a room in which there is

36 It is recorded by Ibn Majah in his Sunan. Al-Zayla'i, vol. 2, 93.
37 It is recorded by Abū Dāwūd in his Sunan. Al-Zayla'i, vol. 2, 95.
39 That is, pictures of things that have life in them. See rule below.
possible for him to do so before commencing, therefore, there will be no need to do so afterwards. God knows best.

14.2 ETIQUETTE FOR THE PRIVY AND THE MOSQUE

It is prohibited to turn one of the two passages towards the qiblah when in the privy, “because the Prophet (God bless him and grant him peace) prohibited this,” turning one’s back towards it is disapproved in one narration insofar as it amounts to the giving up of veneration. In another narration it is not disapproved as the passage of the person turning his back is not facing the qiblah and what drops from it drops downwards as distinguished from the person facing it as his passage faces the qiblah and what comes out is directed toward it.

Sexual intercourse, urination and defecation on the roof of the mosque are disapproved. The reason is that the roof of the mosque takes the same rule as the mosque itself. Thus, following an imām, on the rooftop, by those below is valid. Ṭīkāf (seclusion in a mosque) is not annulled by climbing up to the roof. It is not permitted for a person with major impurity (jumlah) to stand on the roof of the mosque.

There is no harm in urination on top of a house in which there is a mosque. The reason is that the place of prayer prepared in a room does not take the rule of the mosque even though we recommend that such a place be prepared in a house.

It is disapproved that the door of the mosque be closed, as this amounts to preventing prayer. It is said that there is no harm in this during timings other than prayer timings if there is apprehension about the assets of the mosque being lost.

There is no harm in decorating the mosque with gypsum, teak wood and gold paint. His words “there is no harm” indicate that the person who does this will not be paid wages for doing so but at the same time he will not sin due to his act. It is said that it is an act for attaining nearness to God if the person does it with his own wealth. As for the person in charge (mutawalli), he is to undertake, out of the wealth of the waqf, acts that pertain to the ṣuḥūlāt for constructing the structure to the exclusion of what pertains to decoration. If he does so, he is liable for compensating the amount spent. God knows what is correct.

Chapter 15

The Witr Prayer

The witr is obligatory (wajib) according to Abū Ḥanifah (God bless him), while the two jurists said that it is a sunnah, due to the preference of the reports about its being a sunnah, insofar as one who denies the validity of this prayer is not deemed an unbeliever and there is no adhān for it. Abū Ḥanifah (God bless him) relies on the words of the Prophet (God bless him and grant him peace), “God has added another prayer for you. Take note that this is the witr prayer, therefore, offer the prayer in the time between ‘isha’a and fajr.” The tradition contains a command and that gives rise to obligation (waqf). It is for this reason that its performance by way of qadā’ has been prescribed on the basis of consensus (ijmā’). The person who denies it is not imputed with unbelief as its obligation has been established through the sunnah. It is the same idea that underlies the narration that it is a sunnah. It is performed at the time of ‘isha’a, therefore, its adhān and iqāmāt are deemed sufficient for it.

The witr prayer consists of three rak‘ahs that are not separated from each other through salutation, on the basis of what was transmitted by ‘A‘ishah (God be pleased with her) that “the Prophet (God bless him and
grant him peace) used to offer the witr prayer with three rak'ahs.\(^4\) Al-Hasan (God bless him) has narrated the consensus of the Muslims over the number three. This is one of the opinions of al-Shafi'i (God bless him). In another opinion of his, witr is offered with two salutations, which is also the opinion of Malik (God bless him). The proof against them is what we have related.

The qunut (supplication) is offered in the third rak'ah prior to the ruku'. Al-Shafi'i (God bless him) said that it is offered after the ruku' on the basis of the report that "the Prophet (God bless him and grant him peace) offered the qunut at the end of witr,\(^5\) and the end is after the ruku'. We rely on the report that "the Prophet (God bless him and grant him peace) offered the qunut before the ruku'\(^6\) and what is in excess of half of a thing is its end.

The qunut is offered throughout the year with al-Shafi'i disagreeing, except with respect to the second half of Ramadan.\(^7\) Our reliance is on the words of the Prophet (God bless him and grant him peace) to al-Hasan ibn 'Ali (God be pleased with both) when he taught him the qunut saying, "Include this in your witr prayer,\(^8\)" and he did not qualify this in any way.

In each rak'ah of the witr prayer the Fāṭihah and a surah is to be recited, due to the words of the Exalted, "Recite what is easy from the Qur'an.\(^9\)" When the worshipper decides to offer the qunut he is to pronounce the takbir, because the state of the prayer stands altered, and he is to raise his hands (for the takbir) and then offer the supplication (qunut), due to the words of the Prophet (God bless him and grant him peace), "The hands are not to be raised except on seven occasions, and among these he mentioned the qunut.\(^10\)

\(^4\)It has been recorded by al-Nasā'i in his Sunan. Al-Hākim has said that it is a sound tradition meeting the conditions laid down by al-Bukhārī and Muslim. Al-Zayla'ī, vol. 2, 118.


\(^6\)It is related from several Companions (God be pleased with them). One version has been recorded by al-Nasā'i and Ibn Majah. Al-Zayla'ī, vol. 3, 123.

\(^7\)That is, the qunut is offered in the second half of Ramadan.

\(^8\)It has been recorded by well known Imams of the four Sunan. Al-Tirmidhī has called it a hasan tradition. Al-Zayla'ī, vol. 2, 125.

\(^9\)Qur'ān 73:20.

\(^10\)This tradition has preceded in the topic of the description of prayer. See al-Zayla'ī, vol. 1, 389-90.

The qunut is not to be offered in any prayer other than the witr prayer, with al-Shafi'i (God bless him) disagreeing in the case of the fajr prayer. (Our ruling) is based on the report of Ibn Mas'ūd (God be pleased with him) that "the Prophet (God bless him and grant him peace) offered the qunut in the fajr prayer for a month and then gave it up.\(^11\)

If the imām recites the qunut in the fajr prayers, the person behind him (follower) is to remain silent according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf (God bless him) said that he is to follow him, because he is to follow the imām, and further qunut (in the fajr prayer) is subject to ijtihād. The two jurists argue that its recitation in the fajr prayer is abrogated, thus, there is no following in this. Thereafter, it is said that he is to stand waiting to follow in what is obligatory with respect to following. It is also said that he is to sit down to exhibit disagreement, because the silent person is participating with the one offering the supplication. The first opinion is stronger. The issue indicates the permissibility of following a Shafi'i imām in prayer and in following him in the recitation of the qunut in witr. If the person following such an imām comes to know something that he believes will render his prayer invalid, like flowing of blood and other things, then, following him is not valid for him. The preferred recitation of qunut is inaudible, because it is a supplication. God knows best.

\(^11\)This tradition has been reported by some, including al-Tahāwī (God bless him) in his Kitāb al-Athār. The text as it appears in the manuscripts of al-Hidāyah is "disagreeing in the case of the fajr prayer on the basis of the report of Ibn Mas'ūd (God be pleased with him)." This would imply that Imām al-Shafi'i (God bless him) is relying on this report. This is not possible as the report negates his position. Al-Zayla'ī notes this and points out that some text may have been missed here. In our view, this has occurred several times in the first volume and it appears to be a device used by the Author to reduce words and make the reader focus. Accordingly, we have ended the sentence at the word "prayer" and begun the next with the words "(Our ruling)." God knows best.
Chapter 16

*Nawāfil* (Supererogatory Prayers)

The *sunnah* prayers consist of: two *rak'ahs* prior to *fajr*; four prior to *zuhr* and two *rak'ahs* after it; four prior to 'asr, but if the worshipper likes he can pray two *rak'ahs*; two *rak'ahs* after *maghrib*; and four prior to 'ishā' and four after it or two *rak'ahs* if he likes. The basis for this are the words of the Prophet (God bless him and grant him peace), “A person who persists in praying twelve *rak'ahs* in a day and night, for him God will build a room in heaven.” The Prophet (God bless him and grant him peace) elaborated in a manner that is recorded (later) in the *Kitāb al-Asl*, except that the Prophet (God bless him and grant him peace) did not mention the four *rak'ahs* prior to 'asr. Consequently, these have been called good and a blessing in *Kitāb al-Asl*, due to the conflict of reports. The preferred number is four. He did not mention the four prior to 'ishā', for which reason they are deemed recommended due to the absence of the element of persistence. He mentioned the two *rak'ahs* after 'ishā' and in other traditions he mentioned four, for which reason the worshipper is granted the option. It is preferable to offer four especially according to Abū Ḥanifah (God bless him) as has been known from his opinion. The four *rak'ahs* prior to *zuhr* are offered with a single *taslimah* in our view, as

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1. It is recorded by the Imāms of the sound compilations except al-Bukhārī. Al-Zayla’ī, vol. 2, 137–38.
2. By Muḥammad ibn al-Ḥasan al-Shaybānī (God bless him).
3. These are traditions recorded by Abū Dāwūd, Ahmad and others. The tradition of “persistence” stated above does not mention the four *rak'ahs* before 'asr.
4. In the tradition of “persistence” stated above.
5. In al-Qudūri’s statement.
6. That is, four with a single *taslimah* have greater merit during the night in his view.
directed by the Messenger of God (God bless him and grant him peace). Al-Shāfi‘ī disagrees with this. He said: The naṣāfīl (supererogatory prayers), if he wishes, he may pray with the tasilma of two rak‘ahs and if he wishes he may offer four. An excess over this is disapproved. As for the naṣīḥah of the night, Abū Ḥanīfah (God bless him) said that if he offers eight rak‘ahs with a tasilmah it is valid. An excess over this is disapproved. The two jurists take into account the practice for the prayers of the night. The evidence of disapproval is that the Prophet (God bless him and grant him peace) used to pray four rak‘ahs during the day. According to al-Shāfi‘ī (God bless him) uses the words of the Prophet (God bless him) and grant him peace). Al-Shāfi‘ī (God bless him) relies on the words of the Prophet (God bless him and grant him peace), “The prayer of the night and day is two at a time at night and four at a time during the day. According to al-Shāfi‘ī (God bless him), two at a time are to be offered in both cases. Al-Shāfi‘ī (God bless him) says that the Prophet (God bless him and grant him peace), “The prayer of the night and day is two at a time.” The two jurists take into account the practice for the ṭarāwīh prayer for this. Abū Ḥanīfah (God bless him) relies on the report that “the Prophet (God bless him and grant him peace) used to pray four at a time after ‘isha,” which is a report from ‘Abd Allāh ibn ‘Abdullāh (God be pleased with him). The Prophet (God bless him and grant him peace) persistently prayed four for the duḥa prayer. Further, it (four rak‘ahs) involves a longer tahrimah, more hardship and greater merit. Consequently, if a person makes a vow (nadhr) that he will pray four with a tasilmah, he cannot move out of this vow by praying with it two tasilmahs. If the case is reversed, he can be released from the vow. The ṭarāwīh prayer, on the other hand, is offered with the congregation, therefore, ease in offering it is taken into account. The meaning of the tradition related by al-Shāfi‘ī (God bless him) is the observance of an even and not an odd number. God knows best.

16.1 Recitation

Recitation in the definitive obligation (fard) is obligatory in two rak‘ahs. Al-Shāfi‘ī (God bless him) said that it is obligatory in all the rak‘ahs, due to the words of the Prophet (God bless him and grant him peace), “There is no prayer without recitation, and each rak‘ah is prayer.” Malik (God bless him) said that it is obligatory in three rak‘ahs and this maximum number stands in place of the total for the sake of ease. We rely on the words of the Exalted, “Recite what is easy from the Qur‘ān.” The command to do an act does not imply repetition. We made it obligatory in the second due to implication from the first, because they are identical in every respect. As for the next two they are distinguished from them due to their waiver (curtailment) in the case of journey, as well as on the basis of the description of recitation and its extent, therefore, they cannot be linked to the first two. The term salāt in the report is mentioned explicitly, therefore, it is to be interpreted as a complete prayer and that is two rak‘ahs on the basis of practice. Thus, if a person makes a vow that he will not offer salāt (he will break it by praying two) as against one who takes the oath stating that he will not pray (for he will break it with just one rak‘ah).

The worshipper has an option with respect to the other rak‘ahs. The meaning is that if he likes he may remain silent, but if he likes he may

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8In his view, these are to be offered with two tasilmahs.
9It is gharib, and in al-Bukhari there is a tradition that goes against it. Al-Zayla‘ī, vol. 2, 143.
10The tradition has been related from a large number of Companions (God be pleased with them). One version from Ibn ‘Umar (God be pleased with both) is recorded by the four Imāms of the Sunan. Al-Zayla‘ī, vol. 2, 143.
11It is reported by Abū Dāwūd in his Sunan. It is also recorded by al-Nasa‘ī in al-Sunan al-Kubrā. Al-Zayla‘ī, vol. 2, 145.
12It is recorded by Muslim in his Sahih. Al-Zayla‘ī, vol. 2, 146.
13It is recorded by Muslim in his Sahih. Al-Zayla‘ī, vol. 2, 147.
14It is recorded by Muslim. Al-Zayla‘ī, vol. 2, 147.
15Qur‘ān 73:20
16This is the qā‘idah ussābiyyah that we have mentioned in the notes at the beginning of the chapter on the obligations of wudu‘. The qā‘idah is that an absolute or unqualified command does not imply repetition of the required act, unless another evidence requires repetition. Here it poses the question: how is the recitation required in the second then? The Author tries to answer this question in the following lines.
17It is the first it is established by ṭabāt al-naṣṣ, while in the second it is established by ṭalāt al-naṣṣ, because the two rak‘ahs are identical. Al-Sarakhsi claims the ijmā‘ of the Companions (God be pleased with them) on the issue.
Recite or he may even offer glorification. This is how it has been transmitted from Abu Hanifah (God bless him), and it is reported from 'Ali, Ibn Mas'a'id and 'A'ishah (God be pleased with them). It is, however, preferable to recite (as compared to glorification) because the Prophet (God bless him and grant him peace) used to do so persistently. Consequently, there is no obligation of rectifying an error (through prostration) due to its neglect, as stated in the Zahir al-Riwayah.

Recitation is obligatory (wajib) in all the rak'ahs of the supererogatory (nafl) prayers and in all the rak'ahs of the witr prayer. In the case of the nafl prayer, each pair of it is prayer on its own, and standing up for a third is like a renewed tahrimah. Accordingly, with the first tahrimah only two rak'ahs are obligatory, according to the well known (mash'ir) report from our jurists (God bless them). It is for this reason that they said that he is to start with the opening in the third rak'ah, that is, by saying subhanaka 'Ilahumma... In the case of the witr prayer, the reason is precaution.

He said: A person who begins praying the supererogatory prayer and then renders it invalid is to perform it again as qada'. Al-Shafi'i (God bless him) said that there is no qada' for such a person as this is a voluntary act, and there is nothing binding for one who acts voluntarily. Our argument is that the person offering it has begun an act of attaining nearness to God, therefore, it is binding on him to complete it due to the necessity of protecting such an act from becoming nullified.

If he prays four rak'ahs and recites in the first two, adopts the sitting posture, but then the next two rak'ahs are rendered invalid, he is to pray two rak'ahs by way of qada'. This is so according to Abu Hanifah and Muhammad (God bless them). According to Abu Yusuf (God bless him), he is to offer four by way of qada'. This is an issue that has eight interpretations. The underlying basis is that according to Muhammad (God bless him) the giving up of recitation in the first two or in one of the two, leads to the nullification of the tahrimah, because it has been concluded for acts. According to Abu Yusuf (God bless him), the giving up of recitation in the first pair does not lead to the nullification of the tahrimah rather it leads to the invalidity of performance as recitation is an additional rukn (element). Do you not see that salat has existence even without it except that its performance is not valid without it. The invalidity of performance is not more than giving it up, therefore, the tahrimah is not annulled. According to Abu Hanifah (God bless him), the relinquishing of recitation in the first two rak'ahs leads to the nullification of the tahrimah, but doing so in one of them does not lead to it, because each pair in voluntary prayer is salat in its own right and its invalidity due to the relinquishment of recitation in one rak'ah is an issue that is subject to ijthidād. Accordingly, we decided upon its invalidity resulting in the obligation of qada', and we also gave the ruling about the survival of the tahrimah resulting in the second pair becoming invalid by way of precaution. Once this is established, we say: If he did not recite in all of them, he is to offer two rak'ahs by way of qada', according to the two jurists. The reason is that the tahrimah stands nullified due to the relinquishment of recitation in the first pair, according to the two jurists, therefore, it is not valid to commence the second pair. According to Abu Yusuf (God bless him) the tahrimah survives, therefore, commencing the second pair is valid. Thereafter, when all the rak'ahs have become invalid due to the relinquishment of recitation, then, he is under an obligation to pray all four as qada' in his view.
If he recites in the first two and not in the others, he is liable for qadā' of the remaining two on the basis of consensus (ijmā'). The reason is that the tahrimah has not been annulled, therefore, the commencement of the second pair is valid. The second pair is rendered invalid due to the relinquishment of recitation and this does not lead to the invalidity of the first pair.

If he recites in the last two and not in the others, he is liable for the qadā' of the first two on the basis of consensus (ijmā'). The reason is that according to the two jurists, the commencement of the second pair is not valid, and according to Abū Yūsuf (God bless him), even if it was valid he has performed it.

If he recites in the first two and in one of the second two, then, he is liable for the qadā' of the last two on the basis of ijmā'. If he recites in one of the first two and one of the second two, according to Abū Yūsuf (God bless him), he is liable for the qadā' of all four, and so also according to Abū ʻAmr (God bless him). The reason is that the tahrimah subsists. According to Muhammad (God bless him), he is liable for the qadā' of the first two, because the tahrimah stands removed in his view. Abū Yūsuf (God bless him) refuted this narration from him. He said, "I narrated to you from Abū Hanifah (God bless him) that he is liable for the qadā' of two rak'ahs." Muhammad (God bless him) did not, however, retract from this narration from him.

If he recites in one of the first two and not in the rest, he is to pray four as qadā' according to the two jurists. According to Muhammad (God bless him) he is to pray two rak'ahs as qadā'. If he recites in one of the last two and not in the rest, he is to perform four as qadā' according to Abū Yūsuf (God bless him), and two rak'ahs according to the two jurists. He said: The interpretation of the words of the Prophet (God bless him and grant him peace), "He is not to pray after one salāt another one like it," means two rak'ahs with recitation and two rak'ahs without recitation. Thus, it is an elaboration (bayān) of the obligation of recitation in all the rak'ahs of the supererogatory (nafl) prayers.

He is to pray the nafl prayers in the standing posture when there is an ability to stand, due to the words of the Prophet (God bless him and grant him peace), "The prayer of one sitting amounts to one-half of the prayer of one standing." Further, the prayer is prescribed in the easiest of forms (it is lawful but not wājib), and the standing posture may become difficult for the worshipper, therefore, it is permitted to him to give it up so that he is not cut off from offering the nafl prayers. The jurists disagreed about the form of the sitting posture. The view selected is that he is to sit as he sits in the state of tashahhud as that is the legally acceptable form of prayer.

If he opens the prayer in the standing posture and then adopts the sitting posture without an excuse, it is valid according to Abū Hanifah (God bless him). This is istiḥsān. In the opinion of the two jurists, it is not lawful for him to do so, and this is analogy (qiyas), because the rules of commencement are similar to those of naḍhr (vow). He, (the imām) argues that he has not resolved to adopt the standing posture in what remains and when he does so it is valid without it, as distinguished from vow (naḍhr) as in that he is bound by his explicit statement. Thus, if he had not explicitly stated that he would stand, it would not be binding for him according to some jurists (Mashaˈik—God bless them).

A person who is outside the city may offer the supererogatory prayers on the back of the riding animal facing the direction which the animal faces, and he is to pray through indication, due to the tradition of Ibn Umar (God be pleased with both), who said, "I saw the Messenger of God (God bless him and grant him peace) praying on the back of a donkey when he was facing Khaybar, and he was using indications." The reason is that supererogatory prayers are not specific to a particular time. If we make it binding for such a person to dismount and face the qiblah, the caravan will be cut off from him or he will be cut off from the caravan. As for the definitive obligation (fara'id), they are associated with particular timings. The sunan rawatīb take the same rule as supererogatory prayers. According to Abū Hanifah (God bless him), he is to dismount for the sunan of fajr as these are more emphatic (mu'akkadah) than the rest. The qualification of being outside the city eliminates the stipulation of journey as well as permissibility within the city. According to Abū Yūsuf (God bless him), it is permitted within the city too. The interpretation of

20The first two.
21It is gharib. It is mawqūf at 'Umar (God be pleased with him) in the tradition recorded by Ibn Abī Shaybah. Al-Zayla'i, vol. 2, 148.
22It is recorded by the sound compilations except Muslim. Al-Zayla'i, 2, 150.
23Thus, if he makes a vow that he will pray in the standing posture, he has to do so, and the same applies in this case.
24What about one travelling in a train.
25It is recorded by Muslim, Abū Dāwūd and al-Nasā'i, vol. 2, 151.
the Zahir al-Riwayah is that the text pertains to the case that is outside the city and the need to ride is usually outside it.

If he opens the voluntary prayer while mounted and then dismounts he is to continue the prayer. If he prays a rak'ah while dismounted and then mounts, he is to start afresh. The reason is that the tahrirah was formulated to permit rukū' and sujud insofar as he had the ability to dismount and perform them. If he performs them it is valid. The tahrirah of the person who has dismounted was formulated to include the obligation of rukū' and sujud, thus, he does not have the ability to give up what is binding without an excuse. According to Abū Yūsuf (God bless him), he is to recommence the prayer even when he dismounts. The same is the view of Muḥammad (God bless him) when he dismounts after having offered one rak'ah. The correct view is the first, and it is the stronger view.

16.2 PRAYER DURING THE MONTH OF RAMADĀN

It is recommended (mustahabb) that the people congregate during the month of Ramadān, after 'isha', and the imām lead them in praying five tarwihāt with each tarwihah ending with two taslimahs. He is to sit (rest) after every two tarwihahs to the extent of one tarwihah. Thereafter, he is to lead them in the witr prayer. He mentioned the word recommendation, however, the correct view is that it is a sunnah. This is what al-Ḥasan narrated from Abū Ḥanīfah (God bless him), because it is something that was performed persistently by the guided Caliphs (God be pleased with them). The Prophet (God bless him and grant him peace) elaborated his giving up of persistent performance due to the apprehension that it would become prescribed for us.

The sunnah for this prayer is the congregation, but in the nature of a communal duty (kifayah) so that if all the people visiting the mosque were to refuse to establish it, they would become sinners. If some of them were to establish it, then one missing the congregation would be relinquishing a superior merit. The reason is that about a few Companions (God be pleased with them) it is reported that they did not offer the prayer with the congregation. The recommended period of sitting (resting) after two tarwihahs is a period equal to one tarwihah. The same applies to the time between the fifth tarwihah and the witr prayer, as this was the practice of people praying at the two Harāms. Some have preferred resting after five taslimahs, but this is not a correct view. His statement, “thereafter, he leads them in the witr prayer,” indicates that the time for this prayer is after ‘isha’, but before the witr prayer. This is what is maintained by the jurists (Masha‘ikh—God bless them) in general, however, the correct view is that its timing is after ‘isha’ up to the end of the night, before witr as well as after it, because these are supererogatory prayers that were required after ‘isha’.

He did not mention the extent of the recitation in these prayers, but most Masha‘ikh (God bless them) maintain that the sunnah (practice) in this is to complete the Qur’ān once. Thus, he is not to relinquish it due to the laziness of the people as distinguished from the supplications after tashahhūd; which he can relinquish as these are not the sunnah.

The witr prayer is not to be prayed in a congregation, except during the month of Ramadān. There is a consensus (ijnā‘) of the Muslims over this. God knows best.
Chapter 17

Catching the Definitive Obligation (Farīḍah)

If a person prays one rak‘ah of zuhr and then the prayer in congregation commences,⁠¹ he is to pray another rak‘ah, in order to protect the rak‘ah performed from becoming nullified.⁠² Thereafter he is to join the people (congregation), for securing the merit of praying with the congregation. If the first rak‘ah has not been delineated with the prostration, he is to cut it off, and start again with the imām, and this is the sound view.³ He is at the stage where termination is correct, and such cutting off is for attaining perfection in the prayer. This is distinguished from the situation where he is praying supererogatory prayers, because cutting off the prayer would not be for perfection of the prayer. If he is offering sunnah prayers prior to zuhr or jumu‘ah, and the congregation commences, or the khutbah commences, he is to cut it off at the end of two rak‘ahs. This view is narrated from Abū Yusuf (God bless him). It is also said that he is to complete the sunnah prayer.

If he has offered three (rak‘ahs) of zuhr, he is to complete the four rak‘ahs. The reason is that the major part takes the rule of the whole, therefore, it does not admit of termination, as distinguished from the

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¹By the imām commencing the prayer.
²An objection is raised that according to Muḥammad (God bless him) this would annul the prayer and not protect it. Al-‘Aynī maintains that this objection is not valid in this case and that the opinion pertains to the case where he cannot move out of the prayer by continuing. Al-‘Aynī, vol. 2, 563. For example, where the sun has risen while he is praying fajr. In this case, it is possible for him to move out of the prayer by completing the second rak‘ah.
³In this case he has the authority to give it up as long as the prostration has not been performed. The words “sound view” are used to take care of the view that he is to complete two rak‘ahs before doing so.
situation where he is praying the third and it has not been demarcated with a prostration; here he can cut it off, as in this case he is at a stage where the prayer can be cut off. He is given an option. Thus, if he likes he can return to the sitting posture and offer the salutation, and if he likes he can pronounce the takbir in the standing position and make the niyyah of joining the prayer of the imām.5

When he completes his prayer, he may join the people (in the congregation), but what he offers with them will amount to supererogatory prayers, because the definitive obligation (fard) cannot be repeated in a single time.7

If he has offered one rak'ah of the fajr prayers and the congregation commences, he is to cut it off and join the people. The reason is that if he adds another to it, he will miss the congregation. The same applies if he stands up for the second but has not finalised it with the prostration. After completing the prayer he is not to start again with the prayer of the imām due to the disapproval of offering supererogatory prayers after fajr. Likewise, after 'asr on the basis of what we have said. The same applies after maghrib according to the Zāhir al-Riwāyah, because three rak'ahs of supererogatory prayers are disapproved, and in converting them to four entails opposition of the imām.

It is disapproved for a person who enters a mosque in which the adhān has been proclaimed to leave it until he has prayed, due to the words of the Prophet (God bless him and grant him peace), “It is only the hypocrite who leaves the mosque after the call has been made,” unless the person intends to meet a need intending to return to the mosque.

8That is, he has the authority to do so, as already stated.
9It is stated by some that he is to cut it off with a single salutation, while in the standing posture, because this is cutting off and not tahli. It is narrated from al-Halwānī (God bless him) that if he does not return to the tasahhid, his prayer is rendered invalid. The Author maintains in the section on prostrations of error that salutation in the standing posture is not lawful.
10That is, the zuhr prayer that he had started. If he completes it without cutting off, he may join the congregation.
11Because God has not imposed two definitive obligations in a single timing, like two zuhr or two 'asr prayers.
12It is recorded by Ibn Majah in his Sunan. Al-Zayla'i, vol. 2, 155; al-'Aynī, 2, 567.

He said: Unless he is a person through whom the affairs of the congregation are managed, because in his case it is giving up in form and completion in meaning.9

If he has prayed zuhr or 'ishā', then, there is no harm if he goes out, because he has responded once to the one calling towards God,6 unless the mu'adhdhin has commenced the iqāmah as in this case he will be accused of manifest opposition of the community. If, however, the prayer is that of 'asr, maghrib or fajr, he may move out even if the mu'adhdhin has started these prayers, due to the disapproval of offering supererogatory (nafl) prayers after these prayers.

If a person reaches the imām when he has begun praying the salāt of fajr, where this person has not prayed the two rak'ahs of fajr (sunnah), and is afraid that he will miss one rak'ah and catch the second (with the congregation), he is to offer the two rak'ahs at the door of the mosque11 and then enter the mosque, as he is able to combine the two merits. If he fears that he will miss the entire prayers, he is to join the imām, because the spiritual reward of praying with the congregation is greater. The directive for not relinquishing the sunnah prayer (of this time), however, has greater binding force than that for the sunnah prayers of zuhr, for which reason he is to give up the sunnah prayer in favour of the congregation in both situations (for the zuhr prayer),12 because it is possible for him to perform these prayers during the time available after the definitive obligation (fard).13 This is the correct view, however, the disagreement between Abu Yūsuf and Muhammad (God bless them) is about praying the four before the two rak'ahs and offering them after the two rak'ahs. The case of the sunnah prayers is not like this, as we shall elaborate, God willing. The restriction about performance at the door of the mosque indicates the disapproval of praying inside the mosque when
the imām is leading the prayer. The preferred place for offering the sunanah and nafl prayers in general is at one’s house, and this is reported from the Prophet (God bless him and grant him peace).\(^{15}\)

He said: If he loses the two rak‘ahs of fājr, he is not to offer them as qadā‘ prior to the rising of the sun, because it is now like nafl in the absolute sense and it is disapproved to offer them after dawn. He is not to offer them after the sun has risen high according to Abū Hānifah and Abū Yūsuf (God bless them), while Muhammad (God bless him) said: I would prefer that he offer them as qadā‘ up to the time of the declining of the sun. The basis is that the Prophet (God bless him and grant him peace) offered them as qadā‘ after the sun had risen to its height on the day following laylat al-tā‘īs.\(^{16}\) The two jurists maintain that the rule for the sunan is that they are not to be offered as qadā‘, because qadā‘ is specific to the obligation (wajib). The tradition lays down their qadā‘ as secondary to the definitive obligation (fard), therefore, what he has related is to be observed as it is. Thus, he is to offer them by way of qadā‘ as secondary to the obligation, whether he prays with the congregation or individually, up to the time of the declining of the sun. As to the time after this there is a disagreement among the Mashā‘ikh (God bless them). As for the remaining sunan besides them, they are not to be performed as qadā‘ after their timing, independently of the obligation. The Mashā‘ikh (God bless them) disagreed about their performance as qadā‘ as subservient to the definitive obligation (fard).\(^{17}\)

A person who catches one rak‘ah of zuhr, when he did not catch the other three has not offered zuhr with the congregation. Muhammad (God bless him) said that he has gained the merit associated with the congregation, because the person who has caught the end of a thing has caught the thing itself, therefore, he has gained the spiritual reward of the congregation, however, he has not prayed zuhr with the congregation in reality. Thus, if he had made an oath that “if he does not catch the congregation...” he will have violated the oath, and he does not violate the oath in which he said that he will not pray zuhr with the congregation.

A person who arrives in a mosque in which the congregational prayer has already been offered may offer voluntary prayers, as many as he likes, before he offers the prescribed (obligatory) prayer, as long as there is time. He means when there is sufficient time for this, but if there is little time then he is to relinquish this. It is said that this applies to the sunan other than those of fājr and zuhr, as there is greater merit in them. The Prophet (God bless him and grant him peace) said about the sunnah prayer of fājr, “Pray it even if horses trample over you.” About the other sunan, he (God bless him and grant him peace) said, “My recommendation will not include the person who relinquishes the four sunan prior to zuhr.”\(^{20}\) It is said that this applies to all the sunan as the Prophet (God bless him and grant him peace) performed them persistently when he offered the prescribed obligatory prayers with the congregation, and there is no sunnah without persistent performance.\(^{20}\) It is, however, better that the worshipper should not relinquish them in all situations, as these are complimentary to the definitive obligations (fardī), unless he believes that the prayer time will be lost.

A person who arrives when the imām is in rukū‘, and he (this person) pronounces the takbir and waits till the imām raises his head, has not caught this rak‘ah, with Zufar (God bless him) disagreeing. He maintains that he has caught up with the imām in a posture that takes the rule of the standing posture, therefore, he is like one who actually catches the imām in the standing posture. We maintain that the condition is to participate in the acts of the prayer, and this is not found either for the standing posture or for the rukū‘.

If the follower goes into rukū‘ before the imām does so, but then the imām catches up with him (in the rukū‘), his act is valid. Zufar (God bless him) said that his act is not valid, because an act committed before the (similar) act of the imām is not taken into account and so also the following acts. We maintain that the condition is participation in a single

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\(^{15}\)He says this as some jurists have said that he is to offer two rak‘ahs after zuhr and the two after maghrib in the mosque and the rest at his house.


\(^{17}\)It is related from a large number of Companions (God be pleased with them). A version from Abū Qatadah (God be pleased with him) is recorded by Muslim in his Sunan. Al-Zayla‘ī, vol. 2, 157-58.

\(^{18}\)Some said that he may offer them as secondary to the obligation, while others said that he is not to do so.

\(^{19}\)It is recorded by Abū Dāwūd in his Sunan. Al-Zayla‘ī, vol. 2, 160.

\(^{20}\)It is ghārib of an aggravated type. Ḥafīz ibn Hajr has also indicated that he did not find it. Al-Zayla‘ī, vol. 2, 162.

\(^{21}\)This is how the jurists use the term sunnah in fiqh, as already indicated, and as distinguished from sunnat al-hudūd.
component as in the case of one side of the act (going down or rising). God knows best.

Chapter 18

Delayed Substitute Performance (Qadā') of Lost Prayers

A person who loses a salāt is to offer it by way of qadā' if he remembers it, and is to offer it prior to the definitive obligation (fard) of that time. The rule for this is that maintaining a sequential order between lost prayers and the definitive obligation of the time (of remembering it) is required, in our view. According to al-Shāfi‘ī (God bless him) it is recommended, because each prayer is independent in itself and cannot be a condition for another prayer. We rely on the words of the Prophet (God bless him and grant him peace), “A person who sleeps over his prayer or forgets it, not remembering it until he is with the imām, is to complete the prayer he is offering; thereafter he should offer the prayer he remembered and then repeat the prayer he offered with the imām.”

If he is apprehensive that the time of the current prayer will be lost, he should offer the prayer of time first and then offer the lost prayer as qadā'. The reason is that the sequential order is relinquished due to the shortage of time, and so also due to forgetfulness and an excess of lost prayers, so that it does not lead to the loss of the prayer of the time.

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1. He did not say "one who gives up a salāt," because it is not proper to give up a salāt intentionally.
2. Qadā' is a substitute prayer. Adā' is the performance of the obligation at its time. Qadā' is the performance of a similar obligation when the original obligation has not been met. There is a discussion about its cause as to whether it is obligatory due to its original cause or a new cause.
3. That is, it is obligatory.
4. It is recorded by al-Dārāqūṭnī and al-Bayhaqī in their Sunan. Al-Bayhaqī said that the tradition has more than one isnad. Al-Zayla‘ī, vol. 2, 162.
5. There is consensus (ijmā') on performing the prayer of the time when time is short.
If, however, he does offer the lost prayer first, it is valid. The reason is that the prohibition of advancing it is due to a reason found in another prayer. This is different from the case where time is available yet he offers the prayer of the time first, which is not valid, because he offered it before its time determined by the tradition.

If he has lost a number of prayers, he is to order them sequentially for qada' as they became obligatory originally. The reason is that the Prophet (God bless him and grant him peace) could not offer four prayers on the day of Khandaq (Battle of the Trenches) and he offered them as qada' in a sequential order. He then said, “Pray as you see me praying.”

The exception is where the lost prayers exceed six prayers, because the lost prayers have become excessive. The sequential order between the lost prayers is lost, just as it is lost between them and the prayers of the time. The limit for excess is when the lost prayers become six due to the passage of the time of the sixth prayer. This is the meaning of the statement in al-Fātimi al-Ṣaghīr, that is, his words: If he loses more than the prayers of a day and a night, the prayer he begins with is deemed valid. The reason is that the prayers of a day and night becomes the sixth prayer. It is also narrated from Muhammad (God bless him) that he took into account the commencement of the time of the sixth prayer. The first view, however, is correct. The reason is that excess occurs when the number enters repetition (of lost prayers) and that happens according to the first view.

When the old and recent lost prayers add up, it is said that the performance of the prayer of the time is valid, even when the recent prayers are remembered, due to the excess of the lost prayers. It is also said that this is not permitted and the past (old lost prayers) are treated as if they do not exist as a deterrent for negligence.

If he performs some of the lost prayers as qada' so that they are reduced in number, the sequential order is restored according to some, and this is a strong view, because it is narrated from Muhammad (God bless him) about a person who neglected the prayer of a day and a night and began to offer them as qada' the next day with each prayer of the day. The lost prayers are valid under all circumstances, but the prayers of the time become invalid if he offers them before the lost prayers as they have entered the number that is less. The same applies if he offers them later, except the lost 'isha', because in his reckoning there is no further lost prayer when he is offering the 'isha' prayer.

If a person offers the asr prayer, while remembering that he did not pray zuhr, the prayer is invalid, unless he is in the last part of the timing. This is the issue of sequential order. When the obligation is rendered invalid the prayer is not rendered invalid in essence (stands converted to nafl) according to Abū Ḥanafīyah and Abū Yūsuf (God bless them), but according to Muhammad (God bless him) it is nullified. The reason is that the tahrīmah was formulated for the definitive obligation. Thus, when the obligation is nullified, the tahrīmah is nullified altogether. The two jurists maintain that it was formulated for prayer in essence with the attribute of obligation. The necessity of nullification of the attribute does not result in the nullification of the essence of prayer. Thereafter, the asr prayer (in this issue) becomes invalid in a suspended form so that if he were to offer six prayers, and did not repeat zuhr (that he had lost), all the prayers will be converted to valid prayers, according to Abū Ḥanafīyah (God bless him) and according to the two jurists the asr prayer will be irrevocably invalid and cannot become valid under any circumstances. This has been identified under its own discussion.

If he is praying fajr and he remembers that he did not offer the witr prayer, his prayer is invalid according to Abū Ḥanafīyah (God bless him). The two jurists disagree. This is based on the view that witr is obligatory in his view and a sunnah according to the two jurists. There is no sequential order between definitive obligation (fārā'id) and sunnah inter se. Consequently, if he prays 'isha and then performs wuḍū' and offers the sunnah and witr prayers, but he then realises that he prayed 'isha' without purification, then, in his view the worshipper is to repeat 'ishā' and sunnah and not witr, because witr is an independent obligation in his view. According to the two jurists, he is to repeat witr as well, as it is subservient to 'ishā'. God knows best.

The tradition above that requires the performance of the lost prayer first.

It has been related from several Companions (God be pleased with them). One version from Ibn Mas'ūd (God be pleased with him) is recorded by al-Tirmidhi and al-Nāṣirī, Al-Zaylā'ī, vol. 2, 164.

For example, where a person does not pray for a month.
Prostrations of Error During Prayer

He is to prostrate for error, excess\(^1\) or deficiency,\(^2\) making two prostrations after salutation;\(^3\) he is then to offer the *tashahhud* followed by the salutation. According to al-Shāfi‘ī (God bless him), he is to make the prostrations prior to the salutation due to the report that “the Prophet (God bless him and grant him peace) made the prostrations for error prior to the salutation.”\(^4\) We rely on the words of the Prophet (God bless him and grant him peace), “For each error are two prostrations after the salutation.”\(^5\) It is also related that the Prophet (God bless him and grant him peace) made two prostrations for error after the salutation.\(^6\) The two narrations about his acts conflict leaving the adoption of his words as

\(^{1}\)An excess through acts that are similar to the acts of prayer. An excess through acts that are not similar to those of the acts of prayer invalidates prayer.

\(^{2}\)This negates the view held by Imām Mālik (God bless him) that if the error is based upon deficiency, the prostrations of error are made prior to the salutation, and if the error is due to an excess, the prostrations are made after the salutation.

\(^{3}\)There are five views on the issue: (i) The Hanafi view is that prostrations are made after the salutation, as the Author has mentioned. (ii) Imām Mālik’s view, as stated above, that prostrations due to deficiency are made prior to salutation and those due to excess are made after the salutation. (iii) This is also the view of some Shāfi‘is. The sound view in the Shāfi‘ī school is that the prostrations are made prior to the salutation. (iv) The view of the Ḥanbalīs is that prostrations are made prior to the salutation for occasions on which the Prophet (God bless him and grant him peace) made them prior to the salutations, and after it for occasions for which he made them after the salutation. (v) The view of the Zāhiris is somewhat similar to that of the Ḥanbalīs.

\(^{4}\)It is recorded by all the six sound compilations. Al-Zayla‘ī, vol. 2, 166.


\(^{6}\)It is recorded by all the six sound compilations. Al-Zayla‘ī, vol. 2, 168.
a whole." Further, the reason is that the prostrations of error are not repeated, therefore, they are delayed till after the salutation. Thus, if he made an error in the salutation, he would be compelled to perform them after it. This disagreement is about preference (as to when the prostrations are to be performed). He is to make two salutations, and that is the correct view, interpreting the salutation mentioned to mean the practised salutation. He is to send blessings (durūd) on the Prophet (God bless him and grant him peace) and to make supplications for himself during the sitting posture of error. This is the correct view as the proper occasions for supplications is the end of the prayer.

He said: Rectification of error becomes binding on him if he brings about an additional act in his prayer that is similar to the acts of prayer, but is not part of it. This indicates that the prostrations of error are obligatory, and this is the sound view. The reason is that it is imposed for the rectification of a defect that has been brought about in worship. It, therefore, becomes obligatory like atonement (through sacrifice) during hajj. If it is wājib, it is not imposed except due to the neglect of a wājib or its delay or the delaying of an essential element (rukn) by mistake. This is the rule. It has been imposed in the case of excess as that is not devoid of delay of a rukn or the neglect of an obligation (wājib).

He said: It becomes binding on him if he neglects an act prescribed by the Sunnah. It appears that he intended thereby a wājib (not a sunnah), however, he meant by it the designation of an act as sunnah when its obligation has been established by the sunnah. He said: Or when he gives up the recitation of the Fātihat, because it is obligatory, or the qunāt (supplication) or the tashahhud or the takbirs of the 'id prayers. The reason is that these are obligatory. The Prophet (God bless him and grant him peace) recited them persistently without dropping them even a single time. This is the indication of obligation. Further, they are associated with all prayers indicating that these are among the essential features of salāt, and this is due to obligation. Thereafter, the mentioning of tashahhud implies the first sitting posture and the second as well as recitation during them. All this is obligatory and there is prostration for error in them. This is the sound view.

If the imām recites audibly what was to be inaudible, or inaudibly what was to be audible, the two prostrations for error become binding on him. The reason is that audible recitation has its own occasions, and so does inaudible recitation, with respect to the obligations. The narrations have differed with respect to the extent (of such recitation), however, the correct view is that it is recitation with which prayer becomes valid in both cases, because there is no way to avoid a minimum amount of audible and inaudible recitation, but it is possible to avoid a greater amount. The amount with which prayer is valid is considerable except that in his view it is a single verse, while in the opinion of the two jurists it is three verses. This applies to the imām and not to the individual, because audible and inaudible recitation pertains to the congregation.

He said: The error of the imām makes the prostrations binding upon the follower, due to the realisation of the cause against the imām (asla). It is for this reason that he is bound to commence salāt with the niyyah of the imām.

If the imām does not make the prostrations, the follower is not to make them, as this will amount to opposition of his imām, and performance has been made binding through obedience.

If the follower makes an error, the prostrations are neither binding on the imām nor on the follower. If the follower alone makes the prostrations he would be going against the imām. If the imām were to follow him, their functions would be reversed.

A person who makes an error (forgets) about the first sitting posture, but remembers it when he is closer to the sitting posture he is to return and adopt the sitting posture and then recite the tashahhud. An action that is close to another takes the rule of the latter. Thereafter it is said: he is to make prostrations of error due to delay. The correct view, however, is that he is not to make the prostrations, as if he did not get up at all.

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7That is, the second tradition.
8That is, the disagreement with al-Shāfi'i (God bless him).
9Al-Zayla'i says that this is well known and their relinquishment has not been transmitted. Al-Zayla'i, vol. 2, 172.
If he is closer to the standing posture, he is not to return (to the sitting posture), as he is now like one in the standing posture and he should make the prostrations of error. The reason is that he has neglected an obligation (wajib).

If he makes an error about the last sitting posture so that he stands up for the fifth, he is to return to the sitting posture as long as he has not made a prostration. The reason is that in this there is a rectification of his salat, and he is able to do so as what is less than a rak'ah is the stage for termination.

He said: He gives up the fifth, as he has returned to a thing whose occasion is prior to it, therefore, he refuses it. He then makes the prostrations of error for he has delayed a wajib. If he finalises the fifth rak'ah with a prostration, his definitive obligation has become nullified, in our view with al-Shafi'i (God bless him) disagreeing. The reasoning is that he decided to commence supererogatory prayers prior to the completion of the prescribed rak'ah (elements), when it was necessary to move out of the obligatory prayers. This is so as one rak'ah with a single prostration amounts to salat in reality, so much so that he will break an oath with it in which he had said, “I will not pray.”

His prayer stands converted to supererogatory (naf'il) prayers according to Abu Hanifah and Abu Yusuf (God bless them) with Muhammad (God bless him) in disagreement on the basis of what has preceded. He is, therefore, to add a sixth rak'ah to his prayer, but if he does not do so, there is no liability for him, because it is probable. Thereafter, his obligation stands nullified by the placing of the forehead (on the ground) alone, as this amounts to complete prostration. According to Muhammad (God bless him) this occurs when he lifts his forehead, as a thing is completed through its final act, which is the lifting of the forehead, though it is not valid when it is lifted with ritual impurity. The result of this is that he has acquired fadilah during prostrations. According to Muhammad (God bless him) he can continue his prayer from this point with Abu Yusuf (God bless him) disagreeing.

If he adopts the sitting posture after the fourth rak'ah and then stands up without offering the salutation, he is to return to the sitting posture, as long as he has not made a prostration for the fifth rak'ah, and offer the salutation, because salutation in the standing posture is not lawful as it is possible for him to offer the salutation by adopting the sitting posture. The reason is that a prayer that is less than a rak'ah can be terminated.

If he has finalised the rak'ah with a prostration and he then remembers (his error), he is to add another rak'ah to it and complete his obligation, because what is left are the words of the salutation and these are obligatory. He is to add another rak'ah to them so that the two rak'ahs become supererogatory prayers, because a single rak'ah is not valid due to the prescription by the Prophet (God bless him and grant him peace) about a curtailed prayer. Thereafter, these two rak'ahs do not stand in the place of the sunnah of zuhr. This is the correct view as it was done persistently with a fresh tahrimah.

He is to make prostrations of error on the basis of istihlās so as to cover up for the deficiency in the obligation in a manner that is not prescribed by the sunnah. If he cuts off the (fifth) rak'ah he is not liable for qada' as this is a probable prayer. If a person is following him (joins him) in these two rak'ahs, he is to offer six according to Muhammad (God bless him) as they are offered with this tahrimah. According to the two jurists, he is to offer two rak'ahs as the worshipper had decided to move out of the obligatory prayer. If the follower renders his prayer invalid, there is no qada' for him according to Muhammad (God bless him) taking into account the prayer of the imām. According to Abū Yusuf (God bless him), he is to offer two rak'ahs by way of qada', because extinction due to an obstacle is specific to the imām.

He said: If a person offers two voluntary rak'ahs, makes an error in them, offers prostrations of error, and then decides to offer two more rak'ahs, he should not continue the prayer. The reason is that the prostrations of error will nullify them by falling in the middle of the prayer. This is distinguished from the prayer of the person on a journey when he makes the prostrations of error and makes a resolve for the iqāmah; he can continue, for if he cannot, his entire salāt will be nullified. Despite this, if the worshipper performs the other two rak'ahs, it will be valid due to the survival of the tahrimah though the prostrations of error will be nullified. This is the correct view.

A person makes the salutation when he is still liable for the two prostrations of error, and then a person enters his prayer (as a follower) after
the salutation. If the imām (this person) performs the prostrations of error, the follower will enter his salat, otherwise not. This is so according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muhammad (God bless him) said that he has entered the salutation whether or not the imām has made the prostrations. The reason is that in his view the salutation does not in reality move him out of the prayer as long as he is liable for the prostrations of error for these have been imposed as a compulsion to remove deficiency. It, therefore, follows that he be in a state of ihram (resolve) of the prayer. According to the two jurists, the salutation does move him out of the prayer conditional upon return, because it is a basis of release (from the prayer) in itself. It will not operate due to the need of the worshipper to perform the prostrations, thus, it is not effective without it. No such need is established when the absence of return is taken into account. The impact of the disagreement is evident in this case for the termination of purification due to loud laughter as well as in the change in the obligation due to the niyyah of iqāmah in this situation.

A person who offers the salutation intending to cut off his salat when he is liable for error, is to make prostrations for his error, because this salutation does not cut off the prayer, while his intention is to alter what is lawful, therefore, it becomes redundant.

A person who is in doubt during his prayer and he does not know whether he has offered three rak'ahs or four, and this is the first time (in this prayer) that the doubt has arisen, is to commence his prayer from the beginning, due to the words of the Prophet (God bless him and grant him peace), "If one of you is in doubt as to how many (rak'ahs) he has prayed, he is to start afresh."76

If his doubt occurs frequently, he is to base his decision upon his predominant view, due to the words of the Prophet (God bless him and grant him peace), "A person who doubts his prayer should follow his predominant view."77

If he does not have an opinion, he should continue from the stage about which he is certain, due to the words of the Prophet (God bless him and grant him peace), "A person who has a doubt about his prayer and does not know whether he has prayed three or four, should continue from the minimum."78 It is, however, better to begin anew after the salutations as it is the lawful release from prayer and not speech, while intention alone is redundant. In the case of continuing from the minimum, he is to adopt the sitting posture at each occasion that he believes to be the end of his prayer so that he does not become one who is neglecting the obligation of the sitting posture. God knows best.

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76It is recorded by al-Bukhārī and Muslim. Al-Zayla'i, vol. 2, 173.
77It is recorded by Muslim. Al-Zayla'i, vol. 2, 174.
Chapter 20

Prayer During Illness

If the sick person (marid) is unable to stand, he is to pray while sitting, offering the rukūʿ and sujūd, due to the words of the Prophet (God bless him and grant him peace) to ‘Imrān ibn Ḥuṣayn (God be pleased with him), "Pray while standing. If you cannot do that then pray while sitting, and if you cannot do that (either) then on your sides using indicating gestures." The reason is that obedience depends on ability.

He said: If he is not able to bow or to prostrate, he is to do so through indication, that is, while seated as this (indication) is within his ability. His prostrations should have a greater inclination than his rukūʿ, as indication stands in their place and takes their rule. A raised surface is not to be kept close to his face on which he can prostrate, due to the words of the Prophet (God bless him and grant him peace), "If you are able to make the prostration on the ground, do so, otherwise make an indication with your head." If he does so (keep a raised surface), when he lowers his

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1"Unable to stand" here does not mean that he is not able to stand at all. It means a state in which standing would be injurious for him, sap his strength completely, prevent his recovery or cause excessive weakness. Some say that it is a state in which he might fall if he stands, due to weakness or dizziness.

2It is recorded from ‘Imrān ibn Ḥuṣayn by sound compilations except Muslim. Al-Zayla‘i, vol. 2, 175.

3This is a basic principle of the shari‘ah. God does not place a burden on his ‘abd greater than he can bear. The rules is taken from the Qur‘ān [2:286] and has a general application in Islamic law.

4A version from Jābir (God be pleased with him) is recorded by al-Bayhaqi, among others. Al-Zayla‘i, vol. 2, 175.
head, it is valid due to the presence of indication. If he places this (surface) on his forehead, it is not valid, due to the absence of the indication.

If he is unable to sit, he should be made to recline on his back and his feet should be pointed towards the qiblah, and he is to indicate the performance of ruku' and sujud. This is based on the words of the Prophet (God bless him and grant him peace), "The mar'id is to pray in the standing posture; if he is not able to do so then in the sitting posture, making indications, and if he not able to do that, then God has the right to accept his excuse."

He said: If he is made to lie on his side with his face towards the qiblah and prays with indications, it is valid, on the basis of what we have related earlier except that the first is preferable in our view with al-Shāfi`i (God bless him) disagreeing. The reason (in our view) is that the indication of one lying on his back is directed towards the atmosphere of the Ka'bah whereas that of the person reclining on his side is directed towards his feet, and prayer is offered through this (the first).

If he is not able to make an indication with his head his salat will be postponed, and he is not to make indications with his eyes, his heart or with his eyebrows, with Zufar (God bless him) disagreeing. The basis for this is what we have related earlier and also because fixing substitutes on the basis of opinion is prohibited. Analogy cannot be constructed to extend the rule for the head, for it is with the head that prayer is performed and not with the eyes and their sisters (the heart and the eyebrows). His statement that his salat is postponed is an indication that the salat is not removed from his liability even when his inability lasts for more than a day and a night provided the person is likely to recover. This is the correct view as he understands the implication of the khitab (communication) as distinguished from the person who has fainted.

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5That is, the basic requirement of an indication is found and this leads to validity.

6Some jurists maintain that in this position a pillow is to be placed to raise his head so that his posture comes closer to the posture of the person seated.

7It is a gharib tradition. A similar tradition is recorded by al-Dār`ūnī in his Sunan. Al-Zayla`i, vol. 2, 376.

8That is, through indications directed towards the atmosphere of the Ka'bah.

9As well as Malik, al-Shāfi`i and Ahmad (God bless them).

10This appears to be a sound rule, as ritual worship must be based upon text, for otherwise there will be no end to extensions. God knows best.

11In other words, as long as his rational faculty is functioning liability is found as `adl is the basis of ahlīyāt al-adā' (legal capacity for performance of acts).

He said: If he has the ability to stand, but he cannot perform the ruku' and sujud, standing up is not binding on him, and he is to pray with indication while sitting. The reason is that the rukn of standing up is prescribed so that he can move into the prostration attaining the ultimate in glorification. If his standing posture does not lead to prostrations, then, it is not a rukn (for him). He is, therefore, given a choice. The preferred form is to undertake indications while sitting as it is closer in form to prostrations.

If a person in sound health offers part of his prayer while standing, but is then overcome by illness, he is to complete his prayer in the sitting posture performing ruku' and sujud or doing so through indications if he is not able to do so, or he may even recline on his back if he is not able to sit. He has continued the lesser form based on the higher and it amounts to a person following another.

If a person prays in the sitting posture due to illness and offers ruku' and sujud, but thereafter recovers from the illness, he is to continue his prayer while standing according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that he is to renew his prayer. This is based upon their disagreement in following (iqtidā'). The elaboration has preceded.

If he has offered part of his prayer through indications, but is thereafter able to perform ruku' and sujud, he is to renew his prayer according to all the jurists. The reason is that it is not permitted to one who performs ruku' to follow in prayer one who uses indications. The same applies to continuing prayer.

If a person opens voluntary prayer while standing, but then feels exhausted, he may without harm lean on a stick or on a wall or he may adopt the sitting posture, because this is a valid excuse. If the leaning is without cause, it is disapproved as it amounts to violation of the accepted practice. It is said that it is not disapproved according to Abū Ḥanīfah (God bless him), because in his view if this person adopts the sitting posture without an excuse it would be valid, therefore, leaning is also not disapproved. According to the two jurists it is disapproved, because the
adoption of the sitting posture is not permitted in their view, thus, leaning is disapproved.

If he adopts the sitting posture without an excuse, it is disapproved by agreement. The prayer is permitted in his (the Imam's) view, but it is not permitted in their opinion. This discussion has preceded under the discussion of the nawafil (supererogatory prayers).

If a person prays in a ship while sitting without a cause, his prayer is valid according to Abu Hanifah (God bless him), however, he prefers the standing posture. The two jurists say that it is not valid without an excuse. The reason is that the standing posture is within his ability, therefore, he is not to give it up without a cause. He argues that the usual state in a ship is that of dizziness, and this is the decisive factor, except that the standing posture is preferable as it is far removed from a semblance of disagreement. It is better to come out of the ship when it is possible as that is the best for calmness. The disagreement is about a ship that is not anchored, while an anchored ship takes the rule of land. This is the correct view.

A person who remains under a spell of fainting for five prayers or less is to offer them by way of qada' (delayed substitute performance). If the prayers are in excess of five, he is not to perform them as qada'. This is based on istihsan. Qiyas implies that there is no qada' for such a person as fainting covered the entire time of prayer, thus, realising the excuse. In this case it resembles insanity. The reasoning for istihsan is that when the duration becomes longer the number of lost prayers increases and this creates a problem in performance. When this duration is short the number of prayers is less, and there is no hardship. The meaning of excess is that the number goes beyond the prayers of a day and night for in such a case the repetition of the same prayer occurs. Insanity is like fainting as mentioned by Abu Sulayman (God bless him), as distinguished from sleep for its extension is rare; it is, therefore, associated with a short duration. Thereafter, increase is determined in the context of timings according to Muhammad (God bless him), because repetition...
Chapter 21

Prostrations of Recitation

He said: The prostrations of recitation in the Qur’ān are fourteen: those occurring at the end of al-A‘rāf, in al-Ra‘d, al-Nahl, Bani Isrā‘īl, Maryam, the first in al-Ḥajj, al-Furqān, al-Naml, Alif Lām Mīm Tanzīl, Ṣād, Hā Mīm Sajdah, al-Najm, Idha ’s-Samā’ Inshaqqat, and Iqrā. This is how it is written in the mushaf of `Uthmān (God be pleased with him), and that is what is relied upon. The second prostration in al-Ḥajj is for prayer in our view, and the occasion of this prostration is in Hā Mīm as-Sajdah at the words “Lā yasa‘mūna,” according to the

1That is, the occasions in the Qur’ān.
2A‘rāf: 206.
3Ra‘d: 15
4Nahl: 49, 50
5Isrā‘: 109
6Maryam: 50
7Ḥajj: 18
8Furqān: 60
9Naml: 25
10Sajdah: 15
11Ṣād: 24
12Fussilāt: 38
13Najm: 62
14Inshiqaq: 20, 21
15Alaq: 19
16Because it is close to the rukū‘.
words of 'Umar (God be pleased with him), which have been adopted by way of precaution.

A prostration is obligatory (wājib) on these occasions for the reciter and the listener whether or not he intends to listen to the recitation of the Qur'ān, due to the words of the Prophet (God bless him and grant him peace), "The prostration is (obligatory) for one who hears it (the recitation) and for one who recites it." This is a statement of obligation and it has not been qualified with intention.

If the imām recites a verse of prostration, he is to make the prostration and so also with him the follower, as it is binding on him to follow the imām. If the follower recites it, neither the imām nor the follower is to prostrate, either during prayer or after it, according to Abū Ḥanīfah and Abū Yūṣuf (God bless them). Muḥammad (God bless him) said that they are to make the prostration on completing the prayer, because the cause has been established and there is no obstacle other than the state of prayer insofar as it leads to the opposition of the function of imāmah and recitation (in it). The two jurists argue that the follower is interdicted with respect to recitation due to the authority of the imām over his acts, and an act of an interdicted person has no hukm. This is distinguished from the person with major impurity or a menstruating woman for they are forbidden from reciting, except that in the case of a menstruating woman the prostration is not obligatory due to her recitation, just as it is not obligatory for her by listening to recitation, due to the lack of legal capacity, which is a case different from that of the person with major impurity.

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25It is gharib, however, it is recorded by Ibn Abī Shaybah from Ibn 'Abbās (God be pleased with both). Al-Zayla'i, vol. 2, 178.

26Because the occasion may be at these words or earlier, as claimed by others. Delaying it a little does not cause the problem.

27It is obligatory in our view, but according to Mālik, Al-Shāfi‘i and Ahmad (God bless them), it is a sunnah. There are other views as well. It is stated in al-Muṣbārī that it is a sunnah mu‘ukkadh.

28It is a gharib tradition. It is recorded by Ibn Abī Shaybah from Ibn ‘Umar (God be pleased with both). Al-Zayla'i, vol. 2, 178.

29The word ‘ādī in the tradition indicates obligation, and the tradition is not qualified with the intention of hearing, therefore, it is obligatory even if he did not intend listening to the recitation.

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22That is, the one leading the prayer and the one following him.

23Listening to recitation by someone outside prayer is not obligatory. It becomes obligatory when it is within prayer for then it becomes one of the acts of prayer.

24And there is no restriction on them after the prayer is over.

25The imām.

26Along with the existence of the obligation and the absence of restriction.
and make the prostration, thus, he will receive credit for both recitations. The reason is that the second prostration is stronger as it pertains to prayer and envelops the first prostration. In al-Nawadir, it is stated that he is to make another prostration after prayer, because the first has priority in time, therefore, the two are equal. We would say that the second has the strength of being linked with the objective (of performance) and is given preference due to it.

If he recites it, makes the prostration and then enters prayer and recites it, he is to make the prostration again, because the second is primary. There is no reason to link it with the first as that would lead to the hukm coming before the cause.

If a person repeats the recitation of a single occasion of prostration in a single session, it is sufficient for him to make a single prostration. If he recites it in one session and makes the prostration, but then goes away and returns to recite it again, he is to make another prostration. In case he did not make the first prostration, he is under an obligation to make two prostrations. The basis is that the prostration has been structured on concurrence to evade hardship. This is the concurrence of the cause and not the hukm. The rule is more suitable for the 'ibadat on the basis of the cause and thereafter with the concurrence of the hukm for punishments.

The possibility of concurrence arises due to the unity of the session as it gathers diverse occurrences within it. When the session differs, the hukm reverts to its original cause. The session does not differ by merely standing up as distinguished from the case of a woman given a choice for divorce as her getting up is a sign of refusal and standing up annuls the session in that case. In moving from the woof to the warp of a cloth being woven, the obligation will be repeated. The same applies to moving from one branch to the other, according to the correct view, and so also in play. All this is on the basis of precaution.

If the session of the listener changes and not that of the reciter, the obligation will be repeated for the listener, because the cause in his case

92The second is being made due to the cause of the first by linking the first cause to the second cause.
93This is stated to distinguish it from the previous issue. The two prostrations are not linked here as they were in the previous issue.
94That is, the second is more suitable for punishments. In 'ibadat there is a need to affirm the duty whereas in punishments the penalties are waived due to doubt (shubhah).

is listening. Likewise, if the session of the reciter changes and not that of the listener on the basis of what is said. The correct view, however, is that the obligation is not repeated for the listener on the basis of what we have said.

A person who is about to make the prostration of recitation is to pronounce the takbir, but is not to raise his hands. He is then to make the prostration and thereafter pronounce the takbir and raise his head, taking into account the prostration of prayer. It is reported from Ibn Mas'ūd (God be pleased with him).

No tashahhud is to be recited nor is there a salutation, as that is for release from prayer and it implies a prior tahrimah, which is non-existent.

He said: It is disapproved that a sirah be recited during prayer or any other occasion and the verse of prostration be omitted, as that amounts to the avoidance of the prostration. There is no harm if the verse of prostration is recited and what is besides it is omitted. The reason is that this amounts to advancing towards it. Muḥammad (God bless him) said, "It is preferable in my view that a verse or two before it be recited in order to avoid the suspicion of preference." The jurists preferred its recitation in a lower tone, out of affection for the listeners. God knows best.
Chapter 22

Praying During Journey (Safar)

The journey (safar) due to which rules are altered is one that is intended by a human being for a duration of three days and nights, at the speed of a camel or walking on foot, due to the words of the Prophet (God bless him and grant him peace), "The resident is to perform mash (rubbing) for a complete day and night and the traveller for three days and their nights." The exemption is general for all those going on a journey (the genus of travellers) and requires that the number be applied to all as well. Abū Yūṣuf (God bless him) determined it to be two days and a major part of the third day. Al-Shāfiʿi (God bless him) in one of his opinions determined it to be a day and night. The sunnah (quoted tradition) is sufficient proof against both jurists.

The travelling taken into account is one undertaken at an average pace. According to Abū Ḥanīfah (God bless him) it is estimated according to the different stages of the journey, and this is closer to the earlier statement (of three days and nights). The duration is not to be estimated through farāsikh, and this is the correct view.

The journey on water is not to be taken into account, and he means thereby that it is not taken into account for determining the duration of the journey on land. As for what is taken into account for the sea is what is

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1 Like curtailment of prayer, the permissibility of not fasting during Ramadān, the extension of the period of mash (rubbing) over boots, jumuʿah, ʿids and so on.
2 Nights are mentioned to cover the period of rest as well.
3 During the day.
4 It has preceded under the topic of mash over boots. It is recorded by Muslim in his Sahih, Al-Zaylaʾi, vol. 1, 174; al-ʿAynī, vol. 3, 5.
5 Three stages in three days. Al-Sarakhsi (God bless him) has said that the correct view is that it depends on the niyyah of the traveller.
compatible with its prevailing conditions, as is the case in a mountainous area as well.

He said: The definitive obligation (fard) in a prayer of four rak'ahs is two rak'ahs and he is not to add to them.⁶ Al-Shāfi'i (God bless him) said that the obligation for the traveller is four rak'ahs, but the curtailment may be availed as an exemption on the analogy of fasting.⁷ In our view, the second pair of rak'ahs is not to be offered by way of qadā, and the worshipper is not deemed a sinner if he gives them up. This is a sign of their being supererogatory prayers, as distinguished from fasting, which is to be undertaken by way of qadā.

If he offers four rak'ahs sitting to the extent of rashahhud in the second, the first two rak'ahs are valid on account of the definitive obligation (fard), while the second two are treated as supererogatory prayers, on the analogy of ḥajj, however, he sins due to the delay in offering the salutation.

If he does not adopt the sitting posture to the extent required,⁸ his prayer is nullified, due to mixing up of supererogatory prayers with it prior to the completion of its ṣāliḥ (components).

When the traveller moves away from the houses of the city he can (begin to) offer two rak'ahs, because becoming a resident depends on entering the houses, therefore, journey is associated with moving out of them. In this regard, there is a report (athar) from 'Ali (God be pleased with him): "When we cross these huts, we will curtail our prayer."⁹

He continues to be in a state of journey until he makes a niyyah (resolve) to reside in a town or village for a period of fifteen (15) days or more.¹⁰ If he intends to stay for a lesser period, he continues to curtail his prayer. The reason is that it is necessary to take into account the period (of stay within the journey), because the journey includes periods of stay. We have determined this period in the light of the period of purification (after menstruation), because these are periods that reimpose the obligations.¹¹ This period is also available through a report from Ibn 'Abbas and Ibn 'Umar (God be pleased with them).¹² A report in such cases is like a khabar (tradition from the Prophet (God bless him and grant him peace)). The restriction of township or village is imposed to point out that the intention to stay is not valid in the wilderness. This is the stronger view.

If he enters a city with the resolve that he will leave the next day or the day after, but he does not form a niyyah for the duration of his stay so that he stays on for several years (in this state), he is to curtail his prayer. The reason is that Ibn 'Umar (God be pleased with him) stayed on in Adharbijan (Azerbaijan) for six months and continued to curtail his prayer.¹³ A similar report is related from a group of Companions (God be pleased with them).

If the army enters enemy territory and they formulate a niyyah to stay there, they are to curtail their prayers. Likewise, if they lay siege to a city or a fort there. The reason is that those entering vacillate between overcoming and settling and being overcome and retreating, thus, it cannot become a territory of residence.

Likewise, if they have surrounded rebels (ahl al-baghy) within the dar al-islam outside a city or have surrounded them at sea. The reason is that their condition negates their intention. According to Zufar (God bless him) it is valid in both cases if they possess the dominant power (shawkah) leading to their satisfaction about settling down. According to Abū Yūsuf (God bless him), it is valid if they are in houses made of mortar, as that is a location for residing.

An intention of residing formed by people surviving on pasturing, when they live in tents,¹⁴ is not valid it is said. The correct view is that they are residents. This is related from Abū Yūsuf (God bless him) because residence is the general rule, and it is not nullified by moving from one grazing area to another.¹⁵

⁶That is, he has to follow the curtailment.
⁷The same view is held by the Imāms Malik and Ahmad (God bless them).
⁸To the extent of the rashahhud.
⁹It is recorded by Ibn Abi Shaybah. Al-Zayla'i, vol. 2, 183. There is a tradition to this effect recorded by Al-Bukhari and Muslim from Anas (God be pleased with him). Al-'Ayni, vol. 3, 16.
¹⁰That is, after having travelled for three days and nights.
¹¹The period of ṣuhr reimposes the obligations of salāt and ṣawm, while the period of residence reimposes what was curtailed due to the journey.
¹²Al-Tahawi has recorded it from both Companions (God be pleased with them). Al-Zayla'i, vol. 3, 183; Al-'Ayni, vol. 3, 18.
¹⁴Like the report from Anas (God be pleased with him) mentioned above, along with other reports. Al-'Ayni, vol. 3, 21.
¹⁵That is, nomads.
¹⁶The fatwa today is on this ruling.
If a traveller follows a resident-imām within a certain timing, he is to complete four, because his obligation has changed to four due to the following, just as it changes due to the niyyah of taking up residence due to the linking of the changed act with its cause, which is time. If he joins him in performing the lost prayers, it is not valid for him. The obligation cannot change outside the timing due to the lapsing of the cause, just as it is not altered through the intention of taking up residence (after the passage of time). It will, therefore, amount to following by one who is liable for an obligation, of one who is offering supererogatory prayers with respect to the sitting posture or recitation.

If a traveller leads residents in his prayer of two rak’ahs, he is to offer the salutation, while the residents are to complete their prayer. The reason is that the follower has undertaken conformity for two rak’ahs and he becomes independent for the rest like one joining up later, except that he is not to recite, according to the correct view, because he is a follower according to the tahrimah, though not in his act. The obligation has already been performed, therefore, he may (now) give it up by way of precaution. This is distinguished from the case of the person joining later who has caught the supererogatory recitation, and the obligatory recitation has not been made (in his case), therefore, it is better for him to recite. He said: It is recommended for the imām that when he makes the salutation he should say: “Complete your prayer for we are a group of travellers.” The reason is that the Prophet (God bless him and grant him peace) said this when he led the people of Makkah in prayer, for he was on a journey.

When a person on a journey enters his city, he is to offer the complete prayer even if he does not intend to take up residence in it. The reason is that the Prophet (God bless him and grant him peace) and his Companions (God be pleased with them) used to travel and then return to their places of residence as residents without forming a fresh intention for this.

If a person who is a resident of one land moves to it taking up residence in another land, and then travels entering the land of his first residence, he is to curtail his prayer, because this is no longer his place of domicile. Do you not see that the Prophet (God bless him and grant him peace) after the Hijrah counted himself among travellers at Makkah.

This is due to the principle that the land of origin is negated by a land like it (of adopted domicile), but not by journey. At the same time the land of temporary residence (during journey) is negated by one like it, as well as through journey and the land of origin.

If a person travelling forms the intention that he will stay at Makkah and Mina for fifteen days, he is not to offer the full prayer. The reason is that applying the intention to two locations implies that he will be at different locations, and this prevents the rule of residence from operating. The reason is that a journey is not free of such stops. The exception is when he intends to spend the night at one of the two places, in which case he will become a resident the moment he enters the location. The basis is that residence of a person is attributed to the place where he spends the night.

A person who has lost prayers during journey is to offer them as qada’ within a habitation (residence) praying two rak’ahs. A person who has lost prayers as a resident (within civilization) may offer them as qada’ during journey praying four. The reason is that delayed performance (qada’) is dependent upon the original performance (adā’), and what is taken into account for this is the last timing, as that is what is given consideration for causation when performance is not on time.

A person travelling for unlawful activity and one travelling for a pious cause are equal in terms of the exemption provided for their journey. Al-Shafī’i (God bless him) said that journey for evil intent does not yield the exemption. The reason is that the exemption is granted for ease and cannot be available for something that deserves enhanced hardship. We rely on the unqualified meanings emerging from the texts, because journey itself is not evil; evil is what occurs after it or accompanies it. It is, therefore, suitable for the exemption. God knows best.
Chapter 23

The Friday Prayer (Ṣalāt al-Jumu‘ah)

The Friday prayer is not valid except in a comprehensive city (misr āmī‘) or in a central place of prayer of the city.¹ It is not valid in a village, due to the words of the Prophet (God bless him and grant him peace), “There is no jumu’ah, no tashriq, no fitr and no adhā, except in a comprehensive city (misr āmī‘).”² Miṣr āmī‘ is each habitation that has an amīr and a qādī, who implement the aḥkām and establish the hudūd.³ This is the view according to Abū Yūsuf (God bless him).⁴ It is also related from him that if the people of the city gather in their largest mosque it should not be able to accommodate them. The first view is upheld by al-Karkhī (God

¹There are different views about the meaning of a city. Al-Shāfī‘ī (God bless him) does not stipulate this condition and in his view forty persons can hold the congregation.

²It is gharib and mārfū‘. It is also reported as mawqūf at ‘Alī (God be pleased with him), and is recorded by ‘Abd al-Razzāq, Al-Zayla‘i, vol. 2, 195.

³This definition of miṣr āmī‘ would disqualify not only villages and localities within a city, but most if not all cities for the Friday congregational prayer. It would certainly disqualify the mosques in non-Muslim states. An opinion recorded in the Fatāwā ‘Alamgīri maintains that the implementation of the hudūd means the ability to implement them. This would mean that even if actual convictions do not take place, but the law is implemented and will be enforced. The fact that the validity of the jumu‘ah prayer rests on the existence of such a city shows that this prayer is closely linked to the existence of the Islamic state and is dependent upon the effective jurisdiction of such a state. The nature of the khutbahs delivered support this assertion. The issue also highlights the close bond between religion and state and negates claims of their separation. It follows that declaring a Muslim state as secular would render the jumu‘ah prayer void. As for the other aḥkām, other than hudūd, the foremost is the prohibition of ribā.

⁴It is also one opinion of Abū Ḥanīfah, Muḥammad, al-Karkhī and others. See al-‘Aynī, vol. 3, 44-46. The jurisdiction and writ of the Islamic state is implied in most opinions.
bless him) and it is the stronger view. The second view is upheld by al-Thalaji, however, the rule (hukm) is not confined to the place of prayer and applies to all open spaces of the city, because these have the same status as the city itself in meeting the needs of its residents.

**Jumu’ah** is permitted in Mina if the amir there is the amir of Hijaz or if the caliph is travelling according to Abū Hanifah and Abū Yūsuf (God bless them). Muhammad (God bless him) said that jumu’ah cannot take place at Mina. The reason is that it is one of the villages (around Makkah) and, therefore, the ‘id prayer cannot be held there. The two jurists argue that it turns into a city during the days of the hajj (mawsim), while the absence of offering ‘id there is for creating leniency for the people. There is no jumu’ah at ‘Arafat in the opinion of all the jurists as it is just an open space, while there are buildings at Mina. The statement is qualified with “caliph” or “amir of Hijaz” as they are the ones who have authority (there). As for the amir of the mawsim (hajj), he has jurisdiction over the affairs of the hajj and not others.

It is not permitted to establish the jumu’ah except on the authority of the sultan1 or the authority of one appointed by the sultan.2 The reason is that it is established through a huge gathering, and disputes may arise as to who is given priority and in what way regarding the leading of prayer or disputes may arise as to other matters, therefore, the order of the imām is necessary for regulating the affairs of the prayer.

Among the conditions of jumu’ah is timing. Thus, it is valid at the time of zuhr, but is not valid after this,3 due to the words of the Prophet (God bless him and grant him peace), “When the sun has declined, lead the people in the jumu’ah prayer.”4 If the time has passed, while he is offering jumu’ah, he is to start the zuhr prayer afresh5 and is not to continue it into the zuhr prayer, due to the difference between the two prayers.

Among the conditions is the khutbah (sermon). The reason is that the Prophet (God bless him and grant him peace) did not offer the jumu’ah prayer without the khutbah throughout his life.6 It is delivered before the prayer after the sun has declined, as this is prescribed by the sunnah.7 The imām is to deliver two khutbahs (sermons) separating them by sitting in between them for this is how it has come down through the heritage (from the time of the Prophet (God bless him and grant him peace)).8 He is to deliver the sermon while standing and in a state of purification. The reason is that standing during the sermon is part of the heritage.9 Thereafter, it is a condition for this prayer, thus, purification is recommended for it as it is for the adhān. If he delivers the sermon while sitting or without purification it is (still) deemed valid, due to the attainment of the objective, except that it is considered disapproved as it goes against the inherited practice and because it will create a separation between the sermons and the prayer (if the imām proceeds for performing wudu’). If he confines himself to the remembrance of God, it is permitted according to Abū Ḥanifah (God bless him). The two jurists said that it must be remembrance at some length so that it can be called a khutbah. The reason is that it is khutbah that is obligatory and glorification alone or praise alone cannot be called a khutbah. Al-Shāfi‘i11 (God bless him) said that it is not permitted unless he delivers two sermons that conform to practice. He relies on the words of the Exalted, “Hasten earnestly to the remembrance of Allah,”12 without qualification. It is reported about Uthmān (God be pleased with him) that he said “Praise be to God and then became tongue-tied, so he descended and led the prayer.”

Among its conditions is the jumā’ah (congregation), because the word jumu’ah is derived from it. The minimum number for this, according to Abū Ḥanifah (God bless him), is three besides the imām. The two jurists said that it is two persons besides the imām. He (God be pleased with him) said that the correct view is that this is the opinion of Abū Yūsuf (God bless him) alone. He maintains that in the dual we

1By this he means khalīfah or the authority over whom there is no other authority.
2This is the amir or the qādī or the person who delivers the sermon.
3It is reported that Imam Mālik (God bless him) permits it up to the time of ʿāṣr as the two timings overlap, in his view, Al-ʿAyni, vol. 3, 51.
4It is ghārib, however, similar traditions have been recorded by al-Bukhārī and Muslim. Al-Zayla’ī, vol. 2, 195.
5This zuhr would be prayed in the time of ʿāṣr then.
6It is recorded by al-Bayhaqi. Al-Zayla’ī, vol. 2, 196.
7This is based on a tradition recorded by al-Bukhārī. Al-Zayla’ī, vol. 2, 196.
8There are traditions on this point recorded by both al-Bukhārī and Muslim. Al-Zayla’ī, vol. 2, 196.
9This has preceded in traditions quoted earlier. Al-Zayla’ī, vol. 2, 197.
10Qur’an 62:9
11It is ghārib, however, a similar incident became well known in books. Al-Zayla’ī,
have the meaning of gathering (congregating) and indicates the meaning of jamāʿah. The two jurists maintain that true plurality is constituted by three as it is plural in name as well as meaning. Further, jamāʿah is taken into account independently, therefore, the imām is not to be counted among them.

If the people move away before the imām has performed the rukuʿ and sujud leaving behind only women and minor children, he is to begin praying zuhr from the start, according to Abu Hanifah (God bless him). The two jurists maintain that if they go away after he has opened the prayer, he is to offer the jumuʿah prayer. If they move away after he has performed the rukuʿ of a rakʿah and has made a prostration, he is to continue praying jumuʿah according to all three jurists, with Zufar (God bless him) disagreeing. He maintains that it is a condition, therefore, it must be met throughout the prayer, just like timing. The two jurists argue that jumuʿah (congregation) is a condition for commencing the prayer and its existence throughout is not stipulated as in the case of the khutbah (that is, its completion). Abu Hanifah (God bless him) reasons that the congregation is held through commencement of the prayer, and this is not completed unless one rakʿah is completed as what is less than this is not deemed saḥl, therefore, the condition must persist till its completion as distinguished from the khutbah, the completion of which (as a stipulation) will negate prayer, thus, its completion is not stipulated. The presence of women and children is not to be taken into account, because jumuʿah is not held by including them and the congregation is not complete due to their presence.

Jumuʿah is not obligatory for the traveller or women, or the sick person, or the slave or the blind.16 The reason is that there is hardship for the traveller and so also for the sick and the blind, while the slave is busy in the service of his master and a woman in serving her husband. They have, therefore, been granted an excuse in order to avoid hardship and harm. If they attend and pray with the people, they receive credit for the obligation of the time (zuhr), because they performed the duty and became like the traveller who fasts (on a journey).

It is permitted for the traveller, the slave and the sick person to become an imām for the jumuʿah prayer. Zufar (God bless him) said that it is not permitted as the obligation is not imposed on such a person, and his position is like that of a woman or a minor. We maintain that it is an exemption (rukhshah), but when they attend it becomes an obligation as we have elaborated.17 As for the minor, he lacks the capacity, while a woman cannot lead men in prayer. Thus, they18 can hold the jumuʿah prayer as they have the legal capacity for leading prayers, therefore, they have a prior right of becoming followers.

If a person prays zuhr at his place of abode on a jumuʿah, prior to the prayer of the imām, without having a valid excuse, it is disapproved for him to do so, but his prayer is valid. Zufar (God bless him) said that it is not valid for him; the jumuʿah prayer is the primary obligation whereas the zuhr prayer is like its substitute. The substitute cannot be performed with the existence of the ability to perform the primary obligation. We maintain that the primary obligation is that of zuhr for everyone. This is the stronger view, except that each person is commanded to discharge it through the performance of the jumuʿah prayer. The reason is that he is in the position of performing the zuhr obligation on his own and not the jumuʿah prayer, because it depends upon conditions that cannot be fulfilled by one person alone. The obligation depends upon ability.

If a person decides to attend the jumuʿah congregation and he moves towards it when the imām is in the process of praying, then, his zuhr prayer stands nullified, according to Abu Hanifah (God bless him) by the mere making of an effort towards it. The two jurists said that it is not nullified until he joins the prayer with the imām. The reason is that walking is not intended in itself, therefore, it cannot annul it even when it is complete, but jumuʿah is a higher purpose and it does negate it (when he joins it). The position of this person is as if he headed towards the jumuʿah after the imām had completed the jumuʿah prayer. He maintains that walking towards jumuʿah is an attribute of the jumuʿah prayer, therefore, it acquires the same legal position as jumuʿah with respect to the annulment of zuhr, and this by way of precaution, as distinguished from the person walking towards it after the completion of the prayer as it is no longer saʿi towards it.

For those who are handicapped (legally) from offering the jumuʿah prayer, it is disapproved that they offer zuhr as a congregation in the city

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16 The Author has not mentioned traditions in support of this. According to al-Zaylaʿī, there are traditions on these points recorded by Abū Dāwūd and al-Ḥākim. Al-Zaylaʿī, vol. 2, 398–99.

17 The elaboration was that they get credit for the zuhr of the time.

18 The traveller, the slave and the sick person.
on Friday. The same applies to prisoners. This is due to its interference with the jumu‘ah prayer inssofar as it is the congregation of all congregations, and some people may follow them in zuhr (believing it to be the jumu‘ah prayer), as distinguished from the residents of the villages as there is no jumu‘ah obligation for them. If a group of people do so, their prayer is valid, due to the existence of the conditions of zuhr.

A person who joins up with the imam during jumu‘ah is to pray with him what he is able to catch, and is to continue to complete the jumu‘ah, due to the words of the Prophet (God bless him and grant him peace), “What you caught, you are to pray, and what you have lost, you have to offer as qadah.”

If he joins him when he is in tashahhud or when he is making a prostration of error, he is to continue to complete the jumu‘ah according to the two jurists. Muhammad (God bless him) said that if he has prayed with him a major part of the second rak’ah, he is to continue to complete the jumu‘ah, but if he catches less than a rak’ah, he is to continue and complete zuhr. The reason is that it is jumu‘ah in some respects and zuhr in others due to the loss of some of its conditions in his case, therefore, he is to pray four in consideration of zuhr. He is to adopt the sitting posture after two rak’ahs under all circumstances in lieu of the jumu‘ah, and he is to recite in the last two in lieu of the supererogatory aspect of the prayer. The two jurists argue that he has caught the jumu‘ah prayer in this situation for which reason the niyyah of jumu‘ah is stipulated intending two rak’ahs. There is no basis for what he has said (they argue), because the two prayers are different and one cannot be built upon the tahrimah (intention) of the other.

When the imam stands up on Friday, the people are to stop praying and speaking until he has completed the sermon (khutbah). He (God be pleased with him) said: This is the view according to Abū Hanifah (God bless him). The two jurists said that there is no harm in speaking when the imam has arisen and has as yet not commenced the sermon, as well as when he descends and has not pronounced the takbir. The reason for the disapproval is due to the interference with the obligation of listening attentively, and in these situations there is nothing to listen to as distinguished from salat (when the imam is speaking) because that becomes

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extended sometimes. Abū Hanifah (God bless him) relies on the words of the Prophet (God bless him and grant him peace), “When the imam has arisen, there is to be no prayer and no speech,” that are not qualified in any way. Further, speech sometimes becomes extended by its very nature and resembles salat (after the rising of the imam).

When the first adhān (call for prayer) is made by the mu’adhdhin, the people are to give up selling and buying and are to head towards the jumu‘ah prayer, due to the words of the Exalted, “When the call is proclaimed to prayer on Friday (the Day of Assembly), hasten earnestly to the Remembrance of Allah, and leave off business (and traffic).”

When the imam mounts the pulpit, he is to sit and the mu’adhhdhins are to make the calls in front of the pulpit. This has been the inherited practice, and during the times of the Prophet (God bless him and grant him peace) it was only this adhān that was made. It is, therefore, said that it is this call that is effective in the obligation of walking and prohibition of trade. The correct view, however, is that it is the first call that is taken into account, when it is made after the declining of the sun, for the notification of prayer is attained through it. God knows best.

It is recorded by all the six sound compilations from Abū Hurayrah (God be pleased with him): Al-Zayla‘i, vol. 2, 200.

It is recorded by Imam Malik (God bless him) in his al-Muwatta’. Al-Zayla‘i, vol. 2, 201.

Qur’an 62:9

It is recorded by the sound compilations, except Muslim. Al-Zayla‘i, vol. 2, 204.
Chapter 24

The Prayer of the Two ‘Īds

He said: The prayer of ‘īd is obligatory’ on the person on whom the jumu‘ah prayer is obligatory. It is stated in al-Jāmi‘ al-Ṣaghīr that if two ‘īds fall on the same day (that is jumu‘ah and one of the two ‘īds), then, the first is a sunnah, while the second is an obligation, and none of them is to be given up.² He said: This is an explicit statement about its being a sunnah. The first statement indicates obligation (wujūb), which is narrated from Abū Ḥanīfah (God bless him). The reason underlying the first is persistent performance by the Prophet (God bless him and grant him peace).³ The basis for the second are the words of the Prophet (God bless him and grant him peace) in a tradition about a villager following his question, “Am I under an obligation for something else besides these?” He replied, “No, unless it is voluntary.”⁴ The first view is the correct view, and terming it a sunnah means that its obligation has been established through the Sunnah.

On the day of ‘īd al-fitr, it is recommended that each person before going to the place of prayer should eat something, bathe, brush his teeth (miswāk) and use perfume, due to the narration that “the Prophet (God

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¹Most Hanafi jurists consider it obligatory (wājib). It is stated by some that it is fard kifāyah (a definitive communal obligation). Al-Sarakhsi (God bless him) has stated that it is a sunnah. This is explained through the issue of the two ‘īds below.
²This statement in al-Jāmi‘ al-Ṣaghīr shows that it is a sunnah. The fact that it is not to be given up shows that it is a sunnah mu‘akkadah, and giving it up is a bid‘ah that amounts to a neglect of a symbol of Islam. The Author, however, prefers the view of Abū Ḥanīfah (God bless him) stated in the rule to the effect that it is wājib.
³This is well known. Al-Zayla‘ī, vol. 2, 208.
⁴It is recorded by al-Bukhārī and Muslim under the heading of Imām. Al-Zayla‘ī, vol. 2, 208.
bless him and grant him peace) used to eat on the day of 'id al-fitr before going to the place of prayer. He used to bathe for both 'id celebrations. Further, it is a day of congregation, therefore, it is prescribed that one bathe and use perfume as in the case of jum'ah. He is to put on his best clothes because the Prophet (God bless him and grant him peace) had a cloak made of fur or wool that he used to wear on the 'ids. He is to pay the sadakah of fitr to enrich the poor person so that his heart is free for prayer.

He is to move towards the place of prayer without pronouncing the takbir, according to Abū Hanīfah (God bless him), on the way to the place of prayer.

According to the two jurists, he is to pronounce the takbir, in the light of what is done for adhā. He (Abū Hanīfah) argues that the original rule for glorification is to conceal it (keep it silent). The shār' (text) has prescribed it in the case of adhā for it is the day of takbir, but the day of fitr is not like that.

He is not to offer supererogatory prayers at the place of prayer before 'id prayer. The reason is that the Prophet (God bless him and grant him peace) did not do so despite his eagerness for prayer. Therefore, it is said that the disapproval is specific to the place of prayer. It is also said that it is meant for it and for other places, being general, because the Prophet (God bless him and grant him peace) did not do so.

The prayer becomes lawful with the rising of the sun and its timing extends up to the declining of the sun. When the sun declines, its time is over. The reason is that 'the Prophet (God bless him and grant him peace) used to offer the 'id prayer when the sun was at the height of a spear or two spears. When they gave testimony of sighting the moon after the declining of the sun, they ordered that the people go out to the place of prayer the next day.'

The inām is to lead the people in two rak'ahs pronouncing the takbir, once for the opening and three times after this. He is then to recite the Fātihah and another sūrah and pronounce a takbir with which he goes into ruku'. Thereafter he is to commence the second rak'ah with recitation. He is then to pronounce the takbir three times and with the fourth takbir he is to go into ruku'. This is based on the statement of Ibn Mas'ūd (God be pleased with him) and that is our opinion as well. Ibn 'Abbās (God be pleased with him) said that he is to pronounce a takbir in the first rak'ah for the opening and five thereafter. In the second rak'ah, he is to pronounce five takbis r and then recite. In one narration it is stated that he is to pronounce five takbis r. The general practice today is according to the opinion of Ibn 'Abbās (God be pleased with him), because of the order of the Caliphs who are his descendants. As for the madhab (the opinion of the school) it is the first statement. The reason is that takbir is the raising of the hands contrary to the accustomed practice and adopting the minimum number is better. Further, the takbis r are symbols of the din being pronounced aloud, therefore, the rule for them is the plural. In the first rak'ah, it is essential to link them with the opening takbir due to its strength with respect to obligation and precedence. In the second rak'ah, it is only the takbir of the ruku' that is found, therefore, it is essential to merge them with it. Al-Shāfi`i (God bless him) adopted the statement of Ibn Abbas (God be pleased with him), except that he reckoned all the reported takbis r as additional, making out the total number of takbis r to be fifteen or sixteen.

He said: He is to raise his hands in the takbis r of 'id, and by that he means the takbis r other than the takbis r of ruku'. The hands are not to be raised except on seven occasions, and among all of these he mentioned...
the takbīrs of the two 'îds. It is narrated from Abū Yūsuf (God be pleased with him) that the hands are not to be raised, however, the proof against him is the tradition we have related.

He said: Then after the prayer, he is to deliver two sermons (khutbahs). The well-known (mustāfīd) transmission has laid this down.14 In these he is to inform the people about the sadaqat al-fīr and its rules, because they have been prescribed for this purpose.

A person who has lost the prayer with the imām is not to offer it as qadā', because a prayer of this description will not attain nearness to God, except with the associated conditions that the individual cannot bring about.

If the moon is concealed in the clouds, but the people later testify before the imām that they sighted the moon after the declining of the sun, the 'îd prayer is to be offered the next (second) day. The reason is that this delay is due to an excuse, and a tradition is recorded with respect to it.

If an obstacle arises that prevents the offering of the prayer on the second day, he is not to offer it after this. The original rule for it is that it is not offered as qadā' like the jumu'ah prayer, however, we gave it up due to the tradition, which lays down delaying it due to an excuse till the second day.

It is recommended that on the day of adhā one should bathe and use perfume, due to what we have stated, and he is to delay eating till he is free of the prayer. This is based on the report that “the Prophet (God bless him and grant him peace) did not eat on the day of sacrifice until he returned and ate from his sacrifice.”16

He is to walk towards the place of prayer pronouncing the takbīr, because “the Prophet (God bless him and grant him peace) used to pronounce the takbīr on the way.”17

14There are traditions on this recorded by al-Bukhārī and Muslim from Nafi' from Ibn 'Umar (God be pleased with them). Al-Zayla'i, vol. 2, 220.
15He refers to the tradition that has preceded recently in which there is a reference to the sighting of the moon. It has been recorded by Ibn Majah. Al-Zayla'i, vol. 2, 221.
16It has been recorded by al-Tirmidhī, Ibn Majah, Ibn Hibbān and al-Hākim. Al-Zayla'i, vol. 2, 221.
17This is gharīb. Al-Zayla'i says that he did not find it. Al-Zayla'i, vol. 2, 221-22.

He is to offer two rak'ahs like 'îd al-fīr. This is how it has been transmitted.18

After the prayer, he (the imām) is to deliver two sermons (khutbahs).

The reason is that the Prophet (God bless him and grant him peace) did so.19 In these he is to inform the people about the sacrifice and the takbīr of tashrīq. The reason is that this is the legal requirement of the time and the khutbāh has been prescribed for such instruction.

If there is an obstacle that prevents prayer on the day of adhā, it is to be offered the next day or the day after it. It is not to be offered after that.20 The reason is that the prayer is defined by time, the time of sacrifice. It is, therefore, restricted by the number of its days. It is sinful to delay it without valid cause due to its opposition to what is transmitted.

The stay at 'Arafah that the people practice amounts to nothing legally. This is when the people gather on the day of 'Arafah on certain locations attempting to imitate those who stayed at 'Arafah. The reason is that the stay at 'Arafah is a particular worship at a particular location. What is besides this does not amount to worship, as do the other rituals.

24.1 THE TAKBĪRS OF TASHRĪQ

The takbīr of tashrīq21 is to be commenced after the fajr prayer on the day of 'Arafah and is to be ended after the asr prayer on the day of sacrifice. This is the rule according to Abū Ḥanīfah (God bless him). The two jurists stated that it is to end after the asr prayer on the last of the days

18Al-Zayla'i says that if he means by it the number above, then, what al-Bukhārī has recorded supports him. Al-Zayla'i, vol. 2, 222.
19A number of traditions in support have preceded with respect to the khutbāh of 'îd. Al-Zayla'i, vol. 2, 222.
20Al-Zayla'i says that the transmission from the Prophet (God bless him and grant him peace) is only about the tenth day of Dhi’-l-Hajj, and nothing besides that has been mentioned in the traditions. Al-Zayla'i, vol. 2, 222.
21The word pertains to the glistening of meat when it is spread around in sunlight for drying. These days have been called the days of tashrīq, because sacrificial meat used to glisten or dry out at Mina. It is also said that the word is used because the animals are not sacrificed till the sun is shining brightly, that is, after sunrise. It is further said that tashrīq is the 'îd prayer, because it is offered at the time of the ishrāq of the sun. The days of sacrifice are three and so are the days of tashrīq, extended to four up to the 13th of Hajj. The Author says below that the word tashrīq means takbīr.
Chapter 25

The Eclipse Prayer

He said: When the sun is eclipsed, the imām is to lead the people in two rak`ahs of prayer in the form of supererogatory prayers, with one ruku' in each rak`ah. Al-Shaf`i (God bless him) said that there are to be two ruku'as. He relies on what was related by 'Ā'ishah (God be pleased with her). We rely upon the narration of Samurah ibn 'Umar (God be pleased with him). The state (of the Prophet (God bless him and grant him peace) during prayer) was more evident to men due to their nearness (to him). Consequently, the narration of Samurah ibn 'Umar (God be pleased with him) will be preferred.

The recitation in both rak`ahs is to be lengthy and it is to be inaudible, according to Abu Hanifah (God bless him). The two jurists said that it is to be audible. An opinion like that of Abu Hanifah (God bless him) is related from Muhammad (God bless him). As for the lengthy recitation, it is an elaboration of what is better (and is not an obligation). He can shorten the prayer if he likes, because the established practice is to cover the entire time (of the eclipse) in prayer and supplication. If he makes one shorter (the prayer for instance), he is to lengthen the other (supplication). As for inaudible and audible recitation, the two jurists rely upon the report of 'Ā'ishah (God be pleased with her) that the Prophet (God bless him and grant him peace) recited audibly. Abu Hanifah (God bless him) relies upon the reports of Ibn 'Abbas and Samurah ibn Jundub (God
Chapter 26

The Seeking of Rain

Abu Hanifah (God bless him) said that there is no prescribed prayer in a congregation for istisqa'. Thus, if the people pray individually, it is permitted. Istisqa' is essentially supplication and the seeking of forgiveness, due to the words of the Exalted, "Saying: Ask forgiveness from your Lord; for He is Oft-Forgiving." The Messenger of God (God bless him and grant him peace) offered istisqa' but (accompanying) salat is not reported from him.

The two jurists said the imam is to lead in a prayer of two rak'ahs, due to the report that "the Prophet (God bless him and grant him peace) offered two rak'ahs in it similar to the prayer of 'id." It is related by Ibn 'Abbas (God be pleased with him). We would say that he did this once and relinquished it the next time, therefore, it does not amount to a sunnah. In Kitab al-Ashl, only the opinion of Muhammad is recorded (independently).

He is to recite aloud in it, on the analogy of the 'id prayer, and is then to deliver a sermon, on the basis of what is related about the Prophet (God bless him and grant him peace) that he delivered a sermon. This sermon is to be like the sermon for 'id according to Muhammad (God
bless him). According to Abū Yusuf (God bless him) it is to be a single sermon. According to Abū Hanīfah (God bless him), there is to be no sermon as that is dependent upon a congregation and there is no congregation in this case, in his view.

He is to face the qiblah in his supplication, due to the report that "the Prophet (God bless him and grant him peace) faced the qiblah and turned his cloak (inside out)." He is to turn his cloak inside out, due to what we have related. He said: This is the opinion of Muhammad (God bless him). As for Abū Hanīfah (God bless him), he said that he is not to turn his cloak for he is making a supplication, which is to be like all other supplications, while what has been related was by way of an omen of optimisim. The people are not to turn their cloaks, because it has not been related that he commanded them to do so.

The people of the Dhimmah are not to attend the ‘istisqa’, because this prayer is for the descent of mercy and what descends on them is curse.

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Chapter 27

Prayer in a State of Fear

When fear becomes intense, the imām is to divide the people into two groups with one group facing the enemy and another behind it. He is to lead the second group in praying one rak‘ah and two prostrations. When he raises his head from the second prostration, this group proceeds to face the enemy, while the other group moves into their place. He leads this group in one rak‘ah and two prostrations along with the tashahhud and then offers the salutation. This group does not offer the salutation and goes on to face the enemy. The earlier group then comes and offers one rak‘ah and two prostrations by themselves without recitation, as they had joined the prayer from the beginning. They pray the tashahhud, offer the salutation and go on to face the enemy. The other group comes and prays a rak‘ah with two prostrations with recitation, as they were the ones who joined the prayer later. They offer the tashahhud and make the salutation. The basis for this is the narration of Ibn Mas‘ūd (God be pleased with him) that the Prophet (God bless him and grant him peace) offered the prayer of fear in the manner that we have described.

He said: If the imām is a resident, he is to lead the first group in two rak‘ahs and the other group in two rak‘ahs, on the basis of the report that

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1Abū Yusuf (God bless him) denies the legal requirement of this act, however, the proof against him is what we have related.
"the Prophet (God bless him and grant him peace) prayed zuhr with two groups offering two rak'ahs with each."

In the case of the maghrib prayer, he is to lead the first group in two rak'ahs and the second in one rak'ah. The reason is that splitting a single rak'ah into two halves is not possible, thus, he allocates two to the first group on the basis of coming first.

They are not to engage in combat in the state of prayer. If they do, then prayer is nullified. The reason is that the Prophet (God bless him and grant him peace) gave up four rak'ahs on the Day of Khandaq (Battle of the Trenches). If performance was permitted along with combat he would not have done so.

If the state of fear intensifies, they are to pray individually while riding, making indications for ruku' and sujud facing any direction that they like, if they are unable to face the qiblah, due to the words of the Exalted, "If you fear (an enemy), pray on foot, or riding." The facing of the qiblah is dropped due to necessity. It is narrated from Muhammad (God bless him) that they are to pray in a congregation, but this is not correct due to the lack of the unity of location.

Chapter 28

Funerals (Janā'iz)

When a person is close to death, he is to be made to lie on his right side facing the qiblah on the analogy of how he is placed in the grave, as he is about to depart. The preferred view in our lands is that he is to be made to lie on his back as that makes it easy for the passing away of the spirit. The first, however, is the sunnah. He is to be prompted to pronounce the shahadah twice, due to the words of the Prophet (God bless him and grant him peace), "Prompt your dead to pronounce the shahadah, la ilaha illa ilāh." The meaning here is: those near death.

When he dies, his jaw is to be tied and his eyes are to be closed. This is the inherited practice, it makes him look decent, and is to be done for this purpose.

28.1 Bathing the Deceased

When they decide to bathe him, they are to place him on a cot so that the water can flow down through it, and they should place a piece of cloth over his private parts for meeting the obligation of covering. It is sufficient here to cover the genitals (awrah ghafi'ah) alone. This is the

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1 It is recorded by Muslim. Another tradition in the same meaning is recorded by Abū Dawūd. Al-Zayla'i, vol. 2, 245-46.
2 This tradition has preceded in the topic of qad'ah for lost prayers. See al-Zayla'i, vol. 2, 164.
3 Qurʾān 3:239
4 It is recorded by Muslim. Another tradition in the same meaning is recorded by Abū Dawūd. Al-Zayla'i, vol. 2, 245-46.
5 Al-Zayla'i says that he did not find a tradition to support this, but it is close to a tradition recorded by al-Bukhārī and Muslim. Al-Zayla'i, vol. 2, 249.
6 It is related from several Companions (God be pleased with them). The version from Abū Sa'īd al-Khuḍrī (God be pleased with him) is recorded by the sound compilations except al-Bukhārī. Another version is recorded from Abū Hurayrah (God be pleased with him) by Muslim. Al-Zayla'i, vol. 2, 253.
7 The words used are "wash him."
8 It is an obligation under all circumstances.
sound view based on ease. His other clothes are to be taken off so as to enable cleansing. He is to be subjected to minor ablution (wudu') excluding gargling and the drawing of water into the nostrils (madmah and istinshaq), because ablution is a sunnah for bathing, except that it is difficult to extract the water out of him, therefore, the two (madmah and istinshaq) are given up. Thereafter, they are to pour water over him in the same way as done when alive.

Incense is to be burned under the cot an odd number of times insofar as this involves respect for the deceased. An odd number is specified due to the words of the Prophet, “God is witr and loves the witr (odd number).”

The water used is boiled with sidr (Christ's thorn, lotus) or with saltwort (ushnán) to enhance cleansing. If this is not done, then, it should be done with pure water so as to attain the prime objective (of cleansing).

His head and beard are to be washed with marshmallow so that they become very clean.

Thereafter, the deceased is made to lie on the left side and is bathed with water and sidr ensuring that the water reaches the parts in contact with the cot. He is then to be turned on his right side and badeh ensuring that the water reaches the parts in contact with the cot. The reason is that the sunnah is to begin with the right. He is then made to sit with the person bathing him making him recline against him, and he is to rub his stomach lightly, in order to prevent the soil in the shroud. If something comes out, it is to be washed away. The bath, however, is not to be repeated nor is the ablution. The reason is that bathing is ascertained to enhance cleansing. If this is not done, then, it should be done with pure water so as to attain the prime objective (of cleansing).

When they intend to wrap the shroud, they are to begin with his left side, wrapping around it, and then around his right side, as is done in the case of the living. The way to lay out the cloths is to first spread the lifáfah, while the qamis extends from the base of the neck up to the feet. If they fear that the shroud will loosen up, away from his body, they may tie it with a strip of cloth, so as to prevent uncovering.

It is related from a number of Companions (God be pleased with them). One version from Abu Hurayrah (God be pleased with him) is recorded by al-Bukhári and Muslim. Al-Zaylā'ī, vol. 2, 255.

If these views are not based upon traditions, then, it should be possible to use things that attain effective cleanliness.

There is a tradition from 'A'ishah (God be pleased with her) which has been recorded by the sound compilations. It has preceded under the discussion of wudu'.

It is recorded by Imam Ahmad ibn Hanbal (God bless him) in Kitáb al-Zuhd. Al-Zaylā'ī, vol. 2, 262.

The sunnah is to ensnord a man in three clothes: the wrapper (izár), the top covering (qamis) and the outer wrapper (lifáfah), on the basis of the report that the Prophet (God bless him and grant him peace) was ensnored in three white cloths from Sahuliyah. The reason is that this is what a man usually wears during his life, therefore, he should do so after his death too. If they restrict this to two cloths, it is valid, and these two clothes will be the loin cloth and the wrapper. This is the shroud of sufficiency due to the statement of Abu Bakr (God be pleased with him): “Wash these two cloths of mine and ensnord me in them.”

The reason is that this is the minimum dress of the living. The izár is from the head to the feet, and so is the lifáfah, while the qamis extends from the base of the neck up to the feet.

The hair and beard of the deceased are not to be combed nor are the nails and hair to be clipped, due to the words of 'A'ishah (God be pleased with her), “Why do you stretch the forelock of your deceased?” The reason is that these things are for adornment and the deceased is now free of them. In the case of the living it amounts to cleansing for removing the accumulation of filth under them, in which case it is similar to circumcision.

28.2 THE SHROUD

The sunnah is to ensnord a man in three clothes: the wrapper (izár), the top covering (qamis) and the outer wrapper (lifáfah), on the basis of the report that the Prophet (God bless him and grant him peace) was ensnored in three white cloths from Sahuliyah. The reason is that this is what a man usually wears during his life, therefore, he should do so after his death too. If they restrict this to two clothes, it is valid, and these two clothes will be the loin cloth and the wrapper. This is the shroud of sufficiency due to the statement of Abu Bakr (God be pleased with him): “Wash these two cloths of mine and ensnord me in them.”

The reason is that this is the minimum dress of the living. The izár is from the head to the feet, and so is the lifáfah, while the qamis extends from the base of the neck up to the feet.

When they intend to wrap the shroud, they are to begin with his left side, wrapping around it, and then around his right side, as is done in the case of the living. The way to lay out the cloths is to first spread the lifáfah and then to spread the izár over it. The qamis is then to be put over the deceased and he is to be laid out on the izár. Thereafter, the izár is wrapped around him from the left side followed by the right side. The same is thereafter done with the lifáfah.

If they fear that the shroud will loosen up, away from his body, they may tie it with a strip of cloth, so as to prevent uncovering.
A woman is wrapped in a shroud of five cloths: dir' (chemise), izār (inner wrapper), khīmār (veil), līfāfah (outer wrapper), and a piece of cloth wrapped over her breasts. This is based on the tradition of Umm 'Aṭīyyah that “the Prophet (God bless him and grant him peace) gave the women, who bathed his daughter, five cloths.”1 The reason is that she moves around in these during her life, so also after her death. Thereafter, this is the elaboration of her shroud according to the sunnah. If they restrict themselves to three cloths, it is valid. These are two cloths and a veil, and this is the shroud of sufficiency.

Less than this is disapproved. In the case of a man, it is disapproved to limit the shroud to one cloth, except in the case of necessity. The reason is that Muṣ'ab ibn 'Umayr, when he became a shahīd, was wrapped in a single cloth.2 This is the shroud of necessity.

A woman is to be made to wear the dir' (chemise) first. Her hair is then to be placed in two plaits upon her chest over the chemise. The veil is placed over these, followed by the izār under the līfāfah.

He said: The shrouds are to be treated, an odd number of times, with incense before placing the deceased in them. The reason is that the Prophet (God bless him and grant him peace) directed that the shroud of his daughter be treated with incense an odd number of times. Treating with incense means applying perfume. When they are free from the wrapping of the shroud, they are to pray over the deceased as that is a definitive obligation (farīḍah).

28.3 Prayer over the Deceased

The highest priority for praying over the deceased belongs to the sultan, if he is present. The reason is that he is given precedence to avoid degrading him. If he is not present, then the qaḍī is to pray over the deceased, for he is the possessor of authority (in that jurisdiction after the sultan). If the qaḍī is not present either, then it is recommended that the imām of the locality be given precedence, because the deceased accepted his imāmah during his lifetime.

Thereafter, the wali is to be given precedence, and the awliya' receive precedence in the order mentioned for marriage (nikāh). If a person

1It is ghārib with this chain, however, Abū Dāwūd has recorded a different chain giving the same meaning. Al-Zayla'i, vol. 2, 263.

2It is recorded in the sound compilations. Al-Zayla'i, vol. 2, 264.

other than the wali and the sultan pray over the deceased, the wali has the right to repeat the prayer, that is, if he wishes, due to the fact mentioned by us about the right of the awliya'.
prayer (adhan), that is, notification of commencement, which is the giving of information by one to others that they may come and make their claim.

The prayer over the deceased is not to be held within the congregational mosque, due to the words of the Prophet (God bless him and grant him peace). "A person who prays over the deceased within the mosque receives no reward." The reason is that the mosque is erected for the offering of the prescribed obligatory prayers, and it also entails the soil ing of the mosque. There is, however, disagreement among the jurists (Masha‘ikhi, God bless them), when the prayer is held outside (the compound) of the mosque.

If a child cried after birth (and then died), it is to be given a name, a bath, and is to be prayed over, due to the words of the Prophet (God bless him and grant him peace), "When the child cries after birth, it is to be prayed over, but it is not to be prayed over if it does not cry." The basis is that crying is an evidence of life, which realises for it the right to avail of the sunnah for the deceased.

If the child does not cry (at birth and dies), it is to be wrapped in a piece of cloth, a mark of respect for a human being, but it is not to be prayed over, due to what we have related. It is to be given a bath according to texts other than the Zahiri-Riwayah, and that is the selected view.

If a minor is made captive along with one of his (non-Muslim) parents and dies, he is not to be prayed over, as he takes the rule applied to the parents, unless he acknowledges conversion to Islam while possessing mental maturity. His acceptance of Islam is valid on the basis of istislah. And, if one of his parents accepts Islam, he will take the rule of the best of his parents with respect to din. If no parent is made captive with him, he is to be prayed over, as in this case he will take the rule of the din, in which he is, thus, the legal status of Islam will be assigned to him as in the case of the foundling.

If an unbeliever dies and he has a Muslim wali, such wali is to bathe him, put him in a shroud and bury him. This is what Ali (God be pleased with him) was ordered to do, in the case of his father Abu Talib. He is,

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It is related from several Companions (God be pleased with them). One version from Jabir (God bless him) is recorded by al-Tirmidhi, al-Nasa’i and Ibn Majah. Al-Zayla’i, vol. 2, 277.

It is recorded by Abū Dawūd and al-Nasā’i. Al-Zayla’i, vol. 2, 281.
however, to be washed like the washing of an impure dress and is to be wrapped in cloth. A pit is to be dug without observing the *sunnah* about the shroud and the creation of a lateral niche in the grave. The body is then to be cast into this pit and not placed (according to the *sunnah*).

### 28.4 Carrying of the Bier

When they carry the deceased on his cot, they are to hold it from its four posts. This is what the *sunnah* has laid down. It ensures the gathering of a group, greater respect and prevention from falling. Al-Shafii (God bless him) said that the *sunnah* is that two persons are to bear it with the one in front placing it on the base of his neck and the one behind on the upper part of his chest. The basis is that the bier of Sa`d ibn Mu`adh (God be pleased with him) was borne like this. We would say that this was due to the rush of the angels bearing him.

They are to walk quickly with it at a pace that is less than running. The basis is that when the Prophet (God bless him and grant him peace) was asked about it, he said, "At a pace less than running."

When they reach his grave, it is disapproved that they sit down before the bier is lowered from the necks of men. The reason is that there may be the need of cooperation (help), and standing up makes this possible.

He said: The manner of bearing (the bier) is to place the front on one's right (shoulder) followed by the hind part on the right. Thereafter, the front is to be placed on the left followed by the hind part on the left. In this there is preference for commencing with the right, and all this is done by taking turns.

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23 It is recorded by Ibn Majah in his *Sunan. Al-Zayla`i*, vol. 2, 286.

24 It is recorded in *al-Tabaqat* by Ibn Sa`d, in one version it is recorded that the people said, "O Messenger of God, Sa`d was a strongly build person, but we have not seen anyone lighter than him." He (God bless him and grant him peace) replied, "I saw the angels bearing him." Al-Zayla`i, vol. 2, 287.

25 It is recorded by Abü D awud and al-Tirmidhi from Ibn Mas`ud (God be pleased with him). Al-Zayla`i, vol. 2, 289.

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28.5 Burial

The grave is to be dug with a lateral niche (*lahd*), due to the words of the Prophet (God bless him and grant him peace), "The lateral niche is for us and the chasm is for others."

The body of the deceased is to be inserted into the grave from the direction of the *qiblah* with al-Shafii (God bless him) disagreeing. In his view, the body is to be pulled in from the feet of the grave, due to the report that the Prophet (God bless him and grant him peace) was placed in the grave like this. We maintain that the side of the *qiblah* is revered, therefore, it is recommended to insert the body from this direction. Further, reports about the placing of the body of the Prophet (God bless him and grant him peace) conflict.

When the body is placed in the niche, the person placing it is to say: In the name of God and according to the religion of the Messenger of God. This is what the Messenger of God (God bless him and grant him peace) said when he lowered Abü Dujánah (God be pleased with him) in his grave.

The face is turned towards the *qiblah*. This was ordered by the Messenger of God (God bless him and grant him peace). The knot of the shroud is opened, as the shroud is now secure from opening up. Mud bricks are then placed over the niche opening, because mud was used for the grave of the Prophet (God bless him and grant him peace). The grave of a woman is to be curtained with a winding sheet till mud has been placed over the niche, however, a curtain is not to be placed over the grave of a man. The reason is that the state of women is to be in a covering whereas that of men is to be uncovered.

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24 It is related from several Companions (God be pleased with them). One version is from Ibn `Abbás (God be pleased with both) and it has been recorded by the compilers of the four *Sunan. Al-Zayla`i*, vol. 2, 296.


26 Al-Zayla`i says that this is how the text is here and in *al-Mabsut*, but it is not correct, because the Companion mentioned died after the Prophet's time, during the *khilafah* of Abü Bakr (God be pleased with him). This is how it has been transmitted in some traditions. There are, however, traditions that support the rule stated by the Author. Al-Zayla`i, vol. 2, 300–301.

27 It is ghairih, however, a tradition recorded by Abü D awud and al-Nasai lends support to it. Al-Zayla`i, vol. 2, 302.

28 It is recorded by Muslim in his *Šāhīh. Al-Zayla`i*, vol. 2, 303.
Using baked bricks and wood (for the grave) is disapproved as these take the rule of construction whereas the grave is the location of decay. Thereafter, there is the effect of fire on bricks, therefore, it is disapproved as a bad omen. There is no harm in using canes. It is stated in al-Jami' al-Saghir that the recommendation is to use mud and canes, because a bundle of canes was used on the grave of the Prophet (God bless him and grant him peace). The grave is then filled with earth. It is shaped like a hump and not flattened, that is, not shaped like a cube, because the Prophet (God bless him and grant him peace) proscribed the giving of cubical shapes to graves. The persons who saw his grave reported that it was hump shaped.

Chapter 29

The Shahid (Martyr)

The shahid is the person who has been killed by the polytheists, or is found in a battle with marks (of the battle) on him, or has been killed unjustly by the Muslims and no diyah (blood money) is due on his killing. He is to be placed in a shroud, prayed over, but is not given a bath. As this person falls within the meaning of the shuhada' of Uhud. The Prophet (God bless him and grant him peace) said about them, "Wrap them up with their wounds and blood and do not bathe them." A person who is killed unjustly with a sharp weapon, is in a state of purity, is a major, and no financial compensation is awarded for his killing, falls within the meaning of those shuhadda' and is to be assigned the same rule. The meaning of "mark" is wounds as these are an evidence of being slain. Likewise, the flowing of blood from a location that is not usual, like the eye and so on. Al-Shafi'i (God bless him) differs with us with respect to prayer, saying that the sword does away with all sins, therefore, he is in no need of intercession (for which prayer is prescribed). We say: Prayer over the deceased is held to express his dignity, and the shahid deserves this more. A person who is free of sins is not devoid of a need for prayer, like a prophet or a minor.

29 It is recorded by Ibn Abi Shaybah. Al-Zayla'i, vol. 2, 303–304.
30 The first part is reported by Muhammad ibn al-Hasan al-Shaybani (God bless him) in his Kitab al-Athar, while the second part is described by traditions, one of which is recorded by al-Bukhari in his Sahih. Al-Zayla'i, vol. 2, 304.
A person who has been slain by the enemy or rebels or brigands, whatever the instrument of slaying, is not to be bathed, because the *shuhada'*/ of Uhud were not all slain with swords or weapons.\(^5\)

If a person in a state of major impurity (*jannah*) becomes a *shahid*, he is to be bathed, according to Abū Ḥanīfah (God bless him). The two jurists say that he is not to be bathed, because what was obligatory due to major impurity (first bath) stands extinguished with death. The second (bath) is not obligatory in the case of *shahadah*. Abū Ḥanīfah (God bless him) reasons that *shahadah* prevents the obligation of bathing, but does not remove the earlier obligation, therefore, it cannot remove the effect of *janah*. According to the sound view, when Ḥanzalah became a *shahid* in a state of impurity, he was bathed by the angels.\(^6\) This disagreement affects the menstruating woman and one with postnatal bleeding when they acquire purification. Likewise, prior to the cessation of blood according to the sound narration. The same disagreement governs the case of a minor. The two jurists maintain that the minor is entitled to this honour. He (Abū Ḥanīfah) maintains that the sword removed the need for bathing from the *shuhada'*/ of Uhud due to its cleansing attribute, however, the minor has no sins and is not included in their category.

The blood of the *shahid* is not to be washed away from his body and his clothes are not to be taken off, on the basis of what we have related. His leather jacket, cotton lining, helmet, weapons and boots are to be taken off, as these are not part of a shroud. They can add or decrease what they like for the completion of the shroud.

A person whose death is delayed (*irtithath*) is to be bathed. He is a person who has become worn out for the rule of *shahadah* by availing of the facilities of life. The reason is that the effect of injustice has been lightened, and he is no longer in the category of the *shuhada'*/ of Uhud. *Irtithath* is eating, drinking, sleeping and taking medicines or being transferred alive from the battlefield. The reason is that he has availed of some facilities of life. The *shuhada'*/ of Uhud, on the other hand, died thirsty even though water was being circulated among them.\(^7\) They did not accept it for fear that they would lose the (honour of) *shahadah*.

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\(^5\)Some were killed with stones and sticks, but the directive was general for all.

\(^6\)It is related from several Companions (God be pleased with them). One version from Ibn Zubayr (God be pleased with him) is recorded by Ibn Ḥibbān and al-Ḥakim in Al-Zayla'i, vol. 2, 315–16.

\(^7\)It is recorded by al-Bayhaqi, vol. 2, 318.

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They were removed from the battlefield so that they would not be trampled by the riding animals. Beyond this they did not enjoy rest even for a fleeting moment. If a person is covered by a pavilion or a tent, he gets the status of *irtithath*, due to what we have elaborated.

If he stays alive till the time of one prayer passes by and during this period he is in possession of his reasoning faculty, he is a *murtath*. The reason is that this prayer has become a debt against him, and he is governed by the rule of the living. He said that this is narrated from Abū Yūsuf (God bless him). If he makes a bequest with respect to matters of the hereafter, it amounts to *irtithath* according to Abū Yūsuf (God bless him) as it is the availing of facilities. According to Muḥammad (God bless him) it is not, for this pertains to the rules of death.

A person who is found slain within the city will be bathed. The obligation in this case is *qasamah* and *diyakh* and these lighten the effect of injustice. Unless it is found that he was unjustly killed with a sharp weapon. The reason is that the obligation is that of retaliation (*qisas*), which is a punishment and the murderer will evidently not be absolved of it either in this world or in the hereafter. According to Abū Yūsuf and Muḥammad (God bless them), the weapon may be anything that is swift like the sword. This will be known under the topic of *fanāyāt*, God willing.

A person who is executed for a *hadd* offence or by way of *qisas* is to be bathed and prayed over, because he has expended his life to maintain the right of one who had a claim against him. The *shuhada'* of Uhud expended their lives to satisfy the wishes of God, the Exalted, therefore, he cannot be associated with them.

If a person who is one of the rebels or brigands is killed, he is not to be prayed over. The basis is that 'Alī (God be pleased with him) did not pray over the rebels.\(^8\)

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\(^8\)It is *gharib*. Ibn Sa'd has mentioned the incident, but there is nothing about prayer in it. Al-Zayla'i, vol. 2, 319.
Prayers Inside the Ka‘bah

Prayer inside the Ka‘bah, whether a definitive obligation or supererogatory, is permitted with al-Shafi‘i (God bless him) disagreeing about both, and Malik (God bless him) disagreeing with respect to the definitive obligation (fard). (Our reliance is on the report) that “the Prophet (God bless him and grant him peace) prayed inside the Ka‘bah on the Day of the Conquest of Mecca.” Further, it is prayer that gathers within it the conditions of prayer due to the existence of the facing of the qiblah, because facing the entire Ka‘bah is not a condition.

If the imam leads a group in prayer inside it and some of them turn their back towards the back of the imam, it is valid, as they are facing the qiblah and do not consider the imam to be making a mistake as distinguished from the case of determining the direction of the qiblah. If some among them turn their backs to the face of the imam, their prayer is not valid due to their taking precedence over their imam.

When the imam leads the prayer in al-Masjid al-Haram and the people gather in a circle around the Ka‘bah praying with the imam, then the prayer of those who are closer to the Ka‘bah than the imam is valid as long as they are not on the side of the imam, because standing ahead of or behind the imam is relevant when the side is the same.

The prayer of a person on the roof of the Ka‘bah is valid, with al-Shafi‘i (God bless him) disagreeing. The reason is that the Ka‘bah is the area surrounding it up into the sky, in our view and not the structure as

1It is recorded by al-Bukhari from Malik from Nafi‘ from Ibn ‘Umar (God be pleased with them). Al-Zayla‘i, vol. 2, 319.
2It is recorded by al-Tirmidhi from Ibn ‘Umar (God be pleased with both). Al-Zayla‘i, vol. 2, 323.
that changes. Do you not see that if a person prays over the mountain of Abū Qays, it is valid though there is no building in front of him. It is, however, considered disapproved insofar as there is the relinquishment of respect for it. There is a proscription about it reported from the Prophet (God bless him and grant him peace).
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The Obligation of Zakāt

Zakāt is obligatory\(^1\) for each free, sane and major Muslim when he owns\(^2\) the nişāb (minimum scale) through complete ownership and a year has passed over such ownership. The obligation is based upon the words of the Exalted, “Pay the zakāt,”\(^3\) and the words of the Prophet (God bless him and grant him peace), “Pay zakāt on your wealth.”\(^4\) Further, there is the consensus (ijmā‘) of the ummah (on such obligation).\(^5\) The meaning of wāji̇b (obligation) here is the definitive obligation (fard), as there is no doubt about it.\(^6\)

Freedom is stipulated as a condition, because perfect ownership can only arise through it.\(^7\) Sanity and majority (bulūgh) are stipulated for reasons we will mention.\(^8\) Islam is stipulated as a condition, because zakāt is

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\(^1\)He uses the term wāji̇bah here, however, he means fard or definitive obligation as he mentions a few lines below. The obligation itself is proved by qaṭ‘i (definitive) evidences, but the detailed amounts are established by individual narrations (aḥād).

\(^2\)This means exclusive control over it and the right to undertake transactions in it.

\(^3\)Qur’ān 2:277. This verse is mujmal with respect to the amounts, that is, it does not provide any details. The bayān or elaboration comes from the traditions.

\(^4\)It is recorded by al-Tirmidhī. He called it ḥasan saḥīḥ. It is also recorded by Ibn Ḥibbān. Al-Zayla‘i, vol. 2, 327. Another version is recorded by al-Ṭabarānī. Al-‘Ayni, vol. 3, 290.

\(^5\)That is, in the earliest stages as war was waged to recover it.

\(^6\)That is, its proof is based upon definitive evidences.

\(^7\)Freedom is stipulated for the obligation of zakāt, because a slave cannot own wealth in the true sense.

\(^8\)Zakāt is not imposed on a minor.
an act of worship and such worship cannot be brought about by an unbeliever. It is essential to own the amount of the nisāb (minimum scale), because the Prophet (God bless him and grant him peace) determined the cause for payment through it. It is essential that the hawl (year) pass over it, as it is the necessary duration through which growth emerges in the wealth. The shar' (texts) determined it to be the hawl due to the words of the Prophet (God bless him and grant him peace), "There is no zakāt on wealth until the hawl has passed over it." The reason is that it enables growth due to the different seasons included in it, and the rates usually vary during them. The rule, therefore, revolves around it.

Thereafter, it is said that the obligation arises immediately (on the passage of a year), because that is the requirement of the absolute command. It is also said that the obligation is delayed as the entire life (of the person) is the time allocated for its performance, so that he will not be liable after the destruction (consumption) of the nisāb for having been negligent (about prompt payment).

There is no liability for zakāt on the minor and the insane person. Al-Shafi`i (God bless him) disagrees saying that it is a financial penalty and its obligation will be treated like all other financial burdens such as the maintenance of wives. It, therefore, resembles `uṣhr and kharāj. We maintain that it is an act of worship and cannot be performed without volition (ikhtiyār) so as to realise the meaning of test (of obedience) and these two persons have no volition due to the lack of the rational faculty of maturity. This is distinguished from kharāj, because that is a burden imposed on the land. Likewise, the predominant meaning in `uṣhr is also that of a (financial) burden with the meaning of worship being secondary in it.

If the insane person recovers for part of the year, the imposition of zakāt has the same legal status as his recovering for part of the month of Ramadān with respect to fasting. According to Abū Yūsuf (God bless him), the major part of the hawl will be taken into account (for his state) without making a distinction between permanent and temporary insanity. It is narrated from Abū Hanifah (God bless him) that if he attains bulugh in a state of insanity and then recovers, the hawl will be reckoned from the time of recovery having the same status as the minor when he attains puberty.

There is no obligation of zakāt on the mukātab slave for he is not an owner in all respects due to the existence of a negating factor, which is slavery, and it is for this reason that he does not possess the legal capacity to set free his slave.

If a person has a debt that covers his entire wealth, there is no obligation of zakāt on him. Al-Shafi`i (God bless him) said that it is imposed due to the realisation of the cause, which is the ownership of the complete nisāb. We maintain that the wealth stands engaged through his ownership in all respects due to the existence of a negating factor, which is slavery, and it is for this reason that he does not possess the legal capacity to set free his slave.

Unlike the Hanafis, who consider it a religious as well as financial duty with the element of religion being predominant. Those who attempt to impose zakāt on corporations may be doing so on the basis of the Shafi`i opinion. The Shafi`i maintain that the cause is māl, and minority and insanity do not affect this cause, because other financial burdens, like the maintenance of wives, are placed on these persons.

Which are duties imposed on the produce of land and the land itself.

That is, it is recovered in proportion to the period, whether less or more, for which he regained sanity. This is so if he possesses the nisāb.

For which reason the condition of freedom was imposed for the obligation of zakāt.

Arising from qard, credit sale and so on.

The argument is that he owns his wealth that exceeds the nisāb, thus, completing the cause. Debt, on the other hand, is not related to the wealth, but to the dhimmāh of the debtor; it does not affect the wealth or the nisāb.
be non-existent like water for quenching thirst (for the rule of tayammum) and clothes required to provide services and meet professional commitments.21

If his wealth is in excess of his debt, the surplus is to be subjected to zakāt if it reaches the level of the nisāb due to its being free of his essential need. The meaning of debt here is one that is claimed by other persons, so that a debt created through a vow (nadhr) and expiation (kaffārah) do not prevent the imposition of zakāt. A debt created by virtue of accruing zakāt payments does prevent the completion of the nisāb, because these are deducted from the nisāb. Likewise, when the nisāb stands consumed (destroyed). Zu'far (God bless him) disagrees on both issues. Abū Yusuf (God bless him) disagrees on the second issue,22 according to the narration from him, maintaining that there is a claimant for such a debt and this is the imām as in the case of pasturing animals (sawā'im) and his deputy in the case of commercial wealth, while the owners themselves are his deputies.

There is no zakāt on residential houses, personal clothing, household assets, riding animals, slaves for personal service and weapons kept for use.24 As they are employed for meeting primary needs, and they do not grow either. The same reasoning applies to books of those who specialise in that field and professional tools, on the basis of what we have said.

If a person has a claim for a debt upon another, who disputes this for some years, but then he adduces evidence for it, he is not to pay zakāt for the past (disputed years). The meaning is that evidence becomes available to him, like the debtor acknowledging it before people. This is the issue of absent wealth (dimār—bad debts).25 Zu'far and al-Shāfi‘i (God bless him) disagree on this issue. Included in this issue is lost wealth, the runaway slave, the stray animal and usurped wealth, when he cannot adduce evidence to claim them. Wealth that is lost at sea, buried

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21 These jurists are focusing on the cause that is ownership of wealth.
22 It is ghari' according to al-Zayla‘i, however, similar reports are recorded by Abū Ubaid al-Qāsim ibn Sallām and Imām Malik. These reports pertain to bad debts. Al-Zayla‘i, vol. 3, p. 334.
23 Bad debts are not growing wealth under Islamic law, because interest (ribā) is prohibited and is not paid on debts of any kind. In other words, these debts, when recovered, are recovered without any kind of return on them as such return will be treated as ribā. Accordingly, bad debts are wealth that is not growing either actually or potentially.
24 These debts are distinguished from a bad debt.
25 This makes the concept of a bad debt confusing. The statement of the rule shows that when evidence that is admissible becomes available, the debt will not be treated as dimār and zakāt will be due on it.
26 Because wealth is something that comes and goes, while his dhimmah is sound after insolvency.
sides with Abū Ḥanīfah (God bless him) about the *hukm* of zākāt giving preference to the interest of the poor (beneficiaries of zākāt).

If a person buys a slave girl for purposes of trade, but then changes his intention and allocates her to personal service, zākāt levied for her is annulled, due to the linking of the intention with *'amal*, which is the giving up of trade. If he later forms the intention to transfer her to trade, she cannot be part of his trade until he sells her so that the price she fetches is subject to zākāt. In this case, the intention is not linked to his act as he has not begun trading (selling her) as yet, therefore, it is not acknowledged. It is for this reason that a person on a journey becomes a resident by mere intention, whereas a resident does not become a traveller, except by commencing travel.

If he buys something intending trade, it will be part of trade due to the linking of the intention with the act, as distinguished from wealth that he inherits and intends to use for trade, as there is no act on his part (as yet). If he comes to own it through gift, bequest, marriage, *khul'*, or settlement of a contract, and intends it for trade, it will be allocated to trade according to Abū Yūsuf (God bless him) due to its association with his act, but according to Muhammad (God bless him), it will not become part of trade as it is not linked to an act of trade. It is said that the views in the disagreement are the opposite.

The payment of zākāt is not permitted without an associated *niyyah* or the associated setting aside of the amount of the obligation. The reason is that zākāt is 'ibādah, thus, *niyyah* is stipulated as a condition for it. The basis for this is association, except that payments can be various, therefore, the existence of the *niyyah* at the time of setting aside has been deemed sufficient for facilitating it, just as *niyyah* precedes the commencement of fast.

A person who gives away all his wealth by way of charity (sadaqah), without the intention of paying zākāt, is absolved of its obligation, on the basis of *istihsān*. The reason is that the obligation is part of this wealth, and is identified within it, thus, there is no need for (separate) identification.

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34 Acts are determined by intentions.

35 That is, unless he makes a transaction in such wealth.

36 The meaning here is that the intention serves as a means of ascertaining the amount to be paid to the poor. In this case there is no need for ascertainment as the zākāt amount is included in the entire amount, and the entire amount is being given to the poor.

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37 Where the entire wealth was given away as charity.
He (God be pleased with him) said: There is no ṣadaqah on camels that are less than five in number. When the number reaches five, where these are pasturing camels, and a year has passed over them, there is (a charge of) one goat, up to nine camels. When the number reaches ten, there is a charge of two goats for them up to fourteen. When they are fifteen, there are three goats up to nineteen. When they are twenty, there are four goats for them up to twenty-four. When they are twenty-five, there is a charge of one bint makhād, a she-camel that has entered the second year of its age, up to thirty-five. When their number is thirty-six, there is a charge of one bint labūn, a she-camel that has entered the third year of its age, up to forty-five. When they are forty-six, there is a charge of one hiqqah, a she-camel that has entered the fourth year of its age, up to sixty. When they are sixty-one, there is a charge of one jhada‘ah, a she-camel that has entered the fifth year of its age, up to seventy-five. When they are seventy-six, there are two bint labūns up to ninety. When they are ninety-one, there is a charge of two hiqqahs up to one hundred and twenty. This became well known through the written directions
of the Messenger of God (God bless him and grant him peace). They befall, when the number exceeds one hundred and twenty, the obligation is worked out afresh. Thus, there will be one goat for five camels along with two hiqqahs. For ten there will be two goats. For fifteen there will be three goats. For twenty there will be four goats. For twenty-five there will be one bint makhād up to a hundred and fifty for which there will be three hiqqahs. The obligation will be renewed once again, thus, there will be one goat for five camels and two goats for ten. For fifteen there will be three goats and for twenty camels four. For twenty-five camels there will be one bint makhād. For thirty-six camels there will be one bint labān. When the number reaches one hundred and ninety-six, there is a charge of four hiqqahs up to two hundred. The obligation will then be renewed continuously as it was renewed for the fifty after one hundred and fifty.' This is our view. Al-

Shafi`i (God bless him) said: When the camels are in excess of one hundred and twenty, then for each forty there is a hint labuns. The calculation is then to be based upon forties and fifties. Thus, for every forty there is to be one bint labain, and for each fifty there is to be one hiqqah. This is based upon the report that the Prophet (God bless him and grant him peace) caused to be written at the end of the document of `Amr ibn Hazm (God be pleased with him): For what is less than these numbers, there is one goat for every five camels. 2 We act upon this recorded addition.

3. Among these is the document of Abū Bakr al-Ṣiddiq (God be pleased with him). It has been recorded by al-Bukhāri in his Sahih. Another document is that of `Umar ibn al-Khaṭṭāb (God be pleased with him), which is recorded by Abū Dāwūd. A document relied upon by al-Marghināni is that of `Amr ibn Ḥāzm (God be pleased with him) and is recorded by al-Nasā’ī and Abū Dāwūd. There are other documents besides these. Al-Zayla`ī, vol. 2, 335-43.

4. Just as it was done for the fifty after one hundred.

5. This is included in the document of Abū Bakr (God be pleased with him) referred to above. It is recorded by al-Bukhāri. Al-Zayla`ī, vol. 2, 334.

6. It is recorded by Abū Dāwūd, in the Marāṣil, as well as by others. Al-Zayla`ī, vol. 2, 343-44.

The bukh (mixed) and 'irāb (Arab) breeds are the same for the purpose of the obligation of zakār, because the unqualified terms include both. God knows best what is correct.

32.2 BAQAR (CATTLE—COWS AND OXEN)

There is no ṣadaqah on less than thirty pasturing cows. When they reach the number thirty, are pasturing with a year having passed over them, there is one tabi' or tabi'ah for them, and this is a cow that has entered the second year of its life. For forty cows, there is one musinn or musinnah. This is a cow that has entered the third year of its life. This is what the Messenger of God (God bless him and grant him peace) ordered Mu'ādh (God be pleased with him) to charge. When they are in excess of forty, the obligation is at this rate up to sixty. This is so according to Abū Hanīfah (God bless him). Thus, for one additional cow there is one-fourth of the tenth part of the musinnah (two and one-half percent). For two cows there is one-half of the tenth part of the musinnah (five percent). For three cows, there is three-fourths of the tenth part of the musinnah (seven and one-half percent). This is the narration of Kitāb al-Ṣayl, because the exemption was established through the text against analogy, but there is no text in this case. Abū Ḥasan has reported from him (Abū Hanīfah) that nothing is to be levied upon the excess until the number reaches fifty at which number one and one-fourth musinnah or three tabi'is are charged. The basis of this scale (nisāb) is that between two slips is a blank segment (waqṣ) and there is an imposition in each slip. Abū Yūsuf and Muḥammad (God bless them) said that there is no imposition on the excess until the number reaches sixty. This is also one narration from Abū Hanīfah (God bless him). The basis are the words of the Prophet (God bless him and grant him peace) directed at Mu'ādh (God be pleased with him), “Do not change anything for the awqāṣ of cattle.” They elaborated this to mean what is between forty and sixty. Would we say the meaning here is the young calves.
Thereafter, for sixty cows two tabi’s or tabi’ahs. For seventy there is a musinnah and a tabi’. For eighty there are two musinnahs. For ninety there are three tabi’s. For one hundred there are two tabi’s and one musinnah. It is on this basis that the obligation changes for each ten from a tabi’ to a musinnah and from a musinnah to a tabi’. This is based on the words of the Prophet (God bless him and grant him peace), “For every thirty cows is a tabi’ or tabi’ah and for every forty there is a musinna or musinnah.”

Buffaloes and cows are the same for this purpose. The reason is that the term baqar (cattle) includes both as they are similar species (of the same genus), except that the people in our lands do not comprehend it due to their scarcity. Thus, a person will not be violating his oath when he vows that he will not eat the meat of baqar (but then consumes the meat of a buffalo). God knows best.

32.3 Ghanam (Sheep and Goats)

There is no sadaqah on less than forty pasturing ghanam. When the number reaches forty pasturing ghanam and a year passes over them, then the charge is one goat up to one hundred and twenty. If this number increases by one, there are two goats up to two hundred. If this number increases by one, there are three goats. When the number reaches four hundred, there are four goats. Thereafter, for every one hundred goats there is a goat. This is how the elaboration (bayan) has been laid down in the document of the Messenger of God (God bless him and grant him peace) and in the document of Abū Bakr (God be pleased with him), and it is this on which consensus (ijma’) was attained.

Da’n (sheep) and ma’z (goat) are the same for this purpose. The reason is that the word ghanam includes all of them and the text has used this word. The thaniyy are accepted as their zakat, but a jadh’ (goat) is not accepted, except on the basis of a report of al-Hasan from Abū Ḥanīfah (God bless him). The thaniyy is one that has completed one year in age, while the jadh’ is one over which a greater part of the year has passed. It is reported from Abū Ḥanīfah (God bless him), and this is also the view of the two jurists, that the jadh’ is accepted (by way of zakat), due to the words of the Prophet (God bless him and grant him peace), “We have a claim on the jadh’ and thaniyy.” Further, sacrifice is performed with them, so also zakat. The interpretation of the stronger view is that the obligation is the average, and this (jadh’) is from the young. Thus, it is not permitted to accept the jadh’ from among the goats. The permissibility of sacrifice with a jadh’ is known through the text, and the reported text meant jadh’ah of camels.

Both males and females are accepted as zakat for ghanam. The reason is that the term shat (goat) includes both. The Prophet (God bless him and grant him peace) said, “For forty goats is a goat.”

32.4 Khayl (Horses)

If the horses are raised as pasturing horses, whether male or female, the owner has an option. He may, if he likes, pay one dinar for each horse, or he may subject them to valuation and pay five dirhams for every one hundred dirhams. This is the position according to Abū Ḥanīfah (God bless him), and is also the opinion of Zufur (God bless him). The two jurists said that there is no zakat on horses due to the words of the Prophet (God bless him and grant him peace), “There is no sadaqah on the Muslim for his slave or his horse.” He (Abū Ḥanīfah) relies upon the words of the Prophet (God bless him and grant him peace), “On each

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Footnotes:
1 For forty goats is a goat. 9 God knows best.
2 Further, sacrifice is performed with them, so also zakat. The reason is that the obligation is the average, and this (jadh’) is from the young. Thus, it is not permitted to accept the jadh’ from among the goats. The permissibility of sacrifice with a jadh’ is known through the text, and the reported text meant jadh’ah of camels. 13 It is a gharib tradition, however, a tradition with the same meaning is recorded by Abū Dāwūd and Ibn Mājah. Al-Zayla’ī, vol. 2, 354.
15 It is recorded by Muslim. There are other traditions too that pertain to sacrifice. Al-Zayla’ī, vol. 2, 355.
16 This has preceded in the document of ‘Amr (God be pleased with him) referred to above, Al-Zayla’ī, vol. 2, 355.
17 It is recorded in all the six sound compilations. Al-Zayla’ī, vol. 2, 356.
pasturing horse is a dinār or ten dirhams.\[^{17}\] The interpretation of the tradition related by the two jurists is that it deals with the horse of the soldier (gḥāzī). This is also related from Zayd ibn al-Thābit (God be pleased with him).\[^{18}\] The option of paying a dinār or valuation is transmitted from 'Umar (God be pleased with him).\[^{19}\]

Where the horses are all male, there is no zakāt. The reason is that they do not breed. Likewise, where the horses are all females according to one narration. In another narration from him (Abū Ḥanīfah), the obligation is imposed as do they breed through borrowed studs, as against the males. In yet another narration he says that there is zakāt on male horses as well (even without females).\[^{20}\]

There is no obligation in the case of mules and donkeys, due to the words of the Prophet (God bless him and grant him peace), "Nothing has been sent down to me about them." The numbers (rates) are only established through transmission.\[^{21}\] Unless, they are meant for trade, because in that case they become linked to financial assets like all wealth meant for trade. God knows best.

### 32.5 Miscellaneous Rules

There is no sadāqa on the young offspring of camels (fuslān), sheep (humlān) and cattle (ajājil), according to Abū Ḥanīfah (God bless him), unless they are accompanied by full grown animals. This is the last of his opinions\[^{22}\] and is also the opinion of Muḥammad (God bless him). Before this, he (Abū Ḥanīfah) used to say that the obligation in their case is the same as the musinnah. This is the view of Zufar and Mālik (God bless them). He then withdrew his view and said that the obligation is one like them. This is the view of Abū Yusuf al-Shāfiʿi (God bless them).

\[^{17}\] It is recorded by al-Dārʾuṭṭāni and al-Bayhaqī in their Sunan. Al-Zaylaʿī, vol. 2, 357–58.

\[^{18}\] It is gharīb. It is recorded by Abū Zayd al-Dabbūsī in Kitāb al-Asrār. Al-Zaylaʿī, vol. 2, 357.

\[^{19}\] It is gharīb. It is recorded by al-Dārʾuṭṭāni in his Sunan. Al-Zaylaʿī, vol. 2, 358.

\[^{20}\] Because they grow (in years) through pasturing.

\[^{21}\] This is an important rule, and has been mentioned earlier. The reason is that these numbers cannot be identified through analogy or rational arguments.

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BOOK III: Poor-dues

The reasoning underlying the first view is that the term used in the communication (khītāb) includes the young and old animals. The reason for the second is that the interests of both (rich and poor) are secured by it as in the charging of one out of the weak animals. The reasoning for the last is that quantities (numbers) do not acknowledge the operation of analogy (qiyās).\[^{23}\] Thus, when the obligation laid down by the texts (sharīʿa) is prevented, the entire obligation is prevented. If one among the young is a musinnah, the entire flock is governed by that rule in the calculation of the niṣāb without the payment of zakāt. Thereafter, according to Abū Yūsuf (God bless him), there is no obligation when the humlān are less than forty, the ajājil are less than thirty, while it is imposed on twenty-five fuslān at the rate of one. Thereafter, nothing will be obligatory until the number reaches a point where had they been musinnahs, two would have been obligatory.\[^{24}\] After this nothing will be obligatory until a number is reached where had they been musinnahs, three of them would be obligatory.\[^{25}\] In one narration, there is no obligation when the number is less than twenty-five. It is also narrated from him that in five fuslān, one-fifth fasil is obligatory. On this basis two-fifths of a fasil will be obligatory for ten fuslān. It is also narrated from him that the average value of one-fifth fasil is to be compared with the value of a goat and the lesser of the two is paid. In the case of ten fuslān, the value of two goats is to be compared with two-fifths of a fasil in this calculation.

He said: If a person owes an animal of a certain age, but this is not available, the official is to take a better animal and return the excess, or he is to take a lesser animal and charge the excess. This is based upon the fact that the taking of value in the case of zakāt is permissible in our view, as we shall mention God willing.\[^{26}\] In the first case, however, he has the right not to take the (better) animal and to demand the exact animal due or its value, because it is an exchange. In the second case, he is to be compelled to accept as there is no bayʿ here rather it is the payment of zakāt with its value.

It is permitted to pay by value in zakāt, in our view. Likewise, in the case of expiation, sadāqa t al-fitr, 'ushr and nadhr. Al-Shāfiʿi (God bless him)...

\[^{23}\] As stated above.

\[^{24}\] The number seventy-six.

\[^{25}\] The number one hundred and forty-five.

\[^{26}\] There is a discussion about gold and silver as to whether the obligation is linked to the substance ('ayn) of gold and silver and, thus, dinārs and dirhams.
him) said that it is not permitted following the precedent in the texts, as in the case of sacrificed and slaughtered animals. Our reasoning is that the purpose of the command to pay the zakāt to the poor is to make the promised sustenance reach him and this annuls the restriction of giving a goat, thus, it becomes more like jīzāh. This is distinguished from the animals of sacrifice as nearness to God in their case is attained by the flowing of blood, and this is not a rational rule (being a ritual). The basis for nearness in the disputed case is the meeting of the wants of the needy, and this can be rationalised.

There is no sadaqah on work animals, those that bear burdens and those that are fed while tied (not pasturing), with Malik (God bless him) disagreeing. He relies upon the apparent meaning of texts. We rely on the words of the Prophet (God bless him and grant him peace), "There is no sadaqah on loading animals, work animals, nor on cattle employed for cultivation."27 The reason is that the cause is growing wealth and its evidence is in pasturing or being made available for trade, but this is not found here. Further, in feeding a tied animal the burden is excessive, therefore, growth is conceptually absent. Thereafter, the pasturing animal is one that pastures for a greater part of the year so that if the owner feeds the animal while tied for half a year or more, it will be treated as a stall-fed animal, because the minor part is subservient to the major part.

The sadaqah collector is not to take the choicest wealth nor the inferior rather he should take the average category of wealth, due to the words of the Prophet (God bless him and grant him peace), "Do not take the prized wealth of the people—that is, the choicest—rather take the ordinary,"28 that is, the average category, as it secures the interest of both sides (the rich and the poor).

He said: If a person who possesses the niṣab, acquires animals of the same species during the year, he is to add them to the niṣab and pay zakāt on the whole. Al-Shāhī' (God bless him) says that he is not to add them, because it is capital with respect to ownership and so also in its function (zakāt), as distinguished from offspring and profits as these are dependent upon ownership so that they come to be owned through the ownership of the principal asset.29 We maintain that similarity of species is the underlying cause (illah) in the case of offspring and profits. The reason is that with their presence it becomes difficult to maintain the reason is the difficulty of reckoning the hawd for each acquisition. This is the case when the hawd has been stipulated for ease.

He said: Zakāt according to Abu ʿIyānafah and Abu Yūsuf (God bless them) is paid on the (complete) niṣab and not on the exempted part (afw). Muḥammad and Zufar (God bless them) said that it is paid on (afw). Thus, if the exempted part is lost and the niṣab remains, the entire obligation is intact according to Abu ʿIyānafah and Abu Yūsuf (God bless them), but according to Muḥammad and Zufar (God bless them) it is reduced proportionately. The reasoning for Muḥammad and Zufar (God bless them) is that zakāt has been imposed to express gratitude for the blessing of wealth and the entire wealth (owned) is a blessing. The two jurists rely on the words of the Prophet (God bless him and grant him peace), "On five pasturing camels is one goat, and there is nothing on the excess till the number reaches ten,"30 This is how he described each scale (niṣab)31 and exempted the obligation from the excess (afw). The reason is that the surplus is dependent upon the niṣab, therefore, loss is first adjusted against the surplus like profit in the wealth of muṭābābah. Accordingly, Abu ʿIyānafah (God bless him) said that the loss is first allocated, after allocation to the surplus, to the last increment of the niṣab and then to what is adjacent to it until the loss is completely adjusted. The basis for this is that the principal asset is the first niṣab and what is in excess of it is dependent upon it. According to Abu Yūsuf (God bless him), it is to be allocated to the excess first and then proportionately to each individual part of the niṣab.

If the Khawārij collect the kharaj and the sadaqah of the pasturing animals, it is not to be doubled for the people (not to be collected again).

The reason is that the inām did not protect them and tax can be imposed only after protection (al-jinayyah bi-ʿl-hināyah).32 The decision given to

27In this version it is gharīb. There are, however, other versions recorded by Abū Dāwūd, al-Dārquṭni and others. Al-Zaylaʾi, vol. 2, 360.
28This version is gharīb. Al-Bayhaqī and Ibn Abī Shaybah have recorded other traditions that convey the same meaning. Al-Zaylaʾi, vol. 2, 361.
29He agrees that offspring are to be added.
30It is gharīb with these words. Ibn al-Jawzi has recorded it from other jurists. Al-Zaylaʾi, vol. 2, 362. Similar reports are recorded by Abu ʿUbayd al-Qāsim ibn Sallām. Al-Zaylaʾi, vol. 2, 362.
32This is an important principle and runs throughout Hanafi law, especially for crimes committed where the state does not provide protection.
them will be that they pay the *zakat* again, but not the *khraj*, which is something between them (the Khawarij) and God for they too are entitled to *khraj* by virtue of being fighters (against the enemy). The beneficiaries of *zakat*, on the other hand, are the poor and they may not give it to the poor. It is said that if the person paying formed the intention to pay *zakat* to them, he is absolved of the liability. Likewise what is paid to every tyrant. Further, they are poor due to the torments they are facing. There is, however, greater precaution in the first view.

There is no *zakat* on the pasturing animals of a minor of Banū Taghlib. A woman of their tribe pays what their man pays. The reason is that the agreement with them stipulated the double of what is taken from the Muslims, and from Muslim women, but not their minors.

If the wealth is destroyed after the accrual of the obligation of *zakat*, the *zakat* claim is extinguished. Al-Shafi’i (God bless him) said that the owner is to be held liable after the loss as soon as he is able to pay, because this is an obligation attached to his *dhimmah* (liability), and it becomes like the *ṣadāqat al-jir*. Further, he did not pay it after it had become due so it is as if he has consumed it. We maintain that the amount due is part of the *nisab* so as to facilitate payment, thus, it is extinguished by the loss of its subject-matter, like the handing over of the offender slave on account of his offence in which case the obligation is extinguished if the slave dies (is lost). Further, the beneficiary are the poor, who are determined by the owner and no demand has been made by them as yet. It is said that after the demand made by the collector, the owner is to be held liable. It is also said that he is not to be held liable (even after such a demand) due to the absence of loss. In consumption, on the other hand, there is transgression (delict). In case part of the wealth is lost, the liability is extinguished in proportion to the whole.

If he pays the *zakat* prior to the completion of one year (*huwa‘l*), when he owns the *nisab*, it is permitted. The reason is that he paid after the existence of the cause of the obligation. It is permitted and is as if he paid the expiation after causing an injury. Malik (God bless him) disagrees on this issue.

Early payment is permissible more than a year in advance, due to the existence of the cause. It is also permitted on account of several *nisabs*:

1. This pertains to the rights of the rebels.
Chapter 33

Zakāt on Māl (Wealth)

33.1 *Fiḍḍah* (Silver)

There is no *ṣadaqah* on what is less than two hundred *dirhams*, due to the words of the Prophet (God bless him and grant him peace), “There is no *ṣadaqah* in what is less than five *awāq;*” where one *awqiyah* is equal to forty *dirhams.*

When there are two hundred *dirhams* and one year has passed over them, then the charge on them is five *dirhams*. The basis is that the Prophet (God bless him and grant him peace) caused to be written for Mu'adh (God be pleased with him) that he should “take from every two hundred *dirhams*, five *dirhams* and from every twenty *mithqāls* of gold, one-half *mithqāl;*”

He said: There is no charge on the excess until the number reaches forty *dirhams* when the charge on them will be one *dirham*. Thereafter, for every forty *dirhams* there is one *dirham*. This is the view according to Abū Ḥanīfah (God bless him). The two jurists said that whatever is in excess of two hundred is subjected to *zakāt* according to its prescribed rate. This is the view of al-Shāfi‘ī (God bless him) as well. The basis are the words of the Prophet (God bless him and grant him peace) addressed to ‘Alī (God be pleased with him), “What is in excess of two hundred

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1. It is recorded by al-Bukhārī and Muslim. Al-Zayla‘ī, vol. 2, 363–64.
2. Five come to 200 *dirhams*, which is the *niṣāb* for silver.
3. It is recorded by al-Dār’qūtnī, vol. 2, 364.
4. This is an important rule, but it appears that what people follow today is the opinion of the two jurists. In other words, they just work out two and one-half percent on the amount they hold.
is subjected to its prescribed rate." Further, zakāt has been prescribed to offer gratitude for the blessings of wealth. The stipulation of an initial minimum scale (niṣāb) is for verifying who is rich, whereas the niṣāb for pasturing animals is worked out to avoid the fragmentation of the herd. Abū Ḥanīfah (God bless him) relies on the words of the Prophet (God bless him and grant him peace) to Muʿādh (God be pleased with him), "Do not collect anything from the fractions," and his words in the tradition of 'Amr ibn Ḥazm, "There is no sadaqah in what is less than forty." The hardship in the obligation of working out the fractions is to be repelled. The weight acknowledged for dirhams is seven, that is, ten dirhams should have a weight of seven mithqāls. This is what was implemented in the diwān of 'Umar (God be pleased with him) and it became an established precedent.8

If the predominant part of ʿurūd (commodities, goods) is silver, it is assigned the rule of silver, but if the predominant part is another metal it is to be assigned the rule of ʿurūd (commodities, goods). The reason is that dirhams are not free of slight adulteration, because silver cannot be moulded without it. It is, however, devoid of an excessive amount of alloyed metal, therefore, we have deemed the predominant metal as the distinctive factor. This would be more than half taking into account the actual reality. We will mention this in the discussion of ʿazād, God willing. The excessive alloy is essentially for purposes of trade as in most commodities, unless the silver that can be extracted from the metal reaches the niṣāb. The reason is that the value of the silver or the intention to trade in silver metal is not acknowledged.9 God knows best.

33.2 DHALIAB (GOLD)

There is no sadaqah on what is less than twenty mithqāls of gold. When the weight reaches twenty mithqāls, one-half mithqāl is charged on it, on the basis of what we have related (earlier).10 The mithqāl is a weight where seven mithqāls are equal to the weight of ten dirhams and this is well known.

Thereafter, for every four mithqāls (after the first twenty), two dirhams are charged. The reason is that the obligation amounts to one-fourth of one-tenth (2/1/3%). This is so in what we have said as each mithqāl is equal to twenty carats.

There is no sadaqah in what is less than four mithqāls (after the first twenty). This is so according to Abū Ḥanīfah (God bless him). According to the two jurists, it is charged according to the prescribed rate. This is to the two jurists, it is charged according to the prescribed rate. This is an issue of fractions. Each ʿdinār, according to the sharʿ (law), is equal to ten dirhams, therefore, four mithqāls of gold would be equal to forty dirhams.11

He said: Zakāt is imposed on gold and silver dust as well as on jewellery and utensils made of them. Al-Shāfiʿī (God bless him) said that it is not imposed on women's jewellery nor on silver rings for men. The reason is that their use is lawful, therefore, they are similar to dresses that are worn. We maintain that the cause is wealth that grows, and the evidence of growth is present and that is its readiness for use in trade by the very nature of its creation. This evidence is legally acknowledged as distinguished from dresses.

33.3 ʿURŪD (GOODS)

Zakāt is obligatory on goods of trade, whatever their nature, as long as their value reaches the niṣāb valued in silver or gold, due to the words of the Prophet (God bless him and grant him peace) about them: "He is to valuate them and charge five dirhams for every one hundred dirhams."12

Further, these are goods that are prepared for growth through the endowments of the ʿabd (servant), therefore, they are like those readied by the sharʿ (law). The intention to trade in them is stipulated so that their readiness is established.

11He is referring to the tradition of Muʿādh (God be pleased with him) mentioned under the section on silver. Al-Zaylāʾī, vol. 2, 364.
12This is the comparison of the additional brackets of gold and silver. He is not equating the two values.
13This is a gharīb tradition. There is a marjaʿ tradition that is recorded by Abū Dāwūd. There are many traditions recorded by others. Al-Zaylāʾī, vol. 2, 375.

1It is recorded by Abū Dāwūd along with another tradition conveying the same meaning. Al-Zaylāʾī, vol. 2, 365–66.
3This is found in the document of 'Amr ibn Ḥazm (God be pleased with him). Al-Zaylāʾī, vol. 2, 367.
5When the alloy is excessive.
He said thereafter: He is to valuate them in a manner that is most beneficial for the needy (masākin), as a precaution for securing the right of the poor (fuqara'). He (God be pleased with him) said: This is a narration from Abū Ḥanīfah (God bless him). In Kitāb al-Aṣl, the words "best way" have been used. The reason is that prices (currencies) used in the valuation of things have the same effect. The interpretation of the words "most beneficial" is that he valuates them in a manner that creates a niṣāb. It is narrated from Abū Yūsuf (God bless him) that he is to valuate them in terms of a thing that is used as a price for the goods from among the currencies because these are the most accurate in identifying financial value. If they are purchased with things other than currencies, he is to valuate them in terms of the prevalent currency. According to Muhammad (God bless him) he is to valuate them with the prevailing currency under all circumstances as in the case of usurped or destroyed goods.

If the niṣāb is complete at the two ends of the ḥawl (year), then a deficiency in between these two will not extinguish the claim of zakāt. The reason is that it is difficult to maintain its completion during the course of the year. Its existence is essential at the beginning of the year, however, for the realisation of the cause and the verification of affluence, and also at its end for the imposition of the obligation. It need not be so between these two times, because this is the period of the subsistence of wealth, as distinguished from the situation where the entire wealth is lost, in which case the rule of the ḥawl will be nullified and zakāt will not be imposed due to the absence of the niṣāb as a whole. It will not be so in the situation in the first issue as part of the niṣāb still exists, thus, the cause is present.

He said: The value of the goods is to be added to the gold and silver (dīnārs and dīrhams) so as to complete the niṣāb. The reason is that obligation is imposed on the whole in consideration of trade even though their readiness for trade differs.

Gold is to be added to silver, due to their belonging to the same genus with respect to currency-value for which reason they have been deemed a cause for zakāt. Thereafter, the addition (merger) is to be on the basis of

\[ \text{value, according to Abū Ḥanīfah (God bless him). The two jurists maintain that it is to be on the basis of their constituent parts (in weight).} \]

This is also a narration from Abū Ḥanīfah (God bless him). Thus, if a person has one hundred dīrhams and five mithqāls of gold, whose value has reached one hundred dīrhams, then he has to pay zakāt in his view with the two jurists disagreeing. The two jurists maintain that it is quantity that is to be considered here and not the value, thus, no zakāt will be imposed on moulded metal whose weight is less than that of two hundred (dirhams), but its value is more than them. He maintains that merger of one with the other is due to the common genus and this is realised on the basis of value alone and not their form, therefore, they are to be added up on this basis. God knows best.

\[ \text{In other words, the personal niṣāb cannot be worked out separately from one's business niṣāb.} \]

\[ \text{It is for this reason that the obligation is linked to the 'ayn of these metals. In other words, zakāt has to be paid in these currencies.} \]
The Person Who Passes by the Tolls Official
(‘Āshir)

If a person passes by the tolls official with wealth and says, “I acquired it a few months ago,” or “I am under debt,” and then takes an oath to that effect, he is deemed truthful. The ‘āshir is the person who is appointed by the imām on the highway so that he can take the ṣadaqāt (zakāt) from the traders. A trader who denies the completion of the ḥawl or being free of debt, is denying the occurrence of the obligation. The admissible statement is that of one who denies along with his oath.

The same applies if he says, “I paid it to another ‘āshir.” The meaning is if there was within that year another ‘āshir, because this man is claiming the delivery of the trust to whom it was due. The case will differ when there was no other ‘āshir during that year, as this will certainly make it evident that he is making a false statement.

Likewise, if he says, “I paid it myself,” that is, to the fuqarā’ in the city. The reason is that such payment (distribution) was delegated to him. The authority to charge one passing by is due to one entering into this official’s jurisdiction.

The same rules apply to the obligation of ṣadaqah on the pasturing animals in the first three cases. As for the fourth case, which is his claiming that he paid it himself to the poor in the city, he is not to be deemed truthful even if he says it on oath. Al-Shāfi‘ī (God bless him) said that

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1There are other officials too for the implementation of the system.
2That is, if the person takes an oath his statement will be accepted.
3Collection of zakāt.—Within the topic of zakāt, the issue of zakāt collection, especially the compulsory payment of zakāt, is extremely important. It is, however, not given
he is deemed truthful, because he delivered what was due to the beneficiary. We maintain that in this case, the right to collect belongs to the sultan, thus, he does not possess the right to nullify this claim as distinguished from amnal batinah (invisible wealth). Thereafter, it is said that the first payment (assuming that he is made to pay twice) is the zakat payment, while the second payment is by way of siyasaah. Then again it is said that zakat is the second payment, and the first is converted into a supererogatory payment, which is the second view. In payments of zakat of pasturing animals, as well as trading goods, an issuance of a certificate of payment (freedom from liability) is not stipulated in al-Jami’ al-Saghir, while it is stipulated in the Kitab al-Ashl. The latter is stated in a narration of Al-Hasan from Abu Hanifah (God bless him). The reason is that he has made a claim and his claim is certified as proof thereof, therefore, it is necessary to notify it. The reasoning for the first (statement in al-Jami’ al-Saghir) is that one writing resembles another, and cannot be considered as proof.

Matters in which the Muslim is deemed truthful, the dhimmi will be deemed truthful too. The reason is that what is taken from him is double of what is taken from the Muslim. These conditions are, therefore, to be observed in order to realise the double payment.

The enemy (harbi) is not to be deemed truthful, except in the case of his slave girls when he says: "They are mothers of my children (ummahat al-awlad)," or when there are slaves with him and he says that they are his children. The reason is that he is being charged for the protection

adequate attention in some books of fiqh. The Author discusses it here in an indirect manner. A brief description may help. First, the ‘ashir is the tolls official on the highway, as the Author states, and he collects from Muslims with the dhir al-Islam as well as from those who come from the dhar al-harb. The first cases he discusses are those for trading goods: (1) the trader denies that a jawal has passed over his goods; (2) the trader claims that he is under debt; (3) the trader claims that he paid it to another ‘ashir; and (4) the trader asserts that he paid the amount himself directly to the beneficiaries. The last case shows that the amount due on the trading goods can be paid by the individual himself and need not be paid to the imam or his representative. He then compares trading goods to pasturing animals and maintains that the first three cases will apply to pasturing animals, but not the fourth case. In other words, the amount due must be paid to the imam’s representative in the case of pasturing animals. Zakat on personal wealth—gold and silver—can also be paid directly by the individual.

4That is, the tax imposed by the state is by way of siyasaah.

5That is, it is easy to forge documents.

He said: From a Muslim one-fourth of a tenth is charged, from a dhimmi one-half of a tenth and from an enemy (harbi) a tenth. This is what was ordered by ‘Umar (God be pleased with him) as a directive to his officials. If, however, the harbi is crossing over with fifty dirhams nothing is to be charged from him, unless the enemy charges us on such an amount (when we cross over). The reason is that the charge from them is on the basis of reciprocity, as distinguished from the cases of the Muslim and dhimmi. The charge is either zakat or its double, therefore, the existence of a nigab is essential. This is stated in al-Jami’ al-Saghir. In the Book of Zakat, it is stated: We do not levy a charge on trivial amounts even if they do charge us on such amounts, because a small amount continues to be exempted, and further it does not require protection.

He said: If an enemy (harbi) crosses over with two hundred dirhams, and it is not known how much the enemy charges from us, we collect a tenth from him, due to the words of ‘Umar (God be pleased with him), "If you are rendered helpless (about knowing the amount), then charge a tenth." If it is known that they charge from us one-fourth of a tenth or one-half of a tenth, we are to charge accordingly, but if they take away the entire wealth, the entire wealth is not to be taken away as that is gross injustice (treachery). If they do not collect anything, we are not to charge either, because they have relinquished charging our traders, and also because we are under an obligation to observe a higher morality.

He said: If an enemy trader passes by an ‘ashir and he charges him a tenth, but then he passes by again (on his way back), he is not to charge him until a year has passed by. The reason is that charging each time is the extermination of wealth whereas the right to collect has been granted for the protection of wealth. Further, the hukum (operation) of the first aman (safe-custody) still prevails and the aman will be renewed next year.

5This is ghariib. Al-Zayla’i, vol. 2, 379.
6It is to be noted that the Author has deemed it an obligation.
7This principle is similar to the principle identified earlier.
In addition to this, it is not possible for him to reside for more than a year, and charging after that does not diminish wealth.

If, however, he has imposed a tenth on him and he returns to the dar al-ḥarb, but then returns on the same day, he is to charge him a tenth again. The reason is that he has returned on a fresh amān, and charging after a renewed amān does not lead to the diminishing of wealth.

If a dhimmī passes by the ‘āshīr with khāmr (wine) and khīnzīr (pigs), he is to charge for the wine, not for the pigs. His statement that he is to charge for the wine means by value. Al-Ṣāḥibī (God bless him) said that he is not to charge for either of them as they have no (legal) value. Zufar (God bless him) said that he is to charge for both as they are equally valuable for the dhimmīs. Abū ʿYūsuf (God bless him) said that he is to charge them for both when he passes by with both. It is as if he deemed the pigs to be subservient (included within) khāmr. If he passes by with them separately he is to charge for the ‘āshīr and not for the pigs. The reasoning for the distinction according to the accepted rules is that the value in things that have a unique value take the rule of protection, and the Muslim protects wine himself for converting it into vinegar. Likewise, he protects it in the case of another. He does not, however, protect khīnzīr for himself rather he shuns it due to Islam, therefore, he does not protect it for another.

If a minor or a woman from the Banū Ṭaghlib pass by the ‘āshīr with wealth, nothing is to be imposed on the minor whereas the woman is to be charged at a rate charged for their men, on the basis of what we have stated under the topic of pasturing animals.

If a person passes by the ‘āshīr with one hundred dirhams and informs him that he has another one hundred at his place of residence, over which a hawl (year) has passed, he is not to subject the hundred with which he passes by to zakāt, due to their being less than the nisāb.

If a person passes by with two hundred dirhams that he holds on behalf of another, he is not to make any charge on them, because this person is not authorised (by the owner) to pay zakāt on them. He said: The same applies to mudāribah, that is, if the mudārib passes by the ‘āshīr, Abū Ḥanīfah (God bless him) used to say in the beginning, “He is to subject them to a charge due to the strength of the right of the mudārib on account of which the rabb al-māl does not possess the right to restrict his transactions in the wealth after it stands converted to goods (‘urūd), and for this reason he assumes the status of the owner.” Thereafter, he retracted to the view we have stated in the Kitāb (Bidāyat al-Mubnād), and this is the opinion of the two jurists as well. The reason is that the mudārib is neither the owner nor a deputy for the owner for purposes of payment of zakāt. The exception is when there is profit in the wealth and the share of the mudārib has reached the level of the nisāb as in this case he is the owner of such wealth.

If an authorised slave (‘abd maʿdūḥūn) passes by with two hundred dirhams and there is no debt claim on him, he is to be subjected to zakāt. Abū ʿYūsuf (God bless him) said, “I do not know whether Abū Ḥanīfah retracted from this opinion.” The analogy to be constructed upon his second view about the mudārib, which is also the view of the two jurists, is that he is not to subject him to a charge, because the ownership of what is in his possession belongs to the master, while he possesses the right of transaction alone, therefore, his position is like that of the mudārib. With respect to the distinction between the two, it is said that the slave acts on his own so that he does not have recourse to his master for renewal of authorisation. He is, thus, in need of protection. The mudārib, on the other hand, acts upon the rule of agency (deputisation) so that he has to seek authorisation (for zakāt) from his master. It is the rabb al-māl who needs the protection. Consequently, retraction (by Abū Ḥanīfah) in the case of the mudārib will not amount to retraction in the case of the authorised slave. If the master is with the slave, the zakāt is to be collected from him as ownership belongs to him, unless the slave is

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10 This would appear to apply the principle of protection to wealth that the Muslims can protect.

11 That is, if the charge is made for the protection of wealth of the of the visitor, it will mean a thing that is of value to him.
indebted with a debt that covers his master's entire wealth, as here there is a lack of ownership or there is encumbrance.

He said: If a person passes by an 'āshir of the Khawārij, in a land that they have taken over, and he subjects him to zakāt, he is to be made to pay zakāt once again. The meaning here is that if one of the people of 'adl pass by the 'āshir. The reason is that the negligence is on his part as he passed by such an 'āshir.

Chapter 35

Minerals and Treasure-Troves

When a mineral like gold, silver, iron, lead or copper is found in kharāj land or 'ūshr land, then there is a fifth (khums) in it, in our view. Al-Shāfi'ī (God bless him) said that there is no charge on the finder of the mineral. The reason is that it is mubah and he was the first to take it into possession, like something hunted. The exception are mined gold and silver and these are subjected to zakāt without the stipulation of the ḥawl, in one of his views, because the ḥawl is stipulated for growth/gain and the mineral represents gain in its entirety. We rely on the words of the Prophet (God bless him and grant him peace), "In rikāz there is a fifth (khums)."3 This means buried treasure and in its unqualified sense it includes minerals. Further, it was in the hands of the unbelievers and it was transferred to our hands through domination, therefore, it is equivalent to spoils (ghanīmah), and a fifth is imposed on the spoils. It is distinguished from the hunted animal that was in no one's possession. The possession of those who gained the spoils, however, was legal purely through the prima facie proof, while the true possession is that of the finder. We have given consideration to legal possession with respect to the khums and to real possession in the case of four-fifths, which are assigned to his ownership.

If a mineral is found within his house, there is no charge on it, according to Abū Ḥanīfah (God bless him). The two jurists said that

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1Not owned by the finder.

2The distinction lies in the effort required to extract the mineral. Where the mineral is found without much effort, it is subjected to 'ūshr (see rule below for minerals found in one's land), but where considerable effort is required to mine it, zakāt is charged.

3It is recorded by all the six sound compilations. Al-Zayla'i, vol. 2, 386.
there is a fifth (khums) in it due to the unrestricted meaning of what
we have related. He maintains that the mineral is part of the constituents
of the earth, being mixed with them, and no burden is placed upon the
remaining constituents. The same should be the rule for this component,
because this component does not differ from the whole, as distinguished
from treasure as that is not mixed up with the earth.

He said: If he finds it in his land, then, from Abū Ḥanīfah (God bless
him) there are two opinions. The basis for the distinction according to
one of these, and this is the narration in al-Jāmi‘ al-Saḥīr, is that the
house was owned without any burden but not the land, therefore, 'ushr
and kharāj are imposed on the land and not the house. The same applies
to this burden.

If, however, rikāz, that is, treasure is found in it, it is liable for khums,
according to the two jurists on the basis of the tradition we have related.4
The term rikāz is applied to mean treasure due to the underlying meaning
of rākāz, which means being embedded. Thereafter, if it has been minted
by the Muslims (Ahl al-Islām), for example when the kalimat shahādah
is etched on it (the coins) then it has the legal status of found property
(huqūqāh), and its huqūk has been identified under its topic. If the coins
have been minted by the People of the Jāhiliyyah, like the pictures of
 idols etched on them then khums is imposed under all circumstances, as
we have explained. Thereafter, if it is found in mubah (permissible) land
(enemy territory), then four-fifths are for the finder, as he is the one who
found the treasure and those entitled to the spoils did not know about it.
Thus, it belongs exclusively to him. If the person finds it in land that
is owned by another, the huqūk is the same according to Abū Ḥanīfah
(God bless him), because entitlement depends upon the taking of pos-
session and this has occurred on his part. According to Abū Ḥanīfah
and Muḥammad (God bless them), it belongs to the person for whom the
land was delineated, and he is the person who has been made the owner
of a site by the inām first upon conquest. The reason is that he was the
first to take possession of it and this possession is exclusive, thus, he owns
what is beneath the land as well, even though he has possession of what is
above it. It is like a person catching a fish that has a pearl inside it for he
owns the pearl as well. Thereafter, it does not move out of his ownership

4He is referring to the tradition mentioned above, Al-Zādi‘, vol. 2, 381.

It is gharīb. Al-Zādi‘, vol. 2, 382.

It is gharīb as far as ‘Umar ibn al-Khaṭīb (God be pleased with him) is concerned.

It is reported from ‘Umar ibn Abī Ḥaṁdā (God bless him), Al-Zādi‘, vol. 2, 382.
Chapter 36

Zakāt on Crops and Fruit

Abū Ḥanīfah (God bless him) said that what the earth makes to grow, whether less or more, is subject to 'ushr (tenth) irrespective of its being irrigated by flowing water or water from the sky, except for firewood, cane and grass. The two jurists said that 'ushr is not obligatory except on those (crops and fruit trees) that leave behind (storable) yield whose quantity reaches the level of five awsuq. One wasaq is equal to sixty šā's by the standard of the Prophet's (God bless him and grant him peace) wasaq. There is no 'ushr, according to both of them, on vegetables. The disagreement is on two points: on the stipulation of the niṣāb and on the stipulation of non-perishability. On the first point, the two jurists rely upon the words of the Prophet (God bless him and grant him peace), "There is no ṣadaqah (zakāt) on what is less than five awsuq." The reason is that it is ṣadaqah (zakāt), therefore, niṣāb is stipulated for it so as to ensure sufficiency of wealth. Abū Ḥanīfah (God bless him) relies upon the words of the Prophet (God bless him and grant him peace), "What the earth brings out is subjected to 'ushr," and these words do not make distinctions. The interpretation of what the two jurists have related applies to zakāt on trading goods. The reason is that the people in those days used awsuq for trade where the value of the awsuq was forty dirhams. The owner is not given any consideration here so how can his being wealthy

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1That is, Abū Yūsuf and Muḥammad (God bless them).
2It is recorded by al-Bukhārī and Muslim from Abū Saʿīd al-Khuḍrī (God be pleased with him). Al-Zaylaʾi, vol. 2, 384.
3In these words it is gharīb, however, a tradition in the same meaning is recorded by al-Bukhārī from al-Zuhri from Sālim from Ibn ʿUmar (God be pleased with them). Al-Zaylaʾi, vol. 2, 384–85.
be relevant. It is for this reason that no ḥawl (annual period) is stipulated as that is done for purposes of growth/gain, while this is all gain.

On the second point, the two jurists rely upon the words of the Prophet (God bless him and grant him peace), “There is no ṣadāqah in the case of vegetables.”4 Zakāt cannot be deducted from vegetables (due to the impossibility of a ḥawl, therefore, the word ṣadāqah is to be read as ‘ushr. He (the Imam) relies upon what we have related. The tradition narrated by the two jurists is interpreted to mean ṣadāqah that the tolls official charges (when they pass by him). This is what Abū Ḥanīfah (God bless him) adopted. Further, the earth makes to grow things that are perishable, thus, the cause is cultivable land.5 It is for this reason too that khurāj is imposed on such land.

As for firewood, cane and grass, they do not usually grow in orchards rather they are eliminated from such land. If, however, such land is used for growing cane, trees and grass, ‘ushr is to be imposed. The cane mentioned is Persian cane. As for sugarcane or aromatic cane, there is ‘ushr on them. The reason is that the exploitation of the land6 is intended through them as distinguished from palm leaves and chaff as the purpose is fruit, and tamr (dates) are different from these two things.

He said: On land that is irrigated with large buckets, watering wheel or the water scoop, there is one-half of the tenth on the basis of both views. The reason is that the burden is excessive7 in this and is less in what is irrigated by the sky (rain) or flowing water (canals). If the land is irrigated with flowing water and with large buckets, then, consideration is to be given to what occurs for the major part of the year, like the discussion that has proceeded with respect to pasturing animals.

Abū Yūsuf (God bless him) said that things that are not measured by the wasaq, like saffron and cotton, are subject to ‘ushr when the value of these things reaches the value of five awṣaṣq of the cheapest crop, like barley in our times. The reason is that it is not possible to make a determination for it from the perspective of the shari‘ah (that is, the texts), therefore, such a value has been taken into account as in the case of trad-

In the case of honey a tenth (‘ushr) is charged if the yield is from kharaj land. Al-Shāfi‘i (God bless him) said that it is not to be imposed. The reason is that it is produced by an insect and thus is similar to silk. The reason is that it is produced by an insect and thus is similar to silk.

4 It is related from a number of Companions (God be pleased with them). One version from Mu‘ādh (God be pleased with him) is recorded by al-Tirmidhi. Al-Zayla‘i, vol. 2, 386.
5 That is, all perishable goods are subject to the charge.
6 Exploitation of the land is the basis in this case.
7 The charge is reduced due to the excessive burden in this case.
He said: In things that are produced by the earth and are subjected to ʿuṣhr, the wages of the workers and expenditure incurred on cattle are not to be taken into account. The basis is that the Prophet (God bless him and grant him peace) ordered that the obligation correspond with the burden. Thus, calculating these expenses has no meaning.

He said: If a member of Banū Ṭaghlīb owns ʿuṣhr land, then, he is to pay double ʿuṣhr. This is known through the consensus (ijmāʿ) of the Companions (God be pleased with them). According to Muhammad (God bless him), in the case of land purchased by a Ṭaghlībī from a Muslim there is a single ʿuṣhr, because the imposition does not alter in his view by a change of ownership. If a dhimmī purchases the land from the Ṭaghlībī, the land retains the original imposition in their view, due to the permissibility of doubling it for him on the whole, just as if he was passing by the tolls official (ʿuṣhr). Likewise, if a Muslim buys the land from him or if the Ṭaghlībī converts to Islam and this is so according to Abū Ḥanīfah (God bless him), irrespective of the doubling being original or having been acquired, because doubling has become a charge on the land, it stands transferred to the Muslim with respect to it, as in the case of kharāj. Abū Yusuf (God bless him) said that it reverts to a single ʿuṣhr due to the lapsing of the cause for doubling. It is stated in the Book that this is also the view of Muhammad (God bless him) insofar as it is verified from him. He (God be pleased with him) said that the manuscripts have differed with respect to his view. The most authentic view from him is that he sides with Abū Ḥanīfah (God bless him) in the retaining of double imposition except that his view pertains only to the original (double) imposition, because acquired double imposition cannot occur in his view due to non-alteration of imposition.

If the land belongs to a Muslim and he sells it to a Christian, by which he means a dhimmī other than a Ṭaghlībī, and he takes possession of it,

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23 So as to reduce the liability from ʿuṣhr to one-half ʿuṣhr.
24 He took these things into account when he ordered a distinction on the basis of rain-fed lands and irrigated lands.
25 He is referring to the tradition recorded by al-Bukhārī from al-Zuhrī. Al-Zaylaʿi, vol. 2, 393, 384.
26 These rules are important for determining the nature of land in Muslim countries, for lands other than those whose nature was settled. In other words, is the land in a country like Pakistan kharāj land or ʿuṣhr land, even if it is owned by Muslims? The decision affects the avenues of expenditure, because those of ʿuṣhr are different from the avenues of kharāj.

27 This is another rule for determining the nature of land.
28 It is gharib, however, Abū ʿUbayd al-Qāsim ibn Sallām has recorded a report if it conveys such a meaning. Al-Zaylaʿi, vol. 2, 394.
canals dug by non-Arabs. The water of rivers Jayhūn, Sayhūn, Dajlah and Furāt is 'ūshr water according to Muḥammad (God bless him), because no one protects them as in the case of rivers (as well as rain and spring water). It is kharāj water according to Abū Ḫusayf (God bless him), because boat bridges are built over them, and this is an indication of protection.

On the land of a minor and a woman of Banū Taghlib is imposed a charge that is imposed for a Taghlib man, that is, double 'ūshr for 'ūshr land, and a single kharāj for kharāj land. The basis is that the agreement was concluded for doubling the sadaqah and not a mere burden. Therefore on the minor and woman when they are Muslims, a single 'ūshr is imposed, which is doubled when they belong to the Banū Taghlib.

He said: There is no charge on a spring of tar and oil in 'ūshr land. The basis that it is not something that is a yield of the land; it is a spring with a fountain like a spring of water. In kharāj land, kharāj is imposed on it, and this, if its surrounding area is suitable for cultivation, because kharāj is dependent upon the ability to cultivate.14

Chapter 37

Persons to Whom Sadaqah (Zakāt) Can and Cannot be Paid

He (God bless him said: The basis for this are the words of the Exalted, “Alms are for the poor and the needy, and those employed to administer the (funds); for those whose hearts have been (recently) reconciled (to Truth); for those in bondage and in debt; in the Cause of Allah; and for the wayfarer: (thus is it) ordained by Allah, and Allah is full of knowledge and wisdom.” These are eight categories. The mu'allaqat qulābuhum have been dropped from these, because God gave strength to Islam and made it free of their need and a consensus (ijmā') was arrived at on the issue.2 The faqr is one who has meagre resources, while the miskin is one who has nothing. This view is narrated from Abū Ḥanīfah (God bless him). It is also said that the position is the opposite. Each view is supported by its own reasoning. Thereafter, they are two categories or a single category, and we shall mention this in the Book of Bequests (Wasâyah), God, the Exalted, willing.

The imām pays the official, if he works, in proportion to his work, and gives him what is enough for him and and his helpers,3 but not limited by the eight shares.4 Al-Shāfī'ī (God bless him) disagrees with this. The basis is that the official's entitlement is based upon sufficiency, therefore, he is to take it even if he is well off. There is, however, an element

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1 Qur'an 9:60
2 It is recorded by Ibn Abī Shaybah, Al-Zayla'ī, vol. 2, 394.
3 This rule may be noted for distributive justice.
4 Some may say that these are seven avenues, because the share of the mu'allaqat qulābuhum was dropped. The response is that these people were of two types: unbelievers and Muslims. The share of the unbelievers was dropped in his view.
Umar and Ibn ‘Abbas (God be pleased with them)

underlying cause of poverty, therefore, no attention need be given to the
dowering freedom, and this is on the basis of a transmitted ev

It is narrated by al-Tabari in his


The tradition of Ibn ‘Abbās (God be pleased with them) is recorded by al-Bayhaqi. Al-Zayla`i, vol. 2, 395.

The debtor (gharīm) is one who is liable for the payment of debt and does not possess a niṣāb that is in excess of his debt. Al-Shāfi‘ī (God bless him) said that he is a person who has borne a debt for spending on the resolution of disputes and to put out the fires of enmity between two
tribes.

A person striving in the path is one who has become destitute after participating in battle, according to Abū Yūsuf (God bless him), because that is the implication of the term in its unqualified meaning. According to Muhammad (God bless him), he is a person who has become destitute after the hajj. It is reported that a person donated his she-camel in the path of God. The Messenger of God (God bless him and grant him peace) ordered him to provide rides to the hajj pilgrims.6 It is not to be given to wealthy warriors, in our view, because the beneficiaries are the fuqara’ (poor people).

The ibn sabīl is the person who has wealth in his own land, but is stranded at another place with nothing in his possession.

He said: These are the avenues (jihāt) of zakāt, thus, the owner has the right to pay to each one of them, and he also has the right to pay to one category. Al-Shāfi‘ī (God bless him) said: It is not permitted except to pay to three persons in each category as attributing the sadqaḥ to them is for entitlement. We maintain that attributing it to them is for elaborating that they represent the avenues of expenditure and not for establishing entitlement. After it has become known that zakāt is the right of God, the Exalted, and these categories have become avenues due to the underlying cause of poverty, therefore, no attention need be given to the multiplicity of the avenues. The position we have taken is narrated from ‘Umar and Ibn ‘Abbās (God be pleased with them).7

It is not permitted to pay zakāt to a dhimmī, due to the words of the Prophet (God bless him and grant him peace) addressed to Mu‘ādhd (God be pleased with him), “Take it from their rich and return it to their (God be pleased with him) said that he is not to pay it to him, and this is Shāfi‘ī (God bless him) said that he is not to pay it to him, and this is also on one narration from Abū Yūsuf (God bless him) on the analogy of the tradition of Mu‘ādhd. We rely on the words of the Prophet (God bless him and grant him zakāt. We do not take zakāt as well.10

A mosque is not to be built with zakāt (funds) nor is a shroud to be provided with it, due to the absence of passing ownership, which is an essential element of zakāt. The debts of a deceased person are also not to be satisfied through it, because the repayment of the debt of another does not imply ownership on the part of such person, and especially on the part of the deceased. A slave is not to be bought with it for purposes of emancipation. Mālik (God bless him) disagreed with this and upheld the emancipation of a slave with it on the basis of his interpretation of the words of the Exalted, “And for slaves.”11 We argue that that setting free is the extinction of ownership and not the passing of ownership.

Zakāt is not to be paid to a wealthy person due to the words of the Prophet (God bless him and grant him peace), “‘Sadqaḥah (zakāt) is not lawful for a rich person.”12 In its unqualified meaning, this tradition is a proof against al-Shāfi‘ī (God bless him) in his view about rich warriors, and so also the tradition of Mu‘ādhd (God be pleased with him), which we have related.13

He said: The person paying zakāt is not to pay it to his father and grandfather howsoever high, nor is he to pay it to his child, and the child of his child howsoever low. The basis is that the benefits of property are


[4]It has been reported by the Imāms of all the six sound compilations. Al-Zayla`i, vol. 2, 398.


[7]It is related from a number of Companions (God be pleased with them). A tradition from Ibn ‘Umar (God be pleased with both) is recorded by Abū Dāwūd, while another from Abū Hurayrah (God be pleased with him) is recorded by al-Nasa`ī. Al-Zayla`i, vol. 2, 399.

linked between them, therefore, passing of ownership in a complete form is not realized. He is not to pay it to his wife either due to the common participation in the benefits in practice. Nor is the woman to pay it to her husband, according to Abu Hanifah (God bless him) on the basis of what we have stated. The two jurists said that she may pay it to him due to the words of the Prophet (God bless him and grant him peace), "You have two rewards, the reward of the "sadakah" and the reward of strengthening the bond." He said this to the wife of Ibn Mas'ud (God be pleased with him) when she had asked him about paying the "sadakah" (zakat) to him. We would say that this tradition is to be interpreted to mean supererogatory "sadakah" (charity).

He said: The person paying is not to give it to his mudabbir slave, his mukātab slave and his umm al-walad, due to the lack of passing ownership, because the earning of a person owned is for his master, and the master has a right over the earnings of his slave. Accordingly, ownership is not transferred completely. He is also not to pay it to a slave whom he has set free in part, according to Abu Hanifah (God bless him), because he has the same status as the mukātab, in his view. The two jurists said that he may pay it to him as he is a free man under debt, in their view. He is not to pay zakat to the slave of a rich man, because the ownership stands transferred to the master. Nor is he to pay it to the child of a rich person if he is a minor, as he is deemed wealthy due to the financial case of his father as distinguished from a child who is a major and poor, because he is not deemed rich due to the financial case of his father, even if his maintenance is the father's liability. This is distinguished from the wife of a rich man, for if she is poor, she is not treated as rich due to the financial case of her husband, and she does not attain ease due to her maintenance.

Zakat is not to be paid to the Banū Ḥāshim, due to the words of the Prophet (God bless him and grant him peace), "O Banū Ḥāshim, God has prohibited for you the dirty wash water of the people and their impurity, and he has compensated you with the fifth of the fifth." This is distinguished from voluntary charity, because wealth in the case of zakat is like water that has been soiled through meeting of the obligation, but in the case of voluntary charity it is like the coolness attained with water.15 In our view, the teaching of Islamic disciplines is a communal obligation and should not depend upon zakat or any kind of charity. There should be a mandatory tax in Muslim countries to meet this obligation, not only within these countries but in other countries too.

The question to be raised here is whether zakat can be paid for setting up and running madāris. In our view, the teaching of Islamic disciplines is a communal obligation and should not depend upon zakat or any kind of charity. There should be a mandatory tax in Muslim countries to meet this obligation, not only within these countries but in other countries too.

14It has been recorded by al-Bukhārī, Muslim, al-Nasā’ī, Ibn Mājah, al-Tirmidhī and other Imāms of the traditions. Al-Zayla‘ī, vol. 2, 401.
15It is gharīb in these words, however, Muslim has recorded a lengthy tradition that conveys the same meaning. Al-Zayla‘ī, vol. 2, 403.
maintains that in the case of persons other than the wealthy person his act is not valid. The more authentic report, however, is the first. This is the situation when he investigated and paid being convinced that the recipient was a lawful beneficiary. In case he was in doubt and did not investigate, or did investigate and paid, and in his predominant opinion he was not a rightful beneficiary, his act is not valid, unless he knew that the person was poor (in which case it is valid), which is the sound view.

If he pays to a person and then comes to know that he is his slave or his *mukātab* slave, the payment is not valid, due to the lack of transfer of ownership as there is an absence of the legal capacity for ownership, which is a *rukn* as has preceded.

It is not permitted to pay zakāt to a person who owns (wealth equal to) the *niṣāb*, whatever the type of wealth. The basis is that being wealthy legally is determined through the *niṣāb* (standard for determining the existence of wealth). The condition is that such wealth be in excess of the primary needs and growth in wealth is a condition for the obligation of payment.

It is permitted to pay it to one who owns less than this even though he is sound (not an invalid) and has an earning. The reason is that he is poor, and the poor are an avenue of expenditure. The reality of need is not based on such attributes, therefore, the *ḥukm* turns on its *dalāl*, which is the lack of *niṣāb*.

It is considered disapproved to pay to one person a sum of two hundred or more *dirhams*, but if the payment is made it is valid. Zūfar (God bless him) said that it is not permitted, because wealth and payment lie side by side, thus, he has acquired the liability to pay upon acquiring wealth. Our reasoning is that wealth has arisen through the rule of payment and, therefore, follows it, but it is disapproved due to the proximity of wealth, as in the case of a person who prays when impurity lies right next to him.

He (Muḥammad) said: If a person is made wealthy through it, it is preferable in my view. The meaning here is being free of asking another for alms on that particular day, because making absolutely wealthy is disapproved.

He said: It is disapproved to move the zakāt of one land to another. The *ṣadaqah* of each group of people is to be distributed among them (their poor) on the basis of what we have related of the tradition of Muʿādh (God be pleased with him) and in this the right of the neighbour

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10 This has preceded above. Al-Zayla'i, vol. 2. 398.
Chapter 38

*Sadaqat al-Fitr*

He (God be pleased with him) said: *Sadaqat al-fitr* is obligatory on every free Muslim if he owns an amount equal to the *nisāb* in excess of his residence, clothes, household assets, horse, weapons and his slave. The obligation is based upon the words of the Prophet (God bless him and grant him peace) in his sermon, “Pay for each free person and slave, minor or major, one-half *ṣā*’ of wheat or one *ṣā*’ of dates or one *ṣā*’ of barley.” It was related by Tha‘labat ibn Su‘ayr al-‘Adawi or Su‘ayr al-‘Adhari, and through such a narration an obligation is established (but not a definitive obligation) due to the absence of a definitive report on this. The condition of freedom is stipulated to affirm ownership, while Islam is stipulated so that nearness to God is attained. Financial ease is stipulated due to the words of the Prophet (God bless him and grant him peace), “There is no *sadāqah* except that borne by the wealthy.” This is proof against al-Shafi‘i (God bless him) with respect to his statement that it is obligatory upon the person who possesses an excess over the food of the day for himself and his dependents. Financial ease has been

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1 These requirements translate into ownership of considerable wealth in the present times. There are many people today who do not own the houses they live in or even the means of transportation that they use. A large number of people do not have the ability to hire a servant, if that can be treated as a substitute for owning a slave.

2 It is recorded by Ahmad ibn Hanbal (God bless him) in his *Musnad*. Al-Zayla‘i, vol. 2, 411.

3 Which is a *khabar wahid*.

4 It is related from al-Zuhri through different chains of transmission. One of these is recorded by Abū Dāwūd in his *Sunan*. Al-Zayla‘i, vol. 2, 406.

5 He said this due to the words at the end of the first tradition that there is no difference between the rich and the poor, however, the Ḥanafis either deem this segment
determined through the nisāb as this is what is used in the šahr' (law) for estimating wealth, but a nisāb in excess of the other things mentioned is stipulated as these things are required to meet primary needs. Things required for primary needs are deemed to be non-existent (for the calculation of wealth), and no growth in them is stipulated. It is with such a nisāb that the prohibition of accepting sadaqah, the obligation of offering sacrifice as well as the payment of fitrah are linked.

He said: He is to pay it (the amount) on his own account, due to the tradition of Ibn 'Umar (God be pleased with both). He said, "The Messenger of God (God bless him and grant him peace) made the zakāt al-fitr obligatory (fard) for every male and female..." And, he should pay it (the same amount) on account of his minor children. The basis is that the cause is "the head (person)" whose (financial) burden he bears and over whom he exercises legal authority as such a person (head) is associated with the obligation (fitr). Thus, the term, "zakāt al-rū'id" (zakāt for the head) is used, and it is a sign of its causation. The association is made with the fitr obligation as that is the time for it. Accordingly, the number increases with an increase in the number of heads despite the unity of the day (of obligation). The basis for the obligation is his own person (head) for he feeds it and exercises authority over it, thus, whatever has the same meaning is attached to it, like his minor children as he supports them and exercises authority over them. And (he is to pay) for his slaves, due to the existence of legal authority over them and the burden of supporting them. This is the case when such slaves are meant for personal service and when the minor children do not own wealth of their own. If they possess wealth the fitr is to be paid from their wealth according to Abū Ḥanifah and Abū Yūsuf (God bless them) with Muhammad (God bless him). The basis is that the šahr' (law) has treated it as a burden and it, thus, resembles maintenance (of a woman).7

He is not to pay on account of his wife, due to inadequate authority and liability of burden, for he does not have authority over her beyond the rights of nikāh (conjugal rights). He also does not bear her burden, except in the case of prescribed matters like medical treatment. He is also not to pay on account of his children who have attained majority even if they are still part of his family, due to the lack of legal authority. If he does pay for his children and for his wife, without a request on their part, it is deemed valid on the basis of ʾistihsān due to the confirmation of permission in practice.

He is not to pay it on account of his mukātab slave, due to the absence of legal authority (wilāyah), nor is the mukātab to pay on his own account, because he is poor. In the case of the mudābbar slave as well as the umm al-walad his legal authority is established, thus, he is to pay on their behalf. He is not to pay on account of his slaves held for purposes of trade with al-Shāfīʿi (God bless him) disagreeing. In his view, the obligation for fitr is upon the slave, while the liability of the master is for zakāt, thus, there is no contradiction. In our view, the obligation is for the master due to its cause as in the case of zakāt and this will lead to double payment.8

In the case of the slave, who is jointly owned by two partners, there is no fitrah on either one of them, due to deficient legal authority and liability for bearing the burden with respect to each partner. Likewise, several slaves owned by two partners, according to Abū Ḥanifah (God bless him). The two jurists said that each partner is liable for the number of heads specific to him to the exclusion of fractional shares on the basis that he (Abū Ḥanifah) does not uphold the division of ownership in the slave, while the two jurists do. It is also said that this view is based upon ijmāʿ, because the share of each cannot be gathered prior to qismah (division), therefore, exclusive ownership of a slave is not established for either one of them.

A Muslim is to pay the fitrah on account of his unbelieving slave, due to the absolute meaning of the report that we have related, as well as due to the words of the Prophet (God bless him and grant him peace) in a tradition from Ibn 'Abbās (God be pleased with both), "Pay on account of each free person and on account of a slave whether he is a Jew, Christian or Magian."9 Further, the cause stands established and the owner is eligible for payment. Al-Shāfīʿi (God bless him) disagrees with this, because the obligation in his view is upon the slave, but he is not qualified to pay it, and even if it was the opposite (with the owner being an unbeliever and

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4 It is recorded by all the six sound compilations. Al-Zayla'i, vol. 2, 412.
7 Whose maintenance has to be paid even if she independently owns wealth.
8The value of the slave gives rise to payment of zakāt when the slave is owned for purposes of trade.
9It is recorded by al-Dār'ūqūṭi in his Sunan. Al-Zayla'i, vol. 2, 412.
to Islam, or a child is born on the night of the fitr, the payment of his fitrah becomes obligatory in our view, but in his view it is not obligatory. The same applies, in the opposite situation, to a person who dies at this time from among his slaves or children. He (al-Shafi'i) maintains that the obligation is specific to fitr and this (sunset) is its time. Our view is that the possessive relationship between sadaqah and fitr is for making this payment specific to fitr and this can only be related to the day and not the night.\textsuperscript{15}

It is recommended (mustahabb) that the people pay the fitrah on the day of fitr prior to going towards the place of (‘id) prayer. The basis is that the Prophet (God bless him and grant him peace) "used to pay it prior to moving towards the place of prayer."\textsuperscript{16} The command to make him self-sufficient is that he should not be occupied with the seeking of alms away from prayer, and this is done by paying earlier.\textsuperscript{17}

If the people pay it before the day of fitr, it is valid, because it is being paid after the occurrence of this cause, thus, it resembles the hastening of zakāt. There is no distinction between the period of early payment and another period, and this is the sound view. It is, however, said that it is permitted to hasten it up to the second half of Ramadan, and it is said that it should be hastened up to the last ten days.

If they delay it till after the day of fitr, the liability will not lapse, and they are under an obligation to pay it. The basis is that the meaning of nearness to God can be rationalised here as it is a financial burden, therefore, the time of payment cannot be the determining factor as distinguished from sacrifice (on ‘id). God knows best.

\textsuperscript{15}Because fitr pertains to eating and not fasting, and this becomes meaningful in the morning.
\textsuperscript{16}It is gharib with these words, however, al-Dār‘quṭnī has recorded a similar tradition. Al-Zayla‘ī, vol. 2, 432.
\textsuperscript{17}So that the people who are paid should be at peace to join the ‘id prayer.
Al-Hidāyah
THE GUIDANCE
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Chapter 39

The Obligation of Fasting (ṣawm)

He (God bless him) said: ṣawm (fast) is of two types: obligatory and supererogatory. The obligatory fast is also of two types. The first of these is the fast associated with a specific time, like the fast of Ramaḍān and a specified nadhr (vow). Such a fast is permitted with a niyyah (intention) formed the previous night. If no niyyah is formed till morning, a niyyah formed in between that time and the declining of the sun is valid. Al-Shafīʿī (God bless him) said that it is not valid.

Know that the ṣawm (fast) of Ramaḍān is a definitive obligation due to the words of the Exalted, “Fasts have been prescribed for you.” A consensus (ijmāʿ) has taken place about the definitiveness of this obligation. It is for this reason that one who denies the obligation is imputed with kufr (unbelief). The object of a vow (nadhr) is wājib (obligatory) due to the words of the Exalted, “Then let them abide by their vows.” The cause for the first obligation is the month of Ramaḍān, therefore, the obligation is attributed to it. Accordingly, the obligation

1. He discusses the two obligatory types first and then deals with the third category, that is, supererogatory fasts. The second type of obligatory fasts are mostly those that arise out of default. The exception is the unqualified vow (nadhr).
2. Imam Malik (God bless him) said that the niyyah must be formed the previous night whether the fast is obligatory or supererogatory.
3. Qurʾān 2:183
4. That is, one who says that fasting during Ramaḍān is not obligatory.
5. This is wājib and not fard, although it is established by the text of the Qurʾān. The reason is that the text has been subjected to restriction (takḥīṣ) through evidences of different kinds of vows, therefore, it is now ṣanni and not qaʿī.  
6. Qurʾān 22:29
recurr due to the recurrence of the month. Each day of the month is the cause of its fast. The cause for the second type is the *rukn* (vow). The *niyyah* is a condition of this cause, and we will elaborate and explain it, God the Exalted willing.

The reasoning underlying the issue, disputed (by al-Shāfi‘ī), is based upon the words of the Prophet (God bless him and grant him peace), “There is no fast for the person who did not form the *niyyah* on the previous night.” Further, as the first segment of the fast has been rendered invalid due to the lack of *niyyah* so is the second as a matter of necessity, as these cannot be separated. This is distinguished from the supererogatory fast as that can be segmented in his view. We rely upon his (God bless him) words after the villager had given testimony about the sighting of the moon. “Beware, anyone who has eaten is not to eat for the rest of the day, while he who has not eaten may fast.” What he (al-Shāfi‘ī) has related is to be interpreted to convey the negation of additional merit and perfection, or it means a person who does not form a *niyyah* at night (but much before it). Further, it is the day of fasting, therefore, fasting from the start will depend upon a *niyyah* that may be delayed up to a time that it can cover a major part of the fast, as in the case of the *nafl* fast. The basis is that *sawn* has a single *rukn* (the cessation of eating) that is extended (up to the evening). The *niyyah* is for the identification of this *rukn* for God, the Exalted, thus, when the *niyyah* is linked to a greater part of it, its existence is affirmed, as distinguished from prayer and *hajj* as these have several *arkan* and the precedence of *niyyah*, linked to the *rukn* of commencement, is stipulated for their performance. It is also distinguished from delayed performance (*qadā*) of the fast as that depends upon the fast of the day, which is supererogatory.

The fast is already identified in this case and it will be intended with the basic *niyyah*. This is like the previously mentioned person in *Zufar* (God bless him) disagreeing. The reason is that the *dalil* (evidence) adduced by us does not provide detail.

This type of fast (the obligatory) is valid with an unqualified (absolute) *niyyah*, with *niyyah* of a *nafl* fast and also the *niyyah* of another obligatory fast. Al-Shāfi‘ī (God bless him), in the forming of *niyyah* of a *nafl* fast (on the day of the obligatory fast), said that his fast is futile (being neither obligatory nor *nafl*), while in the formation of an absolute *niyyah* has two views. The reason is that by forming a *niyyah* of *nafl* he is evading the *fard*. Consequently, he is not entitled to the *fard*. We maintain that the *fard* is already identified in this case and it will be intended with the basic *niyyah*. This is like the previously mentioned person in a house, who can be identified through the generic noun. If he forms a *niyyah* for a *nafl* fast or for another obligatory fast, then, he has formed a *niyyah* for the primary fast with an additional aspect. The additional aspect will become superfluous and the primary obligation will remain; and this is sufficient (as this is the obligation prescribed).

There is no difference between a traveller or a resident in our view with *Zufar* (God bless him) disagreeing. The reason is that the *dalil* (evidence) adduced by us does not provide detail.

This type of fast (the obligatory) is valid with an unqualified (absolute) *niyyah*, with *niyyah* of a *nafl* fast and also the *niyyah* of another obligatory fast. Al-Shāfi‘ī (God bless him), in the forming of *niyyah* of a *nafl* fast (on the day of the obligatory fast), said that his fast is futile (being neither obligatory nor *nafl*), while in the formation of an absolute *niyyah* has two views. The reason is that by forming a *niyyah* of *nafl* he is evading the *fard*. Consequently, he is not entitled to the *fard*. We maintain that the *fard* is already identified in this case and it will be intended with the basic *niyyah*. This is like the previously mentioned person in a house, who can be identified through the generic noun. If he forms a *niyyah* for a *nafl* fast or for another obligatory fast, then, he has formed a *niyyah* for the primary fast with an additional aspect. The additional aspect will become superfluous and the primary obligation will remain; and this is sufficient (as this is the obligation prescribed).

There is no difference between the traveller and the resident, the healthy and the sick, according to Abū Yūsuf and Muhammad (God bless them). The reason is that the exemption is provided so that the handicapped person does not face hardship. If he decides to bear the hardship,
he is associated with the person who is not handicapped. According to Abu Hanifah (God bless him), when the traveller, or the person who is ill, forms a niyāḥ for another obligatory fast, it is directed at such a wujūḥ. The reason is that he has utilized his time for the obligation that required immediate compliance, due to the pressure of immediate performance (of the qada'), while he will keep the fast of Ramadān on catching it within the duration granted. With respect to the niyāḥ of a voluntary fast, there are two narrations from him. The reasoning for the distinction in one narration is that he has not utilized his time for the more important.

He said: The second type is one for which he acquires liability, like the qada' of (delayed performance) of the fasts of Ramadān, the unqualified vow (nudhr) and the fasts of expiation (kaffārah). These are not permitted except with a niyāḥ formed the previous night. The basis is that these have not been preascertained and it is necessary to identify them prior to commencement.

All the nāfīl fasts are permitted with a niyāḥ formed prior to the declining of the sun, with Malik (God bless him) disagreeing as he adopts, in an unqualified sense, the tradition we have related. We rely on the words of the Prophet (God bless him and grant him peace) who, when he woke up without having formulated the intention to fast, said "I am fasting now." The basis is that a lawful fast outside of Ramadān is supererogatory (nāfīl). Thus, abstaining from eating and drinking at the beginning of the day is based upon its becoming a fast due to the niyāḥ in the manner we have indicated. If he forms the niyāḥ after the declining of the sun it is not permitted. Al-Shaḥīṣī (God bless him) said that it is permitted and the person will be considered to fast from the time he formed the niyāḥ. The reason is that a fast can be fragmented in his view as it is based upon waking up, and it is possible that he will wake up after the declining of the sun, except that its condition is that he should not eat from the beginning of the day. In our view, he starts from the beginning of the day as it is a form of worship that controls the self, and this is realized by abstaining for a determined period. Thus, it is deemed valid if the niyāḥ precedes its major part.

39.1 SIGHTING OF THE MOON

He said: It is necessary that the people try to sight the moon on the twenty-ninth day of Sha'ban. If they see it, they are to begin fasting. If it is not visible to them (on the twenty-ninth), they are to complete the thirty days of Sha'ban and then begin fasting. The basis are the words of the Prophet (God bless him and grant him peace), "Commence fasting on seeing it and end fasting on seeing it. If the moon is not visible to you, complete the period of Sha'ban of thirty days." The presumption is that the month is continuing and they are not to move to the next month without evidence. Such evidence has not been found.

They are not to fast on a day of doubt (as to whether it is the thirtieth) except by way of a voluntary fast, due to the words of the Prophet (God bless him and grant him peace), "The day of doubt is not to be observed as a fast on the assumption that it is Ramadān, rather it is observed as a voluntary fast." This issue has several variations.

First: That he forms the intention of Ramadān, and this is dispensed due to what we have related. Further, it amounts to something similar to what the People of the Book do, for they added to the period of the fast. Thereafter, if it becomes evident that it is the day of Ramadān, his fast will be valid (as that of Ramadān), because he witnessed the month and kept the fast. If it becomes evident that it is still the month
of Sha'bān, his fast will be deemed a voluntary fast. If he breaks such a (voluntary) fast, he is not to fast later as qadā' in lieu of it as it conveys a probable meaning.

Second: That he forms a niyyah for another wājib, which is also disapproved due to what we have related, except that the disapproval here is lesser than that in the first issue. Thereafter, it becomes evident that it is the day of Ramadān, his fast is valid due to the existence of the basic niyyah. If it appears that it is the day of Sha'bān, then, it is said that it will be treated as a voluntary fast, because it is proscribed and an obligation cannot be met with such a fast. It is also said that it will be deemed valid in conformity with his intention. This is the sound opinion as the proscribed fast is one that is prior to Ramadān with the intention of fasting for Ramadān and this does not occur through every fast. This is distinguished from the day of 'id. The reason is that what is proscribed is neglecting to respond to the call (of God); the response applies to each fast. The disapproval here is due to the form of the proscription.

Third: That he forms the intention for a voluntary fast, and this is not disapproved on the basis of what we have related. This amounts to a proof against al-Šāfī`ī (God bless him) in his assertion that it is disapproved right from the start. The meaning of the words of the Prophet (God bless him and grant him peace), "Do not precede the month of Ramadān with fasting of a day or two days," is the proscription of prior fasting with the intention of fasting for Ramadān. The reason is that he is performing the obligation prior to its prescribed time. Thereafter, if this fast conforms with a fast that he used to keep, then, fasting is better by consensus (ijmā'). Likewise, if he (usually) fasts for three or more days at the end of the month. If he separates it from these, then, it is said that not fasting is better in order to avoid the apparent meaning of the prohibition. It is sometimes said that fasting is better following 'Ali and

33Because the first resembles an act of the People of the Book.
34Treated as a wājib if he intended it as such.
35As fasting on that day is disapproved whatever the type of fast.
36It is also Imam Mālik's opinion.
37The words "rather it should be observed as a voluntary fast" in the tradition mentioned above.
38It is recorded by all the six sound compilations from Abu Hurayrah (God be pleased with him). Al-Zayla'i, vol. 2, 440.
39That is, the month of Sha'bān.

Fourth: That he makes his niyyah itself conditional so that he forms the intention that he will fast the next day if it is Ramadān, but he will not if it is Sha'bān. In this situation he does not fast for he was not decisive in forming his niyyah. It is as if he said that if he found food the next day he would not fast and if he does not find it he will fast.

Fifth: That he make his niyyah conditional in its details, like forming the intention that if it is Ramadān the next day he will fast for Ramadān, but if it is Sha'bān, he will fast on account of another obligation. This is disapproved (makrūh) due to its vacillation between two stipulations that are both disapproved. If it turns out to be Ramadān, his fast is valid due to the absence of vacillation in the formation of the niyyah itself. If it turns out to be Sha'bān, his fast on account of another wājib is not valid as the intention is not established due to vacillation about it. The formation of the niyyah itself is not sufficient for it. His fast will be voluntary not liable for qadā' for he has commenced it as one removing two liabilities (and not as one that is binding). If he forms the niyyah for Ramadān if it is to be Ramadān in the morning and for a voluntary fast if it is to be Sha'bān, it is disapproved as he intended a definitive obligation only from one aspect. Thereafter, if it turns out to be Ramadān, his fast is valid on the basis of what has preceded. If it turns out to be Sha'bān, his supererogatory fast is valid, as that is performed on the basis of the absolute niyyah itself. If he renders his fast invalid, he is not to offer it as qadā' as its intention stands extinguished from one aspect.

He said: A person who sights the new moon by himself is to fast even if the imām does not accept his testimony, due to the words of the Prophet (God bless him and grant him peace), "Begin fasting on seeing it, and end fasting on seeing it," and this person has seen it clearly.

35It is gharib. Al-Zayla'i, vol. 2, 442.
36That is, the absence of vacillation in the niyyah.
37Qadā' would be obligatory if he was certain with respect to his intention.
38It is part of a tradition recorded by al-Bukhārī, and has preceded. See Al-Zayla'i, vol.
If he does not keep the fast, he is liable for *qadda* but not *kaffarah*. Al-Shaf‘ī (God bless him) said that he is liable for expiation (*kaffarah*) if he does not keep the fast and has sexual intercourse, because he gave up the fast during Ramādān after being convinced about its commencement, and he is liable legally as fasting is obligatory for him. Our argument is that the *qadda* rejected his testimony on the basis of a legal evidence, which is the allegation of a mistake that gives rise to *shubhah* and expiation is removed due to *shubhah* (doubts). If he gives up the fast prior to the *imām*’s rejection of his testimony, then, the jurists disagree about it. If this person (who starts early) completes thirty days of fasting, he is not to cease fasting but with the *imām*. The reason is that the obligation imposed on him is by way of precaution, and precaution afterwards is in delay in the cessation of fasting. If he does cease fasting there is no expiation for him on the basis of the position ascertained in his view.

He said: If there is an obstruction in the sky, the *imām* is to accept the testimony of a single person, who is in possession of moral probity, for the sighting of the moon, whether such person is a man or a woman, a free man or a slave. The basis is that this is a matter of religion (*dim*) and is similar to the narration of reports (*traditions*). It is for this reason that it is not referred to as *shahadah* (testimony); exclusively Moral probity (*adalah*) is stipulated as the statement of a disobedient person (*jaīzy*) is not acceptable in matters of *dim*. The interpretation of *Al-Talikwi*’s statement, “whether or not he is ‘adil’,” is that such *adalah* is unknown (concealed). The obstruction in the sky may be clouds or snow or something else. In the unqualified statement of the Book (*the smack above), the person who has been subjected to *qaddah* (false accusation of unlawful sexual intercourse) and who then repented will also be included (for purposes of testimony). This is also the view of the *Zahir al-Rawiyyah* as it is a report (*khadāri*) about a matter of *dim*. It is, however, reported from Abu Hanīfah (God bless him) that he is not to be accepted, because it is testimony (*shahadah*), in some respects. Al-Shaf‘ī (God bless him) as one of his two opinions, stipulates two testimonies.

There are traditions on this point recorded by the compilers of the four Sunni as well as others. Al-Zāhidī’s *al-Bā‘ik* vol. 4: 463.

There are traditions claiming that he had sighted the moon, the Prophet (God bless him and grant him peace) accepted the testimony of a single person in the sighting of the moon of Ramādān.

Thereafter, when the *imām* has accepted the testimony of a single person and the people fast for thirty days, they are not to cease fasting (on the same basis, even though it is not proved initially like the entitlement to inheritance on the basis of parentage established through the testimony of the midwife.

He said: When there is no obstruction in the sky, testimony is not to be accepted until a large group of people sight it on whose report reliance can certainly be placed. The reason is that providing the sole testimony in such a situation gives rise to the suspicion of error. The decision is, therefore, to be suspended till a group is available. This is distinguished from the case where there is an obstruction in the sky where the cloud cover may provide an opening at the location of the moon enabling some to view it. Thereafter, in the case of a group it is stated that the person should be the residents of the same locality. Abu ‘Uthmān God bless him, considers the number to be fifty in consideration of the number of spectators. There is no distinction, for this purpose, between the residents of a city and those from outside. Al-‘Abādī (God bless him) has mentioned that the testimony of a single person is to be accepted when he comes from outside the city, because the obstructions for him are few. This is what is indicated in the Book of *Iṣbah* (or Book of *al-Shāfi‘ī*) Likewise, if a person was at a place at a height within the city.

*There are traditions on this point recorded by the compilers of the four Sunni as well as others. Al-Zāhidī’s *al-Bā‘ik* vol. 4: 463.*
He said: A person who sights the moon by himself is not to cease fasting,* by way of precaution. In the case of fasting, precaution lies in the obligation of the fast.

He said: If there is an obstruction in the sky, testimony for the cessation of fasting (Ramadan) is not to be accepted unless given by two men or one man and two women. The basis is that the interest of the subject ('abād) is related to it, which is the commencement of eating, thus, it resembles all his other rights. The time of 'īd al-‘adhā is like that of the cessation of fasting for this purpose, according to the Zāhir al-Riwayah, and this is the sound report. It differs from what is reported from Abū Hanifah (God bless him), who said that it is like the sighting of the moon for the commencement of Ramadan. The basis (for the Zāhir al-Riwayah) is that the interest of the individual is related to it, which is the free availability of sacrificial meat.

If there is no obstruction in the sky, the only testimony that is accepted is that of a group whose report conveys certain knowledge. The basis is what we have stated.

He said: The timing of the fast is from the appearance of the second dawn up to the setting of the sun, due to the words of the Exalted, "And eat and drink, until the white thread of dawn appear to you distinct from its black thread; then complete your fast till the night appears." The two khayts (threads) are the whiteness of the day and darkness of the night.*

Fasting is abstaining during the day from eating, drinking and sexual intercourse, along with the intention of fasting. The reason is that in its actual literal meaning it applies to abstaining from eating, drinking and sexual intercourse, due to the usage employed, however, niyyah has been added to this in the shari' (law) so that worship can be distinguished from usual practice. It has been applied exclusively to the day due to what we have recited. Further, as the linking of the day and night are difficult, the ascertaining of the day is better so that the abstention goes against the usual practice. This is what this worship is based on. Purification from menstruation and postnatal bleeding is stipulated as a condition to affirm proper performance on the part of women.**

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*At the end of Ramadan.

**It is said that Adī ibn Ḥātim (God be pleased with him), when he heard this verse, used to distinguish between a white thread and a black thread, that is, actual threads. He used to eat till such time that he could actually distinguish them. He was doing this one day when the sun began to rise. The matter was reported to the Prophet (God bless him and grant him peace) and he explained to him the meaning given by the Author.

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**That is, they are not to fast in this state and they are to fast later by way of qadā', an exception is made.
Chapter 40

Factors Leading to Qaḍā’ and Kaffārah

He said: If the person fasting eats or drinks or has sexual intercourse during the day out of forgetfulness he has not broken his fast. Analogy, however, dictates that he has broken the fast, and this is the opinion of Mālik (God bless him) due to the existence of what negates fasting. The basis for ḵistihsān are the words of the Prophet (God bless him and grant him peace) addressed to a person who ate and drank out of forgetfulness, “Complete your fast, for it was God who fed you and made you drink.” If this is established for eating and drinking, it is established for intercourse due to equality of the essential element (rukn). This is distinguished from prayer, because the form of ṣalāt maintains remembrance and, therefore, forgetfulness does not become predominant. In fast, on the other hand, there is no constant reminder and forgetfulness can become predominant. There is no distinction between obligation and supererogatory fasts for this purpose, because the text (tradition) does not provide any details.

\[\text{\footnotesize\textsuperscript{1}}\] That is, food entering the body through the mouth. This is the basis of analogy.
\[\text{\footnotesize\textsuperscript{2}}\] This is ḷistihsān on the basis of a text, which is one type of ḷistihsān.
\[\text{\footnotesize\textsuperscript{3}}\] It is recorded by all the six Imāms of the sound compilations in their books from Abū Ḥurayrah (God be pleased with him). Al-Zayla’ī, vol. 2, 445.
\[\text{\footnotesize\textsuperscript{4}}\] This is not analogy (qiyās). It is based upon ḷalāl al-ḡn or the implication of the text. Apparently, the extension is from a lower order meaning to a higher order meaning. The illustration is that of saying ӯff (lie) to parents. If saying ӯff is prohibited, then abusing them and beating them is definitely prohibited by implication. This is different from the present case insofar as an exemption of a facility is being claimed. The Author, therefore, says that this is not an extension from a lower order meaning to a higher order meaning; the levels are the same and forgetfulness affects each ḷukm equally.
\[\text{\footnotesize\textsuperscript{5}}\] Because prayer does not let a person forget the ḷarkān.
\[\text{\footnotesize\textsuperscript{6}}\] That is, it does not distinguish between the type of fasts.
If the person makes a mistake or does it under coercion, he is under an obligation of qada. Al-Shaf'î (God bless him) disagrees and considers the case similar to that of a person forgetting. Our argument is that the existence of this situation is not very common whereas the excuse of forgetfulness is common. Further, forgetfulness is on the part of the person whose own right is involved whereas coercion arises on the part of someone else. The two are, therefore, distinguished like the person confined or one who is ill for purposes of qada of salat.

He said: If he goes to sleep and has a seminal discharge he has not broken his fast, due to the words of the Prophet (God bless him and grant him peace). "Three things do not break the fast of one fasting: vomit, cupping, and discharge." The reason is that the existence of intercourse is not found in form or in meaning, which is ejaculation out of desire and direct contact.

Likewise, if he looks at a woman and ejaculates, on the basis of what we have related. Thus, he is like one who is fantasizing and ejaculates and like one who masturbates, according to what the jurists say. If he applies oil to his body, he does not break his fast, due to the absence of a negating factor.

Likewise, if he is subjected to cupping, due to this reason and due to what we have related. If he applies kohl, he does not break his fast, because there is no direct link between the eyes and the mind. Tears emerge like sweat and what is the difference between mistake and forgetfulness is that the person forgetting intends the act, but has forgotten the fast, while the person making a mistake does not intend the act though he remembers the fast.

Because breaking of the fast in both cases is not intentional in his view. Therefore, it is nayis ma' al faraj or analogy where a distinguishing factor between the two parallel cases exists.

If he prays while seated due to the excuse of confinement, he is liable for qada.

It is related by several Companions (God be pleased with them). The different versions are recorded by al-Tirmidhi, al-Darquti, and others. Al-Zayla'i, vol. 2, 446.

That is, it is not intercourse either in form or in meaning.

The scholars argue that this is not permitted on the basis of traditions. In one such tradition, the person who masturbates is called "curved." An attempt is also made to make a distinction between the intention to suppress carnal desire or to satisfy it.

What the jurists say—the meaning here is that there is weakness in this assertion. He does not counter it, however.

"It is the tradition mentioned earlier. "Three things do not break..." See al-Zayla'i, vol. 2, 446.

If he kisses a woman, his fast is not broken, and by this they mean when he does not ejaculate. There is a lack of a negating factor in form and meaning. This is distinguished from the states of retraction (in divorce) and the marriage relationship as the rule in those cases depends on the cause, as will be coming up in its own discussion, God willing.

If he discharges through kissing or touching, he is under an obligation for qada but not expiration (kaffarah), due to the existence of the meaning of intercourse and the existence of a negating factor in form as well as meaning. This is sufficient for the obligation of qada by way of precaution. As for expiration, it requires the completion of the violation, but it is waived in cases of doubt just like the haidal.

There is no harm in kissing, if the person is in control of himself with respect to intercourse and ejaculation, but it is disapproved if he is not confident about this, because kissing by itself does not break the fast, but it may lead to the breaking of the fast through its consequences. If he is in control, then, kissing itself is taken into account and is permitted to him. If he is not in control of himself, the consequences are taken into account and it is disapproved for him. Al-Shaf'î (God bless him) applied it informally in both cases, and the proof against him is what we have stated. Direct contact without a covering is like kissing according to the Zahir al-Riyahi. Muhammad (God bless him) considered direct contact without a covering as disapproved for it is rarely devoid of trying circumstances.

If a fly enters his throat while he remembers his fast, his fast is not broken. According to qiyas, his fast is broken due to a negating factor entering his bodily cavity, even though it is not nourishing, just like soil and stones are not. The basis of istisbat is that he is not able to prevent

This is said in response to the implied question that if there is no link, how do the tears come out?

He does not break his fast even though the cold has a soothing effect on the internal organs.

These are established by kissing and fondling when done with desire even if the person does not ejaculate.

That is, he permitted kissing whether or not the person is in control. There is, however, a qualification here about a younger man who is not in control, according to Al-Shaf'î's opinion.
it, and it therefore resembles dust particles and smoke. 12 The jurists disagreed about rain and snow. 13 The correct view is that they annul the fast due to the possibility of avoiding them by taking shelter in a tent or under a roof.

If he eats the meat that comes out from between his teeth, he does not break the fast if this is a small quantity, but he does if it is more. Zufar (God bless him) said that he breaks his fast in both cases. 14 The basis is that the mouth takes the rule of the external parts, therefore his fast is not broken by gargling. 15 Our argument is that a small quantity is secondary to the teeth like his saliva as distinguished from a larger quantity for that does not stay between the teeth. The distinctive factor is the size of a pea, and what is less than that is trivial.

If he takes it out and holds it in his hand, and then eats it, his fast is necessarily broken, due to the report from Muhammad (God bless him) that if the person fasting swallow a sesame seed that was between his teeth, his fast is not broken, but if he eats it otherwise his fast is broken. If he chews it, his fast is not broken as that sticks to his teeth alone. When the quantity is the size of a pea, he is under an obligation for qada', but not expiation, according to Abu Yusuf (God bless him). According to Zufar (God bless him), he is liable for expiation as well, as it is food that has been chewed. According to Abu Yusuf (God bless him), it is something that is repulsive.

If he vomits involuntarily, he does not break his fast. The basis are the words of the Prophet (God bless him and grant him peace). "There is no qada' for the person who vomits, but there is qada' for the person who induces vomiting." 16 For this purpose a mouthful or as distinguished from the issues of taharah.

because the form of breaking a fast is not found, which is swallowing. Likewise, the meaning (of eating) is not realised as it does not nourish under normal circumstances. If he (intentionally) takes it back inside, the fast is invalid by consensus (i'tima) due to its consumption after it had come out. Here the form of breaking the fast is realised. If it is less than a mouthful and it reverts, the fast is not broken as it has not come out and he has no voluntary part in taking it back. If he takes it back voluntarily, the rule is the same according to Abu Yusuf (God bless him), because it did not come out. According to Muhammad (God bless him), his fast is invalid due to a positive act on his part in taking it back.

If he vomits voluntarily to the extent of a mouthful, he is liable for qada', on the basis of what we have related 17 and analogy is given up in the face of such a tradition. 18 There is no expiation for him due to the absence of the form of breaking a fast. If the vomit is less than a mouthful, the rule is the same according to Muhammad (God bless him) due to the application of the tradition in the unqualified sense. According to Abu Yusuf (God bless him), the fast is not rendered invalid as the vomit has not come out legally. Thereafter, if it goes back the fast is still not invalid in his view due to the absence of prior emergence of the vomit. If he takes it back on his own, the report from him is that the fast is not broken due to what we have stated. In another report from him, it does become invalid, by linking it to one that is a mouthful, and due to an excessive positive act on his part.

He said: A person who swallows a pebble or a piece of iron has broken his fast, due to the existence of the form of breaking the fast, however, there is no expiation (kaffarah) for him, due to the absence of eating in the true meaning. 19

A person who has intentional sexual intercourse through either of the two passages, is liable for qada', for restoring the interest (ma'salah) that is lost, 20 and is also liable for expiation, due to the completion of the

20The tradition mentioned in the previous issue.
21Analogy here is concerned with something coming out and not something going in. Analogy would, therefore, say that it should not become invalid just as it does not due to urine and other things.
22Because these things are not food and do not benefit the body.
23The ma'salah was the controlling of the self, and intercourse demolishes the interest. Qada' is imposed to restore what was lost.
offence. Ejaculation in the two locations is not stipulated on the analogy of (obligatory) bathing. The reason is that carnal desire is satisfied even without it, and ejaculation is complete satisfaction. According to Abu Hanifah (God bless him), there is no liability for expiation in the case of intercourse through a disapproved (makrūh) passage on the analogy of hadd (that is not awarded in such a case), in his view. The correct view, however, is that expiation is imposed due to the complete satisfaction of carnal desire.

If he has sexual intercourse with a dead person or with a beast, there is no expiation irrespective of ejaculation. Al-Shafi'i (God bless him) disagrees with this. The reason (in our view) is that the violation has to be complete by way of complete satisfaction of carnal desire through a location that is desired, and that is not found in this case.

Thereafter, in our view, just as expiation is imposed for sexual intercourse on a man it is imposed on a woman as well. Al-Shafi'i (God bless him), said in one of his two opinions that she is not liable for it, because expiation is related to actively undertaking sexual intercourse and this is the act of the man, while she is the object of the act. In his second opinion he maintained that she is liable and the man bears it on her behalf on a location that is desired, and that is not found in this case.

If a person eats or drinks something that provides nourishment or is used as a medicine, then, he is liable for qaḍa' as well as kaffārah. Al-Shafi'i (God bless him) said that there is no kaffārah for such a person as it is stipulated for sexual intercourse contrary to analogy, because sin is an act of worship or a penalty and its transference to another is not valid.

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"Kaffārah is atonement for the offence that was complete in all respects."

"Due to the obligation of bathing as a result of intercourse without ejaculation."

"It is gharb in this version, however, Ibn al-Lawzi has relied upon it in al-Talâqī for supporting our view. Al-Zayla'i, vol. 2, 449-50.

"He relies in this on the tradition that is mentioned in the next issue. In this tradition, the villager came to the Prophet (God bless him and grant him peace) full of remorse and repentance. Analogy dictates that his sin be removed due to repentance, therefore, kaffārah should not have been imposed for the removal of sin. Nevertheless, the Prophet (God bless him and grant him peace) did impose kaffārah. Where an obligation is imposed against analogy, the case cannot be extended through further analogy.

"It is related to the actual act of intercourse.

"Repletion does not do away with hadd in the offences of saḥār and zuhār. In the same way, repentance does not amount to atonement in these cases, as is claimed by al-Shafi'i (God bless him).

"Al-Zayla'i says that the words, "It is permitted for you and for no one after you," are not found in any tradition. We would say that without these words, the tradition will grant permission that clashes with other rules. The permission can be understood from the leniency shown to a person who is overwhelmed by fast and his poverty.

"It is recorded by the compilers of all the six sound compilations from Abu Hurayrah (God be pleased with him). Al-Zayla'i, vol. 2, 451."
implies a sequential order. It is also a proof against Malik (God bless him) in his denial of continuous fasting, which the text requires.

A person who has sexual intercourse and ejaculates without penetrating a passage is liable for qada', due to the existence of intercourse in meaning, but he is not liable for kaffarah, due to the absence of its form.

There is no kaffarah for violating a fast other than the fast of Ramadan. The basis is that breaking the fast during Ramadan is an aggravated form of the offence and other forms cannot be linked to it.

A person who takes enema, or something through his nostrils or pours drops into his ear has broken his fast. The basis are the words of the Prophet (God bless him and grant him peace), “The fast is broken with whatever enters (is taken in),” and due to the existence of the form of breaking the fast, which is the taking of a thing into a body cavity that enhances physical well being. There is no kaffarah for such a person, due to the absence of the form. If a person pours drops of water into his ear or water enters his ears, the fast is not rendered invalid, due to the absence of both meaning and form of breaking the fast as distinguished from pouring of oil.

If he applies medicine to a body cavity or a wound and it enters a body cavity, he has broken his fast, according to Abu Hanifah (God bless him) when the thing used is moist. The two jurists said that his fast is not broken due to the lack of certainty about its moving in as the opening opens one time and closes another, and it is just like dry medicine. The Imam argues that the wetness of the medicine mixes with the wetness of the wound and the movement downwards is increased thus reaching a body cavity as against the dry medicine as that absorbs the wetness of the wound and closes its mouth.

If a man pours drops (of medicine) into the opening of his penis, he has not broken his fast, according to Abu Hanifah (God bless him). Abu Yusuf (God bless him) said that he has. The view of Muhammad is not clear on the issue. It is as if Abu Yusuf (God bless him) considers that there is a passage between this opening and a body cavity for which there is no other method available, due to the security of the child. Do you not see that she is permitted to break her fast if she is apprehensive about her child.

The chewing of gum does not make the person fasting break his fast. The reason is that it does not enter his body cavity. It is said that if it is not treated it does invalidate the fast as some of its particles can move into the body cavity. It is also said that if it is black gum it does invalidate the fast even if it has been treated as it splits up into grains. It is, however, disapproved for the person fasting as it exposes the fast to invalidity and creates a suspicion of breaking the fast. It is not disapproved for a woman when she is not fasting as it acts as a substitute for siwak for women. It is disapproved for men, according to what is said, unless it is for an ailment of the mouth. It is also said that it is not recommended as it resembles an act undertaken by women.

There is no harm in using kohl and oil for the whiskers. The reason is that it is a kind of benefit which is not one of the prohibitions during fasting. The Prophet (God bless him and grant him peace) recommended the use of kohl and fasting on the day of 'ashara'. There is no harm in this if the intention is not adornment, as it works like a dye. It is not to be done for the lengthening of the beard when it is of a length required by the Sunnah, that is, a fist-hold.

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303 This is consistent with the logic he has been building about this point in the previous issues.

304 It is related by Abu Ya'la al-Mawsili, Al-Zayla'i, vol. 2, 453-54.

305 That is, consuming food.
There is no harm in the use of wet siwák in the morning and evening by the person fasting, due to the words of the Prophet (God bless him and grant him peace), "The best trait of the person fasting is the siwák," and he did not give any details. Al-Shafi`i (God bless him) said that it is disapproved in the evening insofar as it does away with the blessed effects, which is the smell of the mouth, and that resembles the blood of the shahad (martyr). We would say that it is the effect of worship and it is suitable that it be concealed as distinguished from the blood of the shahid, which is the effect of injustice. There is no difference between green moist siwák or one that is dipped in water, on the basis of what we have related.

40.1 ILLNESS

A person who is ill during Ramadán and fears that his illness will aggravate if he fasts may not fast and offer it as qadá. Al-Shafi`i (God bless him) said that he is not to give up fasting. He permits this in the case of fear of death or loss of limb giving effect to them as he does in the case of tayammum. We say that an aggravation in illness or its protraction may lead to death, therefore, it is necessary to avoid fasting.

If the person travelling does not feel harmed by the fast, his fasting has greater merit, but if he does not fast it is permitted. The basis is that a journey is not devoid of hardship, therefore, journey itself has been deemed an excuse as distinguished from illness, which is sometimes lightened through fasting, thus, the condition of its leading to harm has been stipulated. Al-Shafi`i (God bless him) said that giving up the fast (during journey) has greater merit on the basis of the words of the Prophet (God bless him and grant him peace), "There is no (additional) piety in fasting during journey." We maintain that Ramadán is the better of the two times (as compared to the time of qadá), therefore, performance of the obligation within Ramadán is better. What he (al-Shafi`i) has related is to be interpreted to apply to the case of (extreme) hardship.

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44[It is recorded by Ibn Majah in his Sunan from ‘A’ishah (God be pleased with her). Al-Zayla’s, vol. 2, 498.]
45[This shows that illness in itself is not the permitting factor. It is the fear that it will aggravate that matters. Fear here means conviction, not mere suspicion.]
46[It is related by al-Bukhārī and Muslim from Jābir (God be pleased with him). Al-Zayla’s, vol. 2, 467.
47[Because substitute performance cannot be equal to timely performance.]
The pregnant woman or one breast-feeding a child, who are apprehensive about themselves or their child, are to abstain from fasting and to offer the fasts as *qada*'s, in order to avoid harm, and there is no expiation for them, because the avoidance is due to an excuse. There is no redemption (*fidyah*) for them, but al-Shafi'i (God bless him) disagrees where the woman is apprehensive about her child. He builds the analogy for this upon the case of the enfeebled old person. We maintain that *fidyah* here goes against analogy based upon the case of the enfeebled old person. Abstaining from fasting due to the child does not fall within this meaning, because he is unable to fast after the existence of the obligation (of *qada*'), while there is no obligation for the infant child (or the foetus) at all.

The enfeebled old person, who is not able to fast, may abstain from fasting, and for each day feed a needy person, as he would feed him for the *kaffarah*. The basis are the words of the Exalted, “I-or those who can do it” (with hardship), is a ransom, the feeding of one that is indigent.’

It is said that the meaning is: those who are not able to do it.” If he is able to fast, the rule that *fidyah* is annulled, because the condition for the substitute is the persistence of inability.

If one dies with a liability for the *qada* and he makes a bequest then the *wali* is to feed the needy on his behalf by giving each one-half *sa'*.  

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65 According to some, the Author means here the wet-nurse, because the mother does not give up fasting if the father is present. The reason is that fasting is obligatory upon her while breast-feeding the child is not. There are others who say that this issue needs to be qualified with respect to the ability of the father to provide a wet-nurse or where the child cannot be fed by another.

The excuse in the case of apprehension for the child is based upon threat to another (the child) and not to the person fasting. Accordingly, some maintain that threat to another does not provide sufficient excuse as in the case of one forced under such threat.

The response is that a pregnant woman and one breast-feeding a child are commanded by the *shari'ah* to protect the child.

66 The woman can fast later by way of *qada* whereas the old person cannot, therefore it is *qiyas* ma' al-*fa'rig*.  

67 That is, the old person.

68 Called the *shaykh* fast as he is close to *fanā’* (death).


70 It is also related as *mawqaf* at Ibn `Abbas and Ibn `Umar (God be pleased with both). This tradition is recorded by al-Nasa`i in his al-Sunan al-Kubra. The tradition of Ibn `Umar (God be pleased with both) is recorded by Abd al-Razzaq. Al-Zayla`i, vol. 2, 463.

71 Which shows that a *nafi* fast if broken has to be offered as *qada*.

72 It is recorded by Abu Dawud in his Musnad. Another version is recorded by al-Dar`quni. Al-Zayla`i, vol. 2, 465.
If a minor attains majority, or a disbeliever converts to Islam, during Ramadān, they are to fast for the remaining part of the day, according to the requirement of the time so as to be like those fasting. If they continue eating during this time there is no qaddā' for them, because the fast is not obligatory during this time. They are to fast thereafter, because the cause and the liability are established. They are not to fast by way of qaddā' for that day and for what has gone by, as the khitāb (communication) was not addressed to them. This is distinguished from narration from Abu Yusuf (God bless him) that when disbelief and minority are done away with prior to the declining of the sun, then the person is under an obligation for acquisition of rights and duties (ahliyyat al-wujāb) because such a person has caught the time of niyyah. The basis for the Zāhir al-Riwayāt is that a fast cannot be split into parts for purposes of the obligation and the legal capacity for acquisition of rights and duties (ahliyyat al-wujāb) was absent in the first part, except that the minor is under an obligation to formulate the niyyah for a voluntary fast in this situation, but not the disbeliever, according to what the jurists say, because the disbeliever is not eligible for offering a voluntary fast, while the minor is.

If a person travelling forms the niyyah for not fasting, but reaches the city prior to the declining of the sun and there forms the niyyah for fasting, his fast is valid. The reason is that journey does not negate the legal capacity for acquisition nor the validity of commencing the fast. If he is in the month of Ramadān, he is under an obligation to fast, due to the elimination of the exempting factor within the time of the niyyah. Do you not see that if he was a resident at the beginning of the day and then travelled it would not be permitted to him to forgo the fast by giving preference to the aspect of residence. In this case the requirement is enhanced. If he does not fast in both cases, there is no expiation for him due to the existence of a permitting doubt.

If a person suffers a fit of fainting during Ramadān, he is not to offer qaddā' for the day in which he fainted, due to the existence of a fast in it, which is abstaining from eating and drinking along with the associated niyyah, because it is apparent that he brought it about. He is to offer qaddā' for fasts that follow it, due to the absence of the niyyah (for such fasts). If he suffers a fit of fainting on the first night of Ramadān, he is to offer qaddā' for the entire period of fasting except the day following this night, on the basis of what we have said. Malik (God bless him) said that he is not to offer qaddā' for what follows, because the fasts of Ramadān are kept through a single niyyah, in his view, just like seclusion in a mosque (i'tikāf). In our view it is necessary to form the niyyah for every single day as these are independent acts of worship, because in between two fasts is an intervening period that is not part of this act of worship, as distinguished from i'tikāf.

A person who suffers a fit of fainting for the entire month of Ramadān is to offer qaddā' for the entire month, because it is a kind of illness that enfeebles the body, however, it does not do away with the rational faculty; therefore, it becomes an excuse for delaying the fast, but not for extinguishing the liability.

A person who suffers a fit of insanity for the entire period of Ramadān is not to offer it as qaddā', with Malik (God bless him) disagreeing with this as he considers it similar to fainting. We maintain that the
extinguishing factor is the resulting hardship. Fainting usually does not extend over the entire month, therefore, the hardship is not established whereas insanity does extend over a month thus offering the hardship.

If the insane person recovers for part of the month of Ramadan, he is to offer *qada'*, for the past days of the month. Zufar and al-Shafi'ī (God bless them) disagree. They maintain that performance is not obligatory for such a person due to the absence of *ahliyyah* (legal capacity) and *qada'*. We maintain that the cause is found, which is the month of Ramadan, whereas legal capacity depends upon the existence of *dhimmah* (legal personality). Further, there is a reason for imposing the obligation, which is its becoming required in a manner that does not lead to hardship as distinguished from the person who is insane for the entire month and who is subjected to hardship through performance, thus, the underlying reason is absent. The complete details of this issue are in books dealing with juristic disagreements. Thereafter, there is no difference between

to be completely lost, as the Hanafis assume, no liability is created, therefore, there is no *qada'*.

83 *Issues for discussion in class (1).*—In our view, the reasoning of the Author based on hardship is causing a problem in this issue as well as in the next. If hardship was the basis, then, in the previous issue where fainting extended over a month, despite its being rare, the hardship was found and *qada'* should not have been imposed, but it was imposed. We feel that the basis that applies has been stated by the Author in the previous issue. The reason is that in fainting, the rational faculty ('*aqil*) is not totally lost, and the person is to be treated, in some respects, like one asleep. In other words, his *ahliyyat al-adā'ī* though slightly affected is still working, therefore, liability is created and he should perform *qada'*. As compared to this, in insanity, *'aqil* is gone and so is *ahliyyat al-adā'ī*, therefore, liability is not created. In this state, he did not understand the meaning of the words, "he who sees the month of Ramadan," because he was insane throughout the month of Ramadan. The next issue designed by the jurists creates a problem for this line of reasoning and is mentioned in issues for the calss (2).

84 *Considering a part to apply to the whole.*

85 *Issues for discussion in class (2).*—When we reach this line, we realise that the genius of the great Imāms, who designed these cases, in full display; namely Imām Abū Hanīfah and his disciples (God bless them all). The case beginning with the words, "If a person suffers a fit of fainting..." must be assumed to begin a series of related cases that challenge the mind of the student and show a total interaction between *fāqih* and *usul al-fiqh*. In this case, the jurists are saying that the worshipper has retrospective liability for fasts that were lost even if the worshipper had lost his mind during that period. For those who wish to see the details of the issues may look at the discussion of *'aqil* in the topic of *sawm* in al-Kāsānī, Bada'y al-Sanā'ī', vol. 2, 224–26. The rule of hardship has been

congenital and temporary insanity. It is stated that this is in the Zahir al-Riwayah. It is reported from Muhammad (God bless him) that he did make a distinction between the two, because a person attaining majority in a state of insanity is linked with the case of a minor for whom the *khittāb* (communication) is not found as distinguished from the case where he attained majority when sane but became insane later. This is the view preferred by some later jurists.

A person who does not form the *niyyah* throughout Ramadan, either for fasting or not fasting, is under an obligation to offer *qada'*. For fasting or not fasting. Zufar (God bless him) said that the fast of Ramadan is performed without *niyyah* by one who is in sound health and is resident, because

invoked there too. Nevertheless, we would prefer the discussion without reference to hardship in performance due to the reason mentioned above.

In the previous issue, the insane person was not obliged to offer *qada'*. This person is stated to be a person by Zufar and thereafter al-Shafi'i (God bless him). They maintain that liability for the past days lost prior to recovery is not created, because the insane person did not have *ahliyyat al-adā'ī*. To this the Author replies that obligation is of two types: the obligation of owing the fasts and the obligation of keeping or performing the fasts. Performance depends upon *ahliyyat al-adā'ī*, while owing the fasts depends upon *ahliyyat al-wujāb*, which is planted in the *dhimmah* (human personality). This person lacked the ability to perform in those days, but not the ability to owe fasts, because his *dhimmah* was fully developed. For this to happen, however, an additional factor was required and that was the "cause" that creates the obligation or triggers it in such a case. When this person was insane for the whole period, the cause passed him by or was not activated as he really did not "see the month of Ramadan." When he recovered in the middle of the month, the cause of seeing the month was activated along with the command that created the obligation: "fast for the month." He, therefore, was placed under an obligation for the whole month. On recovery he faced the text: "The Pen has been lifted from three persons: the minor until he attains *bulūgh*; the insane person till he recovers; and the person sleeping till he wakes up." The Pen here is to be read as one "requiring performance" and not in the sense of "he owes nothing," otherwise the person sleeping though the *maghrib* prayer would not be liable for *qada'*. Accordingly, this person is to fast for the remaining days and is to offer those lost by way of *qada'*. He owes them due to a perfect *dhimmah*. The logical question is: what about the minor? He should also be liable for all the previous fasts, because he has *ahliyyat al-wujāb* and he witnessed the past months of Ramadan. The response is that the minor does possess *ahliyyat al-wujāb*, but it is deficient. His *ahliyyat al-wujāb* is perfected upon attaining *bulūgh* and for certain things meeting the additional condition of *ruṣūd*. Thus, he does not acquire the liability of "owing" the *'ibādah*, but the person with the perfect *dhimmah* does. God, the Exalted and Wise, knows best.

86 He is saying this to distinguish the case of the insane person with a perfect *dhimmah* from that of the minor, as we have discussed above.
abstaining from eating and drinking is a duty for him. Thus, in whatever way it is performed it will be reckoned on account of Ramadān. It is just like the gifting of the entire niṣab (amount due by way of zakāt) to a poor person.⁶⁶ We maintain that the duty is to abstain by way of worship, and worship is not possible without niyyah. In the niyyah of the niṣab there is the intention to attain nearness to God,⁶⁷ as has been explained under the topic of zakāt.

If a person wakes up without having formed the niyyah of fasting and eats, there is no expiation for him, according to Abū Ḥanīfah (God bless him).⁶⁸ Zufar (God bless him) said that he is liable for expiation, because the fast is kept without niyyah in his view.⁶⁹ Abū Yūsuf and Muhammad (God bless them) said that if he eats prior to the declining of the sun expiation becomes obligatory, because it amounts to the loss of the possibility of preserving the fast, thus, it is like usurping from the usurper.⁷⁰ According to Abū Ḥanīfah (God bless him), expiation is linked to the rendering of the fast invalid. This is not possible here as there is no fast without a niyyah.

If a woman begins to menstruate or enters the postnatal period, she may break the fast and then offer qadā’. This is distinguished from prayer, because she faces hardship in performing it as qadā’. This has preceded in the topic of salāt.

If a traveller arrives in the city or a woman attains purity in part of the fast, both are to abstain from eating and drinking for the remaining day. Al-Shāfi‘i (God bless him) said that abstention is not obligatory. This disagreement governs the case of every person who acquires the liability of fasting when he was not liable at the commencement of the day.⁷¹ He says that adopting a state similar to one fasting is a substitute for fasting, therefore, it is not obligatory except for one who was initially liable like one breaking the fast intentionally or even by mistake. We maintain that it is obligatory⁷² due to the requirement of the time and not as a substitute as it is a revered time.⁷³ This is distinguished from the case of the menstruating woman, the person who is ill, and the traveller insofar as the fast is not obligatory for these people as long as the excuse lasts due to the existence of an obstacle for adopting a similar state⁷⁴ just as a reason exists now for adopting the state of the fast.

He said: If he wakes up for the morning meal (sahār) thinking that the dawn has not arrived as yet, when it has, or he eats thinking that the sun has set, when it has not, he is to abstain from eating for the rest of the day in order to meet the requirement of the time as far as that is possible or to avoid the levelling of an accusation against him. He is now liable for qadā’, because it is a claim that is to be met with a similar duty, as in the case of a person who is ill or travelling. There is no expiation for him. The reason is that the offence is deficient due to lack of intention. It is in this context that ‘Umar (God be pleased with him) said, “We did not intend a sin, the qadā’ of a day is easy for us.”⁷⁴ The meaning of dawn (above) is the second dawn, the meaning of which we explained in the discussion of salāt.

Thereafter, the morning meal is recommended, due to the words of the Prophet (God bless him and grant him peace), “Take the morning meal for there are blessings in the morning meal.”⁷⁵ It is recommended that the meal be delayed, due to the words of the Prophet (God bless him and grant him peace), “Three of the traits of the Messengers are: breaking the fast promptly, delaying the morning meal, and brushing of the teeth (swā’ik).”⁷⁶ The exception is when the subject is not sure about the dawn, which means that the probability is the same for him. It is preferred for such a person to abstain from eating in order to avoid the prohibited, but it is not obligatory for him, thus, if he does eat, his fast is complete. The reason is that the presumption is that it is night. It is reported from Abū Ḥanīfah (God bless him) that if the person is in a situation where he cannot discover whether the dawn has arisen or the night is moonlit or

⁶¹It amounts to the payment of zakāt.
⁶²And that is reflected through niyyah in this present case.
⁶³Prior to the declining of the sun or after it.
⁶⁴That is, the niyyah is not needed for the obligatory fast, in his view, and the person is under a duty to fast.
⁶⁵For determining who will compensate the thing misappropriated. The second usurper prevents the restitution of property. The case here is being compared to liability for expiation.
⁶⁶Like an unbeliever converting to Islam, a minor attaining puberty, or an insane person recovering.
⁶⁷Because of which kaffarah is imposed on the person who breaks (violates) his fast.
⁶⁸Where fast is prohibited, adopting such a state is not allowed.
⁶⁹It is recorded by Ibn Abī Shaybah. Al-Zaylā‘i, vol. 2, 469.
⁷⁰It is recorded by all the sound compilations, excluding Abū Dāwūd, from Anas ibn Mālik (God be pleased with him). Al-Zaylā‘i, vol. 2, 470.
cloudy, or if his sight is defective, and he is not sure, he is not to eat. If he eats he has sinned due to the words of the Prophet (God bless him and grant him peace), “Give up what creates doubt for you for what does not create a doubt.” If, however, he is convinced that he had the morning meal when the dawn had arisen, he is under an obligation for qadā (acting upon the presumption) and there is no doubt in this. According to Zāhir al-Riwayah there is no qadā for such a person. The reason is that certainty is done away with only by an equal certainty. If it becomes manifest that the dawn had arisen, there is no expiation for him. The reason is that he based his action on a legal rule and intention (for the deviation) cannot be established.

If a person is not sure about the setting of the sun, breaking the fast is not permitted to him, because the presumption is that the day continues. If he eats (breaking the fast), he is liable for qadā, acting upon the presumption. If his predominant view is that he ate prior to the setting of the sun, he is liable for qadā according to the unanimous narration, because of the presumption of continuity of the day. If he is not sure about it, and it is apparent that the sun had not set, it becomes necessary to impose kaffah (expiation) on him in view of the presumption of continuity, which is the continuity of the day.

Where a person eats during a fast out of forgetfulness and believes that this has terminated his fast, if he then eats intentionally, he is liable for qadā, but not kaffah (expiation). The reliance for his (confused) belief is on analogy, thus doubt is established (doing away with expiation). If the tradition has reached him and he has understood it, the same ruling is given by the Zāhir al-Riwayah. It is, however, narrated from Abu Hanifah (God bless him) that expiation becomes obligatory. The same is narrated from the two companions. The same is narrated from the authority of Abu Hanifah (God bless him) that expiation becomes obligatory. The reason is that certainty is done away with only by an equal certainty. If it becomes manifest that the dawn had arisen, there is no expiation for him. The reason is that he based his action on a legal rule and intention (for the deviation) cannot be established.

If a woman is asleep or one who is insane is subjected to intercourse, when she is fasting, she is liable for qadā, but not kaffah. Zufar and al-Shāhi (God bless them) maintain that there is no qadā on the analogy of one eating in a state of forgetfulness. The excuse here is stronger than the lack of intention. In our view, the state of forgetfulness is very common, while this situation is rare. Kaffah is not imposed due to the absence of an offence (on her part).

For the first view is based upon the existence of legal doubt due to analogy, and this is not negated through knowledge (of the tradition), as in the case of a father having intercourse with his son's slave girl.

If he submits to cupping and believes that this has broken his fast, and then eats intentionally, he is liable to qadā as well as kaffah, because his belief (in this case) is not based upon a shar’ī (legal) evidence, unless a jurist gives him a ruling about the terminating of the fast, as a ruling is a legal evidence as far as he is concerned. If the tradition reaches him and he relies upon it, the same rule (of no kaffah) applies according to Muhammad (God bless him). The reason is that the saying of the Messenger of God (God bless him and grant him peace) is not to be lowered in comparison to the ruling of the mufti. A disagreement on this is narrated from Abū Yūsuf (God bless him) who maintains that the layman is under an obligation to follow the fuqahā’ for he lacks the expertise to interpret the traditions. If he is aware of the interpretation of the tradition, he is liable for kaffah due to the lack of doubt. The opinion of al-Awāzī (God bless him) does not give rise to shubhah (doubt) as it opposes analogy.

If he intentionally indulges in slander (or backbiting) and then eats, he is liable for qadā as well as kaffah, whatever the situation. The reason is that breaking the fast opposes analogy, and the tradition has been interpreted differently by consensus (ijma’).

If a woman is asleep or one who is insane is subjected to intercourse, when she is fasting, she is liable for qadā, but not kaffah. Zufar and al-Shāhi (God bless them) maintain that there is no qadā on the analogy of one eating in a state of forgetfulness. The excuse here is stronger than the lack of intention. In our view, the state of forgetfulness is very common, while this situation is rare. Kaffah is not imposed due to the absence of an offence (on her part).

The rule is that the ruling of the faqih is the (only) dalil for the muqallid.

This is to be noted, especially by those assessing the law for themselves on the internet, without possessing the required expertise. Our suggestion would be that they should try to acquire the expertise.

He is referring to the tradition that implies that backbiting leads to the breaking of the fast. One such tradition is recorded by Ibn Abi Shaybah. Al-Zayla’i, vol. 2, 482.

That is, to mean that he loses the spiritual reward (thawab) of the fast.

"That is, to mean that he loses the spiritual reward (thawab) of the fast.

"This is to be noted, especially by those assessing the law for themselves on the internet, without possessing the required expertise. Our suggestion would be that they should try to acquire the expertise.

See the discussion under the next rule about reading or hearing traditions and understanding them to derive the law. The tradition referred to is one that requires the continuation of the fast for it is God who has fed the worshipper. Al-Zayla’i, vol. 2, 472.
40.2 What a Person Imposes on Himself

If he says, "I will fast on the day of sacrifice for God," he is to eat on that day and then fast by way of qadda'. This nadhr (vow) is sound in our view, with Zufar and al-Shafi'i (God bless them) disagreeing. They maintain that this is a vow to undertake a violation, due to the existence of a prohibition about fasting on these days. Our view is that a vow for fasting is legally valid, while the prohibition pertains to something else, which is the giving up of the response to the invitation from God. Thus, his nadhr is valid, but he eats on this day in order to avoid the violation that is associated with the fast. Thereafter, he fasts by way of qadda' in order to fulfill the obligation. If he does fast on that day, he discharges his undertaking for he has performed it according to the obligation.

If he had intended an oath (yamin) (instead of a nadhr), he is liable for the expiation for the violation of an oath, that is, if he eats on this day. This issue has six cases: (1) When he does not intend anything. (2) When he intends a nadhr (vow) and nothing else. (3) When he intends a nadhr and intends that it is not an oath, in such a case it will amount to nadhr for he has made the vow in its legal form and has accepted its requirements. (4) When he intends an oath and intends that it is not a nadhr, it will amount to an oath as the oath is the probable meaning of his statement and he has determined this meaning, while negating others. (5) When he intends both, it will amount to nadhr as well as yamin according to Abü Hanifah and Muhammad (God bless them), while according to Abü Yusuf (God bless him), it will amount to nadhr. (6) If he intends an oath, it will amount to yamin and nadhr in their view, while it will amount to a yamin. Abü Yusuf (God bless him) maintains that oath is the actual meaning, while oath is the figurative meaning so that the actual (first meaning) is not dependent upon niyyah (intention), whereas the second meaning is dependent upon it and intention does not include both. Further, the figurative meaning is fixed through intention, but with the intention of both the actual meaning is given preference. The two jurists maintain that the two aspects do not repel each other, because both require an obligation, except that nadhr requires it for itself, while the oath requires it for another reason, thus, we combine the two.

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108 He is referring to the tradition of 'Umar (God be pleased with him) recorded by al-Bukhari and Muslim. The tradition conveys the prohibition of fasting on the two 'idh-Al-Zayla', vol. 3, 483.

109 The tradition has been recorded from several Companions (God be pleased with them). Different versions are recorded by al-Tabarani, al-Darqutni, Ibn Abi Shaybah and Abü Ya'la. Al-Zayla'1, vol. 3, 484-85.
protect it. Its protection is not obligatory as obligation depends on such protection. He does not violate the proscription by the mere making of a vow, which is the cause of the obligation nor by mere commencement in prayer, for example, till he completes a rak'ah. It is due to this reason that an oath of not praying is not violated by mere commencement. The protection of the act performed is necessary and he pays for it through qada'. According to Abu Hanifah (God bless him), qada' is not imposed for the excess prayer either. The stronger view, however, is the first. God knows best.

Chapter 41

'īṭikāf (Seclusion in a Mosque)

He said: 'īṭikāf is recommended. The correct view is that it is a sunnah mu'akkhadah, because the Prophet (God bless him and grant him peace) performed it persistently in the last ten days of Ramadān. Persistent performance is an evidence of sunnah.

'īṭikāf is remaining inside the mosque with a fast along with the niyyah of 'īṭikāf. The essential element (rukn) is remaining in the mosque, thus, it comes into existence because of it, while fasting is a condition for it. Al-Shāfi‘i (God bless him) disagrees about this. Niyyah, however, is a condition for all acts of worship. He says that a fast is an act of worship and is a primary act in itself. It cannot, therefore, be a condition for another act. We rely upon the words of the Prophet (God bless him and grant him peace), “There is no 'īṭikāf without a fast.” Analogy in the face of a transmitted text is not acceptable. Thereafter, fasting is a condition for the validity of the obligatory form on the basis of a unanimous narration. In a narration of al-Hasan from Abu Ḥanifah (God bless him), it is also a condition of validity for its voluntary type, on the basis

107 That is, the obligation of qada'.
of the apparent meaning of what we have related. On the basis of this narration it cannot have a duration of less than one day. According to a narration in the Kitāb al-Asl, which is the opinion of Muhammed (God bless him), the minimum (voluntary type) is a moment and is without a fast. The reason is that the nafl is based on ease. Do you not see that the worshipper can sit in the supererogatory prayer even when he has the ability to stand. If he has begun it and then cuts it off, he is not liable for qada' according to the narration of Kitāb al-Asl, because it is not determined, therefore, cutting it off does not amount to its nullification. According to the narration of al-Hasan he is liable for qada', as it is limited by one day like the fast.

Thereafter, ṭīkāf is not valid except in a congregational mosque, due to the statement of Hudhayfah (God be pleased with him). "There is no ṭīkāf except in a congregational mosque." It is narrated from Abū Hanifah (God bless him) that it is not valid except in a mosque in which all five prayers are offered. The reason is that it is a worship that waits for prayer, therefore, it is specific to a location where such prayers are offered. For a woman, she offers ṭīkāf in the mosque of her house, as that is the place of her prayer and that is where her worship waits for prayer. If there is no place of prayer in her house she makes a spot in it as a place of prayer and performs ṭīkāf in it.

The worshipper is not to come out of the mosque, except to meet a need or for the Friday prayer (jumu'ah). As for need, it is permitted on the basis of the tradition of A'ishah (God be pleased with her), "The Prophet (God bless him and grant him peace) except the mosque. `..." Further, the occurrence of these needs is expected and it is necessary to come out to meet these needs, therefore, coming out for them is an exemption. He is not to linger on after purification, because what is established on the basis of necessity is limited to the extent of the need. As for jumu'ah, it is one of the most important of his needs and its occurrence is expected. Al-Shāfi'ī (God bless him) said that coming out for jumu'ah invalidates the ṭīkāf, because it is possible for the person to undertake it in the jamī' (central mosque of the city). We maintain that ṭīkāf is permitted in each mosque, and when it is legal necessity that permits exit from the mosque. If he is to come out when the sun has declined, because the communication requiring jumu'ah becomes directed at him after it. If his location is far removed from it, he is to come out at a time that will enable him to catch the prayer and four rak'ahs prior to it. In another narration, it is six rak'ahs, four for the sunnah and two for greeting the mosque. After the prayer, he should have time for four or six in accordance with the disagreement about the sunnah of jumu'ah. The sunnah prayers are subservient to it and are, therefore, associated with it. If he stays on in the jamī' mosque for a period in excess of this, his ṭīkāf is not rendered invalid, because it is a place of ṭīkāf, except that it is not recommended as he is bound to perform it in one mosque. He should, therefore, not complete it in two mosques without necessity.

If he moves out of the mosque (even) for a moment, without an excuse, his ṭīkāf becomes invalid, according to Abū Hanifah (God bless him) due to the existence of a negating factor. This is based on qiyās. The two jurists maintain that it is not invalidated, unless it is for more than half a day. This is based upon istihsān, because there is a necessity for minor exits.

He said: As for eating, drinking and sleep, they take place at the location of his ṭīkāf. The basis is that there was no place of abode for the Prophet (God bless him and grant him peace) except the mosque. Further, it is possible to meet these needs in the mosque, and there is no necessity of coming out for them.

There is no harm if he undertakes sale and purchase inside the mosque without bringing the goods into the mosque. The reason is that he may be in need of this especially when he cannot find one who can meet his needs. The jurists have, however, disapproved the presentation of goods inside the mosque, because the mosque is protected against

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6 It is recorded by al-Tabarānī in his Mu'jam. Other versions are recorded by al-Bayhaqī, Al-Zayla'ī, vol. 2, 490-91.
7 That is, a mosque other than the jamī'. In the case of the jamī', ṭīkāf is valid even if all five prayers are not being offered in it.
8 According to Qadi'khān, if she does it in a mosque, she needs her husband's permission.
9 That is to answer the call of nature.
10 This is ghārīb in this version, however, a similar tradition has been recorded by all the six sound compilations, Al-Zayla'ī, vol. 2, 491.
interference by the rights of individuals and these transactions invoke such rights. The activity of sale and purchase inside the mosque is disapproved for persons other than the mu'takif due to the words of the Prophet (God bless him and grant him peace), "Keep your children away from your mosques," up to the point where he said, "And your sale and purchase." 14

He said: He is not to utter words that are not decent, however, total silence is disapproved for him. The basis is that a fast of silence does not achieve a nearness to God in our shari'ah though he is to avoid uttering what is sinful.

Sexual intercourse is prohibited for the mu'takif due to the words of the Exalted, "Do not approach your wives when you are in a state of i'tikaf in the mosques." Fondling and kissing are prohibited likewise, as they lead to sexual activity, thus they are prohibited as that activity is one of the prohibitions of this form of worship just as it is a prohibition for the state of ihram. This is distinguished from fasting, because abstaining from sexual activity is an essential element and not a prohibition, therefore, these two acts will not lead to it.

If he indulges in sexual intercourse during the night or the day, intentionally or in a state of forgetfulness, his i'tikaf stands nullified. The reason is that night is equally the subject-matter of i'tikaf, as distinguished from fasting, and the state of i'tikaf is a constant reminder; therefore, forgetfulness is not admissible as an excuse.

If he has physical contact without penetration of any kind and ejaculates or kisses or fondles and ejaculates, his i'tikaf stands nullified. The basis is that all this falls within the meaning of sexual intercourse and even the fast is rendered invalid due to such activity. If he does not ejaculate, the fast is not rendered invalid even when he is in a state of ihram, because in that case it does not fall within the meaning of sexual intercourse, which is the invalidating factor, therefore, it does not invalidate the fast.

He said: A person who makes obligatory for himself an i'tikaf of two days, or a certain number of days is bound to observe the i'tikaf of the nights of those days as well. The reason is that the mentioning of days is in an inclusive fashion and includes the nights that correspond to them. Thus, it is said, "I have not seen you for so many days." The intention is to include the nights as well. The nights are in consecutive order even if a consecutive order is not stipulated. The basis is that i'tikaf is built upon consecutive order, because all timings are acceptable to it, as distinguished from a fast as that is built upon separation for the nights are not acceptable for the fast. Thus, fasts are obligatory with separation even if the person expressly stipulates a consecutive order. If he forms an intention for the days alone, the intention is valid, for it is directed towards the actual object.

If the person makes the i'tikaf of two days obligatory for himself it becomes binding along with the nights, but according to Abū Yūsuf (God bless him), the first night is not included. The reason is that the dual form is not the plural, while the middle night is necessary for establishing a link between the two days. The reasoning of the preferred (zahir) opinion is that in the dual form, the plural is implied and is associated with it for acts of worship. God knows best.

14It is related from several Companions (God be pleased with them). Different versions are recorded by Ibn Majah and others. Al-Zayla'i, vol. 2, 491–93.

It is practised by the Magians.

Qur'ān 21:87

The night precedes the day as it depends on the moon.
## Al-Hidāyah

### BOOK FIVE

### Hajj (Pilgrimage)

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Chapter 42

The Obligation of Hajj

Hajj is obligatory (wājib) for free, major, and sane persons in sound health if they possess provisions and the means of travel in excess of residence and necessities, along with the maintenance (expenses) of their families till the time of their return, and (this) if the highways are secure. He (al-Qudūrī) has described it through obligation (wujiḥ), but it means certain definitive obligation (fard), whose definitive character has been established by the Book (the Qur’ān), and these are the words of the Exalted, “To God belongs the claim, against people, of the hajj of the House.”

It is obligatory in one lifetime, and only a single time. The basis is that the Prophet (God bless him and grant him peace) was asked whether hajj was obligatory each year or only once, and he replied, “No. It is but a single time, and what is in excess of that is supererogatory.” The basis further is that its obligating cause is the Bayt (the House) and that does not increase in number, therefore, the the obligation does not recur.

Thereafter, it is obligatory with prompt compliance according to Abū Yūsuf (God bless him). The narration from Abū Ḥanīfah (God bless
him) indicates the same. According to Muḥammad and al-Shafiʿi (God bless them), the obligation requires delayed compliance, because it is an act of worship for a lifetime, therefore, the entire lifetime is like the time available for prayer. The reasoning for the first view is that the obligation is associated with a specific time and death during a year is not unusual, therefore, it is limited by way of precaution. Accordingly, hastening performance has greater merit. This is to be distinguished from the timings of prayer, because death within such a (short) period is rare.

Freedom and majority have been stipulated due to the words of the Prophet (God bless him and grant him peace), “A slave who has performed the hajj ten times and is then set free is under an obligation to perform the hajj of Islam; a minor who performs the hajj ten times and then attains majority is under an obligation to perform the hajj of Islam.” Further, hajj is a worship and liability for all (forms of) worship has been removed from minors.

Sanity (ʿaql) is a condition for legal validity of (the imposition of) all obligations. The same applies to the soundness of limbs (and organs), prayer, for example. The rule followed there was that the command imposing the duty required delayed compliance. Here Abū Ytsuf (God bless him) is saying that the command imposing the obligation of hajj requires prompt compliance, and Abū Hanīfah (God bless him) is said to have upheld the same. Imām Muḥammad (God bless him) is applying the rule in the same manner as it was applied in the case of prayer. Al-Marghīnānī appears to be saying that the rule has been altered here on the basis of the likelihood of death. Thus, if hajj is delayed till the expected end of life, it is possible that the obligation would be lost, because death may occur before that time. In the case of prayer, he says, the rule is applied as adopted, because death is not likely in the duration provided for the zuhr prayer. It can happen, of course, but the law is not based upon exceptions, rather it is based on things that usually happen. In other words, the application of a qaʿīdah usuliyyah has been altered on the basis of an external factor—the fear of losing the obligation due to death.

Al-Shafiʿi (God bless him) has reversed the rule too, because an absolute command, in his view, requires immediate compliance, but he prefers delayed compliance in this case.

It is recorded by al-Ḥakīm in al-Mustadrak. It said that it is a sound tradition on the conditions of the two Shaykhs. It is also related by al-Bayhaqī. Al-Zawāʾirī, vol. 3: 6; al-Aynī, vol. 4: 142.

Obligation in the sense of voluntarily accepting a duty. It is to be distinguished from liability that can arise in some cases, as in the case of an insane person destroying someone’s property.

because without them inability becomes certain. If a blind man can find a person to whom he can give provisions and travel expenses, even then hajj is not obligatory for him according to Abū Hanīfah (God bless him). The two jurists disagree, and this disagreement has preceded in the Book of Saḥāfa. As for the invalid (one confined to a chair, for instance), according to Abū Hanīfah (God bless him), hajj is obligatory, as he can perform it through another. His case is similar to that of a person who is able to do so through a seat on a riding animal. According to Muḥammad (God bless him), it is not obligatory for he is not able to perform it on his own, as distinguished from the blind person, who can do it on his own if guided—he is like one who has strayed away from the rites of hajj.

It is necessary to possess provisions and the means of travel. This is the ability to rent one side (seat) of the riding animal or a loading animal. The possession of expenses during travel, while going and coming back, is also necessary. The Prophet (God bless him and grant him peace), when he was asked about travel (to the House), said, “Provisions and the means of travel.” If a person can hire the taking of turns with another on a riding animal, he is under no obligation to perform hajj. The reason is that if the two take turns the complete means of travel (seat) is not found for the entire journey.

It is stipulated that these expenses (mentioned above) be in excess of residence as well as necessities like a servant, household assets and clothes as these things pertain to his primary needs. It is also stipulated that all this be in excess of the maintenance of his family till his return. The reason is that maintenance is a right that belongs to a woman, and the right of the subject (ʿabd) is prior to the right of the sharīʿah (law) as directed by the law.

Thus, hajj is not obligatory for an invalid even if he possesses all other things. The same would apply to old and enfeebled persons.

It is related from several Companions (God be pleased with them) and recorded by al-Tirmiṣī, Ibn Mājah and others. Al-Zawāʾirī, vol. 3: 7-8.

Providing a servant today would be an excessive requirement.

Such statements occur many times in fiqh, that is, the right of the individual is to be preferred over the right of the sharīʿah. These statements need to be reconciled with the views of those jurists who maintain that the public interest is to be preferred over the private in the context of the maqāṣid al-sharīʿah. It is to be noted here that in reality if the hereafter and another based upon the interests of this world. To be specific, ḥifṣ...
Travel expenses are not a condition of the obligation for the residents of Makkah and those living around it, because there is no additional hardship in performance for them, and it resembles the effort required for proceeding towards the Friday congregation (jumadil-akhir). It is necessary that the highways be safe as the ability to perform hajj is not established without such safety. Thereafter, it is said that safety is a condition of the obligation so that a bequest (for the performance of hajj) is also not obligatory (at such a time). This is narrated from Abu 'Ali al-Hamad bin 'Ali bin 'Abd al-Rahman (God be pleased with him). It is said that it is a condition of adadi (performance) and not obligation, because the Prophet (God bless him and grant him peace) elaborated the ability to perform hajj to be (merely) provisions and the means of travel and nothing besides these.

He said: It is deemed proper for the woman that she have with her a mahram (relative of the prohibited category) or her husband for performing hajj. It is not permitted for her to perform hajj in the company of anyone else besides these two when the distance between her and Makkah is a journey of three days. Al-Shafi'i (God bless him) said that it is permitted for her to perform hajj when she departs with companions and there are with her trustworthy women for the attainment of safety through companionship. We rely upon the words of the Prophet (God bless him and grant him peace), "A woman is not to perform hajj except when there is a mahram with her." The reason is that without an accompanying mahram there is apprehension that she will be exposed to trials and such exposure increases by the merger (company) of other women with her. It is for this reason that Isma'il under such a woman is prohibited even when there is another woman with her. This situation is distinguished from the case when there is between her and Makkah a journey of less than three days, because it is permissible for her to depart without the mahram on a journey that is less than safar (three days).

If she does find a mahram, the husband does not have a right to prevent her (from proceeding for hajj). Al-Shafi'i (God bless him) said that he has this right as her absence causes a loss of his (conjugal) rights. Our reasoning is that the right of the husband is not predominant in the case of fara'id and hajj is among them. Thus, when the hajj being performed is supererogatory, he does have the right to prevent her. When the mahram is a fasiq (who does not follow the directions of the shar'a), our jurists have said that hajj does not become obligatory for her, because the objective of protection (from exposure) is not attained through such a person.

She has the right to depart with every type of mahram, unless he is a Magian, for he may assume the permissibility of marriage with her. The minor and the insane person are not considered for this category as protection is not attained through them. A minor girl who has attained the age of seven years is included in the meaning of a major so that no other than a mahram is to travel with her. The maintenance expenses of the mahram are borne by the woman (performing hajj) as it is through him that she reaches the rites of hajj. The jurists disagreed about whether the presence of the mahram is a condition for the performance of the hajj (after reaching Makkah).

If the minor attains majority, or the slave is emancipated, after wearing the ihram, and they complete the hajj, it will not be valid as the hajj of Islam (the obligation). The reason is that their ihram (intention) was formed for the performance of a supererogatory hajj and cannot be converted to one for the performance of the definitive obligation. If the minor renewed the ihram prior to the station (al-Araf) and forms the intention of the hajj of Islam, it is valid. If the (emancipated) slave does the same, it is not valid. The reason is that the ihram of the minor was not

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1 He is pointing to the tradition that has preceded. Al-Zayla'i, vol. 3, 10.
2 This view, and that of Imam al-Shafi'i (God bless him) below, when applied to situations other than hajj shows that there is very little restriction on the freedom of movement of women. Nevertheless, the rules for being alone with a strange woman apply.
3 It is related from two Companions (God be pleased with them). It is recorded by al-Bazzar and al-Darqutni. Al-Zayla'i, vol. 3, 10-11.
binding upon him due to the lack of legal capacity (for 'ibādāt). As for the ḥaṭṭām of the slave, it became binding, and it is not possible for him to exit from it after having commenced a ḥaḍr other than the obligatory ḥaḍr.

God knows best.

42.1 THE MAWAQĪT

The mawāqīt (limits) that a person is not permitted to cross except in a state of ḥaṭṭāt are five. For the people of Madīnah, it is Dhū ’l-Ḥulayfah; for the residents of Iraq, it is Dhat ‘Irq; for the residents of Syria, it is al-Jahfah; for the residents of Nejd, it is Qarn; and for the people of Yemen, it is Yalamlam. This is how the Messenger of God (God bless him and grant him peace) determined the limits (mawāqīt) for these people. The benefit of fixing the limits is the prevention of delaying the ḥaṭṭāt till beyond them. The reason is that crossing them otherwise is not permitted by agreement.

Thereafter, a person coming from a distance (āfāq), if he reaches the mawāqīt with the intention of entering Makka, is under an obligation to wear the ḥaṭṭāt whether or not he has formed the intention of performing ḥaḍr and 'umrah, in our view. This is based on the words of the Prophet (God bless him and grant him peace), “No one is to cross the mawāqīt unless he has formed the intention of performing the 'umrah.” The reason is that the obligation of ḥaṭṭāt is due to reverence for this noble area, therefore, persons performing the ḥaḍr or the 'umrah or other ritual are the same for this purpose.

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21 The word mawāqīt in its primary meaning applies to time, but has been borrowed to apply to a location. In other words, it is the location for wearing the ḥaṭṭāt.
22 The Prophet (God bless him and grant him peace) stopped at a location where there was a tree.
23 The location for all pilgrims coming from the east.
24 For the people of Egypt, Maghrib, and Syria.
25 It is recorded by al-Bukhārī and Muslim through different channels. Al-Zayla‘î, vol. 3, 12.
27 The text of al-Hidāyah is somewhat different in different books here. In al-‘Aynī’s al-Bināyāh, in place of “persons performing the ḥaḍr or the 'umrah” the text reads “the trader or the resident.” Accordingly, he interprets the words “whether or not he has formed the intention of performing the ḥaḍr” to mean “even if the person is coming in for trade.” Al-‘Aynī quotes al-Shāfī‘î (God bless him), who says that the person need not wear the ḥaṭṭāt if he does not intend the rites.
28 Qur‘ān 2:196
29 The tradition of ‘Āli and Ibn Mas‘ūd (God be pleased with them) is narrated from Abū Ḥanīfah (God bless him) that there is greater merit in wearing the ḥaṭṭāt prior to the mawāqīt, because the interpretation of “complete it” implies this, there is greater effort involved, and there is greater reverence. It is narrated from Abū Ḥanīfah (God bless him) that there is greater merit in it if the person is confident that he will not indulge in the prohibited (in the longer period).
30 For a person who is inside the mawāqīt, the limit for him is the Hil, which means the Hil that is in between the mawāqīt and the Haram, because it is permitted for him to wear the ḥaṭṭāt from the huts of the residents, and what is beyond the mawāqīt up to the Haram is a single location.
31 For a person who is at Makka, the limit for him for ḥaḍr is the Haram itself and in the case of 'umrah it is the Hil. The reason is that the Prophet (God bless him and grant him peace) ordered the Companions (God be pleased with them) to wear the ḥaṭṭāt for ḥaḍr from within Makka30 and ordered the brother of 'A‘ishah (God be pleased with both) that he should make her commence the ḥaṭṭāt from Tan‘īm,32 which is within the Hil. The reason is that the performance of ḥaḍr is at Arafah, which is within the Hil. Thus, the ḥaṭṭāt is from the Haram so that one form of journey towards it is realised. As compared to this, the performance of the 'umrah is at the Haram, therefore, the ḥaṭṭāt for it begins at...
Chapter 43

The Ḥaram

When a person desires to wear the Ḥaram, he is to bathe or perform minor ablution, but bathing is better, on account of the report that the Prophet (God bless him and grant him peace) used to bathe for his Ḥaram. It is, however, for cleanliness so that the menstruating woman will be ordered to bathe, even though it is not a fard for her. Thus, minor ablution stands in place of bathing as in the case of the Friday congregation (jumu`ah), but bathing is preferred as the meaning of cleanliness is perfect in it and also because the Prophet (God bless him and grant him peace) chose it.

He said: He is to wear two new cloths or those that are washed as a loin cloth and as a covering. The basis is that the Prophet (God bless him and grant him peace) put on the loin cloth and the top covering at the time of his Ḥaram. The reason is that this person is forbidden from wearing stitched clothes. It is necessary to cover the private parts and to repel heat and cold. This is attained through what we have identified. New cloths are preferred however, as they come closest to purification.

He said: He is to apply perfume if he has it. It is reported from Muhammad (God bless him) that he disapproved the use of a thing as perfume when its substance continued to remain on the body even after...
wearing the ihram. This is also the view of Malik and al-Shafii (God bless them). The reason is that this person is like one who has used perfume after wearing the ihram. The well known interpretation is in the tradition of 'Aishah (God be pleased with her) who said, "I applied perfume on the Messenger of God (God bless him and grant him peace) for his ihram prior to his wearing the ihram." What is prohibited with respect to perfume is the use of perfume after ihram. What remains on the body is subservient to the main issues as it is associated with the use. This is distinguished from clothes as these are separated from his body.

He said: He is to pray two rak'ahs, due to the report from Jibril (God be pleased with him) that the Prophet (God bless him and grant him peace) prayed two rak'ahs at Dhul-Hulaylah on wearing his ihram. He said: He is to say: O Lord, I wish to perform the hajj, so make it easy for me and accept it from me. The reason is that it is performed in various seasons and from various locations, therefore, it is usually not devoid of hardship. Accordingly, he requests ease. This type of supplication is not made for prayer as its duration is short and its performance is usually easy.

He said: Thereafter he pronounces the talbiyah, at the end of his prayer, on the basis of the report that the Prophet (God bless him and grant him peace) pronounced the talbiyah at the end of his prayer. If he pronounces the talbiyah after his riding animal stands up it is permitted, but the first is better on the basis of what we have related.

If he is performing the hajj alone, he is to form the intention for the talbiyah of hajj, because it is an act of worship and acts depend upon intentions. The talbiyah means saying: labbayka Allâhumma labbayk, labbayka la sharika lak, labbayka inna 'l-hamda wan-ni'mata laka wal-mulk, la sharika lak. In his statement "inna 'l-hamda," the word is inna, and not anna, to indicate the commencement of a new sentence. It is not the continuation of the previous as anna will qualify the previous statement. It (the talbiyah) is the response to the call made by Ibrâhim, Khalil Allâh, as is well known in the narration. It is not proper to drop any word out of these words, because these have been transmitted by agreement of the narrators, therefore, it is not to be shortened. If an addition is made to them, it is permitted with al-Shafii (God bless him) disagreeing according to the narration of al-Rabi' (God bless him) from him. He considers it to be like the adhân and tasâhhat insofar as these are pronouncements with a determined syntax. We maintain that prominent companions like Ibn Mas'ud, Ibn 'Umar and Abu Hurayrah (God be pleased with them all) made additions to the transmitted syntax. Furthermore, the purpose is glorification and the expression of submission. Accordingly, an addition is not to be prevented.

He said: When he pronounces the talbiyah, he has acquired (completed) the ihram, that is, when he forms the niyyah, because an act of worship is not performed without a niyyah, except that he (al-Quduri) does not mention it as he indicated it earlier in his statement: O Lord, I wish to perform the hajj. He does not (legally) enter the state of ihram with the niyyah alone, unless he pronounces the talbiyah, with al-Shafii (God bless him) disagreeing. The reason (in our view) is that niyyah is like a compact for performance, therefore, it is necessary to follow it up with dhikr as in the ta'hrimah of prayer. Thus, he enters the ihram through dhikr that is intended for glorification other than the talbiyah whether this is in Farsi or Arabic. This is the well known view of our earlier jurists (God bless them).

The distinction between this and prayer is based on their principle that the category of hajj is wider than the category of prayer so that one dhikr may be substituted for another, like the garlanding of the sacrificial animal (instead of driving it). Likewise, a dhikr other than the talbiyah or a language other than Arabic.

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5 Al-'Ayni maintains that there is liability of dam for its use according to Muhammad (God bless him). The vast majority of the jurists have approved it.
6 It is recorded by al-Bukhari and Muslim in their sound compilations. Al-Zayla'i, vol. 3, 18.
7 From Jibril (God be pleased with him) it is gharîb, however, it has been recorded by Muslim from Ibn 'Umar (God be pleased with both), as well as by Abu Dâ'ud from Ibn 'Abbas (God be pleased with both). Al-Zayla'i, vol. 3, 20-22.
9 It is recorded by al-Bukhari and Muslim. Al-Zayla'i, vol. 3, 22.
10 There are adhâr on this from the Companions as well as the Tâbi'ûn (God be pleased with them all). Al-Zayla'i, vol. 3, 22.
11 It is related from 'Aishah and Ibn Mas'ud (God be pleased with them) with a slight variation. Al-Zayla'i, vol. 3, 23.
12 It is related by all the six sound compilations. Al-Zayla'i, vol. 3, 24.
13 That is, the performance of a form of worship that consists of various arkâm.
14 That is, he completes the ihram through any kind of speech that conveys glorification.
He said: He is to abstain from what God has prohibited of obscenity, wickedness or wrangling. The basis for this are the words of the Exalted, "Let there be no obscenity, nor wickedness, nor wrangling in the hajj." This is a prohibition that has been expressed in the form of denial. Rafath is obscenity and intercourse or obscene language or the mentioning of intercourse in the presence of women. Fuṣūq is the commission of sin and its prohibition in the state of ihram is more severe. Jidāl is entering into argumentation with one's companion. It is said that this means arguing with the polytheists about the advancing and delaying of hajj (in the early days of Islam).

He is not to hunt (kill prey), due to the words of the Exalted, "Do not kill game when you are in a state of ihram." He is not to point towards prey nor indicate where it is, due to the tradition of Abū Qatādah (God be pleased with him), who said that he hunted a wild donkey, which is permissible, and his companions were in a state of ihram. The Prophet (God bless him and grant him peace) said to his Companions, "Did you point towards it, did you indicate its location; did you help?" They said "No." He said, "In that case, eat." The reason is that such actions remove the sanctuary available to the hunted animal, for it has sought sanctuary in the wild away from human eyes.

He said: He is not to wear a shirt or trousers or a turban, nor is he to wear boots, unless he cannot find sandals, in which case he is to cut them up to the bottom starting from the ka'b. This is based on the report that the Prophet (God bless him and grant him peace) forbade the person in a state of ihram from wearing these things. At the end of this tradition he said, "Nor is he to wear boots, unless he cannot find sandals, in which case he is to cut them downwards from the ka'b." The word ka'b here pertains to the (rising) joint in the middle of the foot next to the location of the shoelace knot and not the ankle, according to what has been reported by Hishām from Muḥammad (God bless him).

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11) Qurʾān 2:197
12) Qurʾān 5:95
13) It is recorded by all the Imāms of the six sound compilations in their books. Al-Zaylaʾi, vol. 3, 26.
14) It is recorded by all the six sound compilations. Al-Zaylaʾi, vol. 3, 26.
15) That is the meaning of the word ka'b here from that used in the verse of ablution.
There is no harm if he seeks the shade in a room or under a canopy. Malik (God bless him) said that seeking the shade under a tent or what resembles is disapproved, because it amounts to covering the head. We maintain that for ‘Uthmân (God be pleased with him) a canopy was set up in his state of ihram, and as it did not touch his head it was more like a room.

If he moves under the drape of the Ka'bah so that it does not touch his head or face, then there is no harm in this, because it amounts to seeking shade.

There is no harm if he ties a money-belt around his waist (middle). Malik (God bless him) said that it is disapproved if he carries in it the maintenance allowance of another as the necessity for this is not established. We maintain that the belt does not fall in the category of something stitched, therefore, the two situations are similar.

He is not to wash his head or his beard with marshmallow, because it is a kind of perfume and it kills lice in the head.

He said: He is to pronounce the talbiyah a number of times after prayers and each time he climbs a height or descends into a valley or when he meets a group of riders as well at the time of sahr. The basis is that the Companions of the Messenger of God (God be pleased with them) used to pronounce the talbiyah in these situations. Talbiyah in the state of ihram is like pronouncing the takbir during prayer, thus, it is to be pronounced at the time of change of one set of circumstances into another. He is to raise his voice while pronouncing the talbiyah, due to the words of the Prophet (God bless him and grant him peace), "The best hajj is that with 'ajj and thajj." "Ajj is the raising of one's voice for the talbiyah, and thajj is the copious flowing of (sacificial) blood.

He said: When he enters Makkah, he is to begin with al-Masjid al-Haram, on the basis of the report that the Prophet (God bless him and grant him peace) whenever he entered Makkah used to begin with the talbiyah whenever he entered Makkah used to begin with the words of the Prophet (God bless him and grant him peace) "and say: la illaha illallah (tahlil)." Ibn ‘Umar (God be pleased with them) used to say that when he meets the House, he is to say: bismillahi ‘r-Rahman ‘r-Rahim, wallahu Akbar. Muhammad (God bless him) did not identify in al-Aṣl any supplications for the various locations during hajj, because ascertaining a timing for everything (making it too formal) does away with the gentleness of the heart. If the person glorifies God with the transmitted words it is good.

He said: Thenafter, he is to begin with al-hajar al-aswad (the Black Stone) by greeting it and then pronouncing the takbir and tahlli. The basis is the report that "the Prophet (God bless him and grant him peace) entered the Mosque and after greeting it pronounced the takbir and the tahlli." He said: He is to raise his hands, due to the words of the Prophet (God bless him and grant him peace), "The hands are not raised except on seven occasions..., and among these he mentioned the greeting of the hajr." He should touch the Black Stone with his two hands, and kiss it, it he is able to do so without tormenting another Muslim. The basis is the report that "the Prophet (God bless him and grant him peace) kissed the Stone and placed his lips upon it," and then said to ‘Umar (God be pleased with him), "You are a powerfully built man and can injure the weak, therefore do not rush towards the Stone into the people, but if you find an opening place your two hands on it and kiss it, otherwise greet

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33 This is ghurib, however, Ibn Abi Shaybah has recorded a report that conveys a similar meaning, Al-Zayla‘r, vol. 3, 32.
34 That is, carrying his own or someone else’s money.
35 It is ghurib, however, Ibn Abi Shaybah has recorded a report that conveys part of the meaning, Al-Zayla‘r, vol. 3, 33.
36 As in the case of takbir for prayer.
37 It is related from several Companions (God be pleased with them) and different versions are recorded by al-Tirmidhi, Ibn Mājah, Ibn Abi Shaybah and others, Al-Zayla‘r, vol. 3, 33-35.
it and then pronounce the takbir and say la ilaha illallah. The reason is that kissing the Stone is a sunnah, while not harming a Muslim is an obligation.

He said: If it is possible for him to touch the Stone with something in his hand, like a date palm branch (that carries the date cluster), or something else, he may do so and then kiss that. The basis is the report that "the Prophet (God bless him and grant him peace) performed the circumambulation on his riding animal and kissed the arkan (corners of the House) with his staff." If he is unable to do any of these things, he is to greet the Black Stone (from a distance), pronounce the takbir, the tahli, and send blessings on the Prophet (God bless him and grant him peace).

He said: He turns to his right, that is, towards the side that has the door (of the Ka'bah), having done the idtiba' of his top sheet prior to this, and circumambulates the House with seven circuits. The basis is the report that "the Prophet (God bless him and grant him peace) kissed the Stone and then turned to his right in line with the side that has the door and completed seven circuits." Idtiba' is the passing of the top sheet under the right armpit and letting it hang from over the left shoulder. This is a sunnah; it has been transmitted from the Messenger of God (God bless him and grant him peace).

He said: He is to make his circuits by going around the Hātim, which is the name of the enclosed space (mizaḥ). It was called by this name as it crumbled (huttima). It is also called Hijr as it was restricted (hujra). It is, however, a part of the House according to the words of the Prophet (God bless him and grant him peace) in a tradition from 'A'ishah (God bless her and grant her peace). "The Hātim is part of the House." It is for this reason that the circumambulation is undertaken. Thus, if a person passes through the opening between the Hātim and the House, it is not valid. (Although it is part of the House), if a person faces the Hātim during prayer, the prayer is not valid, because the definitive obligation of turning towards the House is established through the text of the Qur'an. By way of precaution, prayer in the direction of the Hātim cannot be performed on the basis of what is established through a khābat waqfa (individual narration). In the case of tawaf, as a precaution, it is to be around the Hātim. He said: In the first three of the circuits he is to perform ramal. Ramal means walking briskly while moving (shrugging) the shoulders like a contestant coming into the arena, adopting a strutting gait between the rows. This is accompanied by idtiba'. The legal basis of this was a display of strength for the polytheists when they said: The heat of Yathrib has exhausted them. Thereafter, the hukm (rule) remained, even after the disappearance of the cause, during the period of the Prophet (God bless him and grant him peace) and even after his time. He said: He is to walk in the remaining circuits in a dignified manner. The narrators of the rites of the hajj of the Prophet (God bless him and grant him peace) agree on this. Ramal is undertaken from the Black Stone up to the Black Stone. This is what is related of the ramal of the Prophet (God bless him and grant him peace). If the people rush over him during ramal, he is to stand still, and on finding a path he is to continue the ramal. The reason is that ramal has no substitute, thus, he is to come to a standstill.

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This is in response to the implied issue. If the Hātim was part of the House, prayer during it would have been permitted.

"Turn your faces towards it." Qur'an 2:144

"When it confronts a definitive (qatl) text" Qur'an 2:144

"Because of the likelihood that it is part of the House, and here no definitive text, implying the contrary, stands in the way. The issue then is: on one occasion you say that the House, excluding the Hātim, is to be faced during prayer, while in the case of tawaf you say that circuits around the House include the Hātim."

"It is recorded by al-Bukhari and Muslim. Al-Zayla'i, vol. 3, 45.

"This counters the argument of those who say that rules are to be suspended where the cause disappears. Further, ramal is not permitted for women. Those who would encourage women to run in streets on the pretext of a marathon race should examine this in depth.

"It is recorded by al-Bukhari and Muslim from 'Abd Allah ibn 'Umar from Nafi' from Ibn 'Umar (God be pleased with them). Al-Zayla'i, vol. 3, 44.

"It is recorded from several Companions (God be pleased with them). One version from 'Abd (God be pleased with him) has been recorded by Muslim, al-Tirmidhi, al-Nawawi and Ibn Majah. Al-Zayla'i, vol. 3, 46.
that he can undertake it in accordance with the Sunnah. This is distinguished from kissing the Stone, which has a substitute in greeting (from a distance).53

He said: He is to kiss the Stone each time he passes by it, if possible. The reason is that the circuits of the tawaf are like the rak`ahs of salat. As each rak`ah is commenced with a takbir, each circuit is opened with a salutation for the Stone. If he is not able to kiss the Stone, he is to undertake the greeting (from a distance), and to pronounce the takbir and tahil as mentioned. He is to kiss/touch the Rukn Yamani, which is a recommended act according to the Zahir al-Riwayah. It is narrated from Muhammad (God bless him) that it is a sunnah. He is not to touch/kiss the other two arkan. The Prophet (God bless him and grant him peace) used to kiss these two arkan, but not the others.54 He is to end the tawaf (circumambulation) with kissing, that is, istilam of the Stone.

He said: Thereafter, he is to go to the Station (of Abraham) and pray two rak`ahs next to it or wherever it is possible in the Mosque. These two rak`ahs are obligatory (wajib) in our view. Al-Sha`bi (God bless him) said that they are a sunnah due to the absence of the evidence of obligation. We rely upon the words of the Prophet (God bless him and grant him peace), “The person performing the tawaf is to offer two rak`ahs for every seven circuits,”55 and the command gives rise to obligation.56 He is then to return to the Stone and kiss it. This is based on the report that the Prophet (God bless him and grant him peace), when he had offered two rak`ahs, returned to the Stone.57 The basis is that each circumambulation that is to be followed by sa`i (circuits of al-Safa and al-Marwah) requires returning to the Stone. The reason is that just as tawaf is commenced with istilam, the sa`i too is commenced with it. This is to be distinguished from the case where the tawaf is not to be followed by sa`i.

53In other words, he can continue without kissing the Stone, but he cannot do so in the case of tawaf.
54It is recorded by the sound compilations, except al-Tirmidhi. Al-Zayla`i, vol. 3, 46.
55It is ghafari in this version, however, al-Bukhari and Muslim have recorded traditions that convey the meaning that the Prophet (God bless him and grant him peace) used to offer the two rak`ahs. Al-Zayla`i, vol. 3, 47.
56That is, when the command is found the obligation is found, unless another evidence indicates otherwise. It is strengthened by the verse, “Take the station of Abraham as a place of prayer.” Qur'an 2:125.
57It is recorded in Imam Malik's al-Muwatta'. Al-Zayla`i, vol. 3, 48.

He said: This tawaf is the tawaf al-qudum (arrival), and it is also called tawaf al-tahiyah (circumambulation of greeting). It is a sunnah and not an obligation (wajib). Malik (God bless him) said that it is an obligation due to the saying of the Prophet (God bless him and grant him peace), “Whoever comes to the House is to greet it with a tawaf.”58 Just as we maintain that God the Exalted has given the command for the tawaf,59 and the absolute command does not require repeated performance (like the absolute command does not imply obligation here).60 The tawaf in the Qur'an has been identified as the tawaf al-ziyarah (and that is the obligation). In what he has related, it has been called greeting, which is an evidence of recommendation.61 The residents of Makkah are under no obligation to perform the tawaf al-qudum, due to the absence of arrival on their part.

He said: Thereafter, he is to proceed to al-Şafa and climbing up on it is to salute the House, pronounce the takbir and the tahil, and is to send blessings on the Prophet (God bless him and grant him peace). He is then to raise his hands and make supplications for his needs. This is based on the report that “the Prophet (God bless him and grant him peace) climbed on to al-Şafa and on seeing the House turned towards the qiblah and made supplications to God.”62 The reason is that glorification and prayer precede supplication in order to make it more suitable for a response, as is the case with other supplications. Raising of the hands is a required practice (sunnah) of supplication.63 He is to climb up on to al-Şafa to the extent that the House comes into his sight. The reason is that the salutation of the House is the purpose of climbing up. He is to proceed to al-Şafa from any side he wishes. The Prophet (God bless him and grant him peace) went towards it from the door of Banu Makhzum,
He said: He is then to descend towards al-Marwah walking in his normal gait, when he reaches the centre of the valley, he is to adopt a running gait by way of sa`i between the two green lines. Thereafter, he is to adopt his calm gait until he reaches al-Marwah. He is to climb between them. Such a syntax is used (in the Qur'an) for permissibility.

He said: This comes to a single circuit. He is to perform seven such circuits beginning at al-Šafâ and ending at al-Marwah. He is to perform sa`i in the middle of the valley for each circuit. This is based on the tradition we have related. He is to begin the (first) circuit at al-Šafâ due to the words of the Prophet (God bless him and grant him peace), "Begin with what God, the Exalted has begun." Thereafter, the sa`i between al-Šafâ and al-Marwah is wâjib (obligatory) and is not a rukn (essential element).25 Al-Šafi`i (God bless him) said that it is a rukn on the basis of the words of the Prophet (God bless him and grant him peace), "God has prescribed the sa`i for you, therefore, perform the sa`i." We rely on the words of the Exalted, "There is no harm for you if you perform the circuit prescribed when death approaches any of you, because it resembles the prayer at 'Arafat, the station there, and the ifādah. The conclusion to be drawn here is that there are three sermons in hajj. We have mentioned the first of these. The second is delivered at 'Arafat on the day of Arafah. The third is delivered at Mina on the 11th day (of Dhū 'l-Hijjah). Each sermon is separated from the other by an intervening day. Zufar (God bless him) said that the imām is to deliver these sermons on three successive days, the first being on the day of the tarwiyah (the 8th). The reason he gives is that these are the days of the hajj and the days for the gathering of those performing hajj. We maintain that the purpose of these sermons is the imparting of instruction. The day of the tarwiyah and the day of sacrifice are two days for being occupied with the rites. Accordingly, what we have said is more beneficial and the sermons are received more effectively.

25Qur`ān 2:158. The objection raised by some is that here the bequest in this verse was meant to be a definitive obligation, but the verse was abrogated. Others maintain that it was not abrogated, and the verse conveys a recommendation, as the Author has stated.26

26It is recorded by Ibn Hibbān in his Sahih. Al-Zayla`i, vol. 3, 57.

27It is recorded from Jabir and Ibn 'Umar (God be pleased with them). The versions are

28And not an obligation (wâjib).

29It is not permitted for women.

30This has preceded in the lengthy tradition of Jabir (God be pleased with him) mentioned earlier. Al-Zayla`i, vol. 3, 53.


32A rukn, as pointed out earlier is like a pillar. If it is missing, the act cannot be valid.

33It is related through several channels and these are recorded by al-Tabarānī, Ahmad and al-Šafi`i. Al-Zayla`i, vol. 3, 55.

34Qur`ān 2:158.

35On the basis of ijma` according to some.
After the worshipper has offered the *fajr* prayer on the day of the *tarwiyah* at Makkah, he is to depart for Minā. He is to stay there until he has offered the *fajr* prayer there on the day of 'Arafāt. This is based on the report that "the Prophet (God bless him and grant him peace) offered the *fajr* prayer on the day of *tarwiyah*, at Makkah, and when the sun had risen he departed for Minā. At Minā he offered the *zuhr*, *'asr*, *maghrib*, *'isha*, and *fajr* prayers, and thereafter he departed for 'Arafāt."77

If he spends the night of 'Arafāt at Makkah offering the morning prayer and then moves towards 'Arafāt passing through Minā, his act is deemed valid. The reason is that on this day no rites are required to be performed at Minā, however, he has not done well by neglecting to follow the Messenger of God (God bless him and grant him peace).

He said: He is to move (from Minā) towards 'Arafāt and is to stay there, on the basis of what we have related.77 This is the preferred time of departure, but if he departs before *fajr*, it is valid, because no *hukm* has been laid down for this moment. It is stated in *al-Asl* that he is to descend upon 'Arafāt along with the people, because staying alone reflects arrogance when the state of the worshipper here is that of humility. Further, there is greater chance of prayer being answered with the congregation. It is also said that the meaning in the text (al-Asl) is that he should not dismount on the way so as not to obstruct the movement of the pedestrians.

He said: When the sun has declined,79 the *imām* is to lead the people in the *zuhr* and *'asr* prayers. He is to begin with the sermon in which he instructs the people about the station at 'Arafāt, the station at Muzdalifah, the throwing of stones at the *jimār*, the sacrifice, shaving of the head, and the *tawf* al-*ziyārah*. He is to deliver two sermons, separating them by being seated as in the case of the *jumu`ah*. This is what the Prophet (God bless him and grant him peace) did.81 Malik (God bless him) said that he is to deliver the sermon after the prayer, because it is a sermon of admonition and remembrance that resembles the *'id* sermon.

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77This too has preceded in the lengthy tradition from Ḥābir (God be pleased with him). Al-Zayla'ī, vol. 3, 58; vol. 3, 46.
78He refers to the previous tradition.
79At 'Arafāt.
80The *khilaf* or his representative.
81Found in the lengthy tradition of Ḥābir (God be pleased with him) referred to above. Al-Zayla'ī, vol. 3, 59; vol. 2, 46.
82He refers to his statement above, "This is what the Prophet (God bless him and grant him peace) did."
83'Umar.
84This is the *adhan* of *zuhr*.
85This is in the absolute sense. Al-Zayla'ī, vol. 3, 60.
86There are six opinions on the issue. The first is the opinion of the Hanafi school, as stated. The second view maintains that there is one *adhan* and one *iqāmah*. This is the view of the Zahiris, one opinion from al-Shafi`i and Ahmad (God bless them). It is also the view preferred by Abū Thawr and al-Taḥawi. The third view upholds two *adhan* and two *iqāmahs*, and this is an opinion from Ibn Mās`ūd (God be pleased with him). The fourth view upholds only two *iqāmahs*. This is an opinion from Abū Thawr, al-Shafi`i and Ahmad (God bless them). The other two views are, first, that there is one *adhan* and two *iqāmahs*; second, that there is no *iqāmah* and no *adhan*.
87It has preceded in the lengthy tradition from Ḥābir (God be pleased with him). Al-Zayla'ī, vol. 3, 60; vol. 3, 46.
The worshipper is not to offer supererogatory prayers in between the two prayers in order to attain the purpose of the station of 'Arafah. It is for this reason that 'asr is offered prior to its timing. If the imām offers supererogatory prayers at this time, he has committed a disapproved act, and is to repeat the adhān, for the 'asr prayer, according to the Zāhir al-Riwayāth. This is different from what is related from Muhammad (God bless him). The reason (according to the Zāhir al-Riwayāth) is that occupation with voluntary prayers or with another act terminates immediate compliance with the requirement of the first adhān, therefore, the adhān is repeated for 'asr.

If the imām offers the prayer without a sermon, the prayer is deemed valid. The reason is that this sermon is not an obligation.

He said: A person who offers the zuhr prayer by himself at the place of his location is to offer the 'asr prayer at its appointed time, according to Abū Ḥanifah (God bless him). The two jurists said that even the individual alone is to combine the two prayers, because the permissibility of combining is based on the need for an extended period for staying at 'Arafah and the person praying individually is in need of this too. According to Abū Ḥanifah (God bless him), the prescription of the timings is obligatory on account of the texts (muṣḥfat), therefore, it is not permitted to give it up unless the sharīʿa (law) requires it and that is to combine it with the congregation along with the imām. Advancing the timing is for the securing of the congregation, because it will be difficult for the people to congregate once they have spread out separately in 'Arafah. It is not due to the two jurists who stated (regarding the extended duration) as there is no conflict (between moving around and praying individually).

Thereafter, according to Abū Ḥanifah (God bless him), the presence of the imām is a condition for both prayers. Zafar (God bless him) said that he is to lead the 'asr prayer in particular as that is the prayer whose timing is altered. On the same reasoning is based the disagreement about the iḥrām of hajj. According to Abū Ḥanifah (God bless him) the prayer is advanced contrary to analogy and the legality of this is found when 'asr is prayed after zuhr and is offered with the congregation along with the imām in a state of iḥrām for the hajj, and the legality is confined to it. Further, it is necessary to be in the state of iḥrām for the hajj prior to the declining of the sun, advancing the iḥrām prior to the congregation, according to one narration, while another narration maintains that it is sufficient to adopt it before the prayer as the objective is the prayer.

He said: Thereafter, following the prayer, he is to move towards the station (mawqif) along with the people and is to stay close to the mountain. The basis is that the Prophet (God bless him and grant him peace) moved towards the mawqif after the prayer. The mountain is called al-Mawqif al-Azam, while the station is called al-Mawqif al-Aʿzam.

He said: The entire 'Arafah is the station except the Batn 'Uranah, due to the words of the Prophet (God bless him and grant him peace), "All 'Arafah is the station, but stay away from Batn 'Uranah. All of Muzdalifah is the station, but stay away from the Muhāssal valley."

He said: It is essential for the imām to stay in 'Arafah on his mount. The basis is that the Prophet (God bless him and grant him peace) stayed on his mount. If he stays on his feet however, it is valid, but the first is preferred as we have elaborated. It is essential that the worshipper face the qiblah, while staying at the station, because the Prophet (God bless him and grant him peace) stayed there in this state. In addition, the Prophet (God bless him and grant him peace) said that "the best of stations is one in which the qiblah is faced." He is to make supplications and instruct the people about the rites on the basis of the report that "the Prophet (God bless him and grant him peace) used to make supplications, on the day of 'Arafah, with hands outstretched like a needy person asking for food." He is to pray for what he likes, even though there are reports about specific supplications, and we have recorded their details in our book entitled 'Uddat al-Nāsīk fi Iddah min al-Manāṣik, with success granted by God.

He said: It is necessary for the people to stay close to the imām. The reason is that he makes supplications and imparts instructions so they should remember them and listen attentively. It is essential that they stay valid.

88 That is, the imām or the people.
89 Who maintains that it is not to be repeated and simply pronouncing the iqalāmah is valid.
behind the imām, so that they come to face the qiblah. This is an explanation of acts of greater merit, because all 'Arafat is the station as we have mentioned.

He said: It is recommended that he bathe prior to the station at 'Arafah and strive to make supplications. As for bathing, it is a sunnah and is not obligatory. If he restricts himself to wudū’ (minor ablution), it is valid, as in the case of jum'ah, the two 'īds, and the time of wearing the ihram. As for striving in supplications, the basis is that the Prophet (God bless him and grant him peace) made excessive efforts in making supplications for his ummah at this station, and his prayers were answered other than unjust homicide and injustices (committed by the people).12

He is to pronounce the talbiyah after short intervals at the place where he is located. Mālik (God bless him) said that he is to terminate the proclamation of talbiyah as soon as he adopts the station at 'Arafah, because responding with speech occurs prior to occupation with the arkan (essential elements). We rely on the report that the Prophet (God bless him and grant him peace) continued to proclaim the talbiyah until he reached the Jamrat al-Aqabah.13 The reason is that talbiyah is like the takbīr in 'salāt, thus, he is to bring it about till the last rite of his ihram.

He said: When the sun sets, the imām and the people with him are to depart at their normal pace till they reach Muzdalifah. The basis is that the Prophet (God bless him and grant him peace) departed after the setting of the sun.14 Further, it is an expression of opposing the polytheists. The Prophet (God bless him and grant him peace) travelled on his camel at the normal pace.15 If he fears overcrowding by the people and departs prior to the imām, but does not cross the boundary of 'Arafah, it is valid, because he has not moved out of 'Arafah. There is greater merit if he stays in his location so that he does not become one who has performed the rites prior to their timing. If he stays back for a short while after the setting of the sun and the departure of the imām, and does so for fear of overcrowding, there is no harm in it. This is based

95It is recorded by Ibn Majah in his Sunan, Al-Zayla'i, vol. 3, 64.
96It has been recorded by all the six sound compilations, Al-Zayla'i, vol. 3, 65.
97There are various traditions on this. Some of these have been recorded by Abu Dawūd, al-Tirmidhi and Ibn Majah. Al-Zayla'i, vol. 3, 65–67.
98This has preceded in the lengthy tradition of Jabir (God be pleased with him). Al-Zayla'i, vol. 3, 67.
99It is recorded by Ibn Abi Shaybah. Al-Zayla'i, vol. 3, 68.
100It is recorded by Aba Dāwūd, al-Tirmidhi and Ibn Majah from 'Ali (God be pleased with him). Al-Zayla'i, vol. 3, 68.
101It is recorded by Ibn Abi Shaybah. Al-Zayla'i, vol. 3, 68.
102As in Zufar's view.
103It is ghubr and recorded by al-Bukhārī as a report from Ibn Mas'ūd (God be pleased with him). Al-Zayla'i, vol. 3, 70.
has been delayed beyond its time as distinguished from the combining of prayers at 'Arafah, because it was 'asr that was advanced prior to its appointed time.\(^{104}\)

He said: If a person offers the maghrib prayer on the way (to Muzdalifah), it is not valid, according to Abu Hanifah and Muhammad (God bless them), and he is under an obligation to repeat it as long as the dawn has not appeared. Abu Yusuf (God bless him) said that it is valid, but the worshipper, he says, has done a bad thing. The same disagreement applies if he prays at 'Arafi. The reasoning adopted by Abu Yusuf (God bless him) is that he has offered the prayer at its appointed time, therefore, it is not to be repeated, just like praying after the rising of the dawn. Delaying the prayer is part of the Sunnah, thus, he has done a bad thing by neglecting it. The two jurists rely on the report that the Prophet (God bless him and grant him peace) said to Usamah (God be pleased with him) that "the prayer lies ahead of you."\(^{105}\) By this he meant the time of the prayer. There is an indication in this that the delay is obligatory. It was made obligatory to facilitate the combining of the two prayers at Muzdalifah. Thus, he is under an obligation to repeat the prayer as long as the dawn has not arisen so that he can be treated as one who has combined the two prayers. When the dawn has risen,\(^{106}\) it is not possible for him to combine the two prayers, and the obligation of repetition lapses.

He said: When the dawn has arisen, the imam is to lead the people in the morning prayer during the last darkness of the night (ghalas). The basis is the report of Ibn Mas'ud (God be pleased with him) that "the Prophet (God bless him and grant him peace) led the morning prayer that day in the last darkness of the night."\(^{107}\) The reason is that praying in the dark meets the requirement of staying (for the night). Thus, it is permitted like the advancing of the 'asr prayer at 'Arafi.

He is then to stay with the people staying with him, and he is to make supplications. The basis is that the Prophet (God bless him and grant him peace) stayed at this station praying to an extent that, as reported in the tradition of Ibn 'Abbâs (God be pleased with both),\(^{108}\) all his prayers for the ummah were answered, even the unjustified homicides and other injustices (committed by the people).\(^{109}\) Thereafter, this stay is obligatory in our view, but is not a rukn (essential element) so that if he were to neglect it without excuse he would be liable for dam (sacrifice of atonement).\(^{110}\) Al-Sâ`îdî (God bless him) said that it is a rukn on the basis of the words of the Exalted, "Then when you pour down from (Mount) the waters of the Exalted, 'Then when you pour down from (Mount) the waters of the Exalted protect him,' and such an evidence establishes a rukn. We rely on the report that the Prophet (God bless him and grant him peace) dispatched the weaker members of his family earlier.\(^{111}\) Had the stay been a rukn he would not have done so.

What is mentioned in the verse, which he has recited, is remembrance, and that is not a rukn on the basis of ijmã (consensus). We have understood the meaning of obligation from the saying of the Prophet (God bless him and grant him peace), "For the person who has stayed with us at this station, when he had departed earlier from 'Arafi, his hajj is complete."\(^{112}\) Thus, he made the completion of hajj contingent upon it. This is suitable for consideration as a sign of obligation, except that when he gives it up due to an excuse, like being weak or ill or being a woman afraid of overcrowding, there is no liability for the worshipper on the basis of what we have related.\(^{113}\)

He said: The entire area of Muzdalifah is a station except for the valley of Muhassir, on the basis of what we related earlier.\(^{114}\)

He said: When the sun has risen, the imam departs and the people depart with him until they reach Minâ. This feeble servant (may God the Exalted protect him) says: This is how it has been stated in the manuscript

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\(^{104}\)Delaying prayer conforms with analogy, just like all delayed prayers are offered by way of qadâ'. Advancing a prayer, on the other hand, goes against analogy.

\(^{105}\)It is recorded by al-Bukhari and Muslim from Usamah (God be pleased with him).

\(^{106}\)On the day of Nahr.

\(^{107}\)It is recorded by Al-Bukhari and Muslim. Al-Zayla'i, vol. 3, 71.

\(^{108}\)This was not reported by Ibn 'Abbâs, but the Author does not imply another Ibn 'Abbâs here, as is mistakenly believed by some. Al-Zayla'i, vol. 3, 57; vol. 3, 64.

\(^{109}\)This has preceded in the lengthy tradition from Jabir (God be pleased with him).

\(^{110}\)Al-Zayla'i, vol. 3, 71.

\(^{111}\)But the hajj would not be lost.

\(^{112}\)Qur'an 2:198

\(^{113}\)It is recorded by al-Bukhari and Muslim from 'A'ishah (God be pleased with her).

\(^{114}\)It has been recorded by all the compilers of the four Sunan. Al-Zayla'i, vol. 3, 73.

\(^{115}\)By this he means the report according to which the Prophet (God bless him and grant him peace) sent the weaker members of his family earlier.

\(^{116}\)This is the tradition above that asks the worshippers to stay away from the Muhassir valley.
of the Mukhtasar, and it is incorrect. The correct statement is that when there is enough light, the imām and the people depart. The basis is that the Prophet (God bless him and grant him peace) departed prior to the rising of the sun.106

He said: He is to begin with the Jamrat al-‘Aqabah and is to throw seven pebbles at it from the base of the valley, where the pebbles are the size of small chips of stone. The basis is that when the Prophet (God bless him and grant him peace) arrived at Mina, he did not do anything until he had cast pebbles at the Jamrat al-‘Aqabah. The Prophet (God bless him and grant him peace) said, "You are to use pebbles the size of chips so that some of you may not injure others."107 If he uses stones of a larger size, it is valid due to the attainment of the requirement of casting stones, except that the worshipper is not to use large stones so that he does not injure others. If he throws the stones from a height above ‘Aqabah, it is valid. The reason is that whatever surrounds it is the location of the rite. There is greater merit, however, if this is done from the base of the valley, on the basis of what we have related. He is to pronounce the takbir with each throwing of the stone. This was related by Ibn Mas‘ūd and Ibn ‘Umar (God be pleased with them).108 If he pronounces the tasbih in place of the takbir, it is valid, due to the attainment of the dhikr, which is part of the recommendations for casting the stones. He is not to stand (stop) by it, because the Prophet (God bless him and grant him peace) did not stop close to it.109 He is to stop reciting the talbiyah on casting the first stone, on the basis of what we have related. He is to pronounce the takbir when he throws the first stone at the Jamrat al-‘Aqabah.110 Thereafter, the way of throwing stones is that he place the stone on the back of his right thumb, supported by his index finger (used for shahādah). The extent of the throw is that there be between the thrower and the place where the stone will fall a distance of five arm lengths or more. This is how it has been narrated by al-Hasan from Abū Ḥanīfah (God bless him), because a distance less than this would amount to tossing (the stone). If he does toss the stone, it is valid, because he has aimed at its feet, however, he does a bad thing by opposing the Sunnah. If he just drops the stone, it is not valid, for it does not amount to throwing. If he throws the stone and it falls close to the Jamrah it is sufficient, because this is something that cannot be avoided. If the stone drops far away from the Jamrah, it is not valid, because nearness to God is not attained except through the specified location. He is to take the stones from any place that he likes except from around the Jamrah as this is disapproved. The basis is that the stones that are around it are (equally) rejected. This is what has come down in reports and is considered an evil omen.111 Despite this, if he does so, it is deemed valid due to the bringing about of the act of ramy.

Ramy is permitted, in our view, with whatever constitutes a part of the earth. Al-Shafi‘ī (God bless him) disagrees. The reason (in our view) is that the aim is to commit the act of ramy and this is achieved through clay as it is with stone. This is to be distinguished from the case where one throws gold or silver as that would be termed distribution and not ramy.

He said: Thereafter, he slaughters (an animal) if he wishes and then shaves his head or cuts his hair, on the basis of the report from the Messenger of God (God bless him and grant him peace) that he said, “The first rite for us on this day of ours is that we undertake ramy then slaughter and then shave (our heads).”112 The reason is that shaving is one of the causes of coming out of the ihram, and so also slaughter, so much so that a person under siege (prevented from reaching the ḥajj) can come out

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106 It is recorded by all the sound compilations, except Muslim. Al-Zayla‘ī, vol. 3, 74.
107 This has preceded in the lengthy tradition from Jābir (God be pleased with him). Al-Zayla‘ī, vol. 3, 75.
109 The tradition from Ibn Mas‘ūd (God be pleased with him) is recorded by al-Bukhārī and Muslim. The tradition from Ibn ‘Umar (God be pleased with him) is recorded by al-Bukhārī. Al-Zayla‘ī, vol. 3, 76.
110 This is found in the previous tradition from Ibn ‘Umar (God be pleased with him) recorded by al-Bukhārī. Al-Zayla‘ī, vol. 3, 77.
111 He appears to be referring to the tradition referred to above that he (God bless him and grant him peace) continued to pronounce the talbiyah till he reached the Jamrat al-‘Aqabah. The report, however, is not from Ibn Mas‘ūd (God be pleased with him).
112 This is the meaning understood from the lengthy tradition related by Jābir (God be pleased with him). Al-Zayla‘ī, vol. 3, 78.
113 There are traditions about this, and among these are those recorded by al-Ḥākim and al-Dār al-qatnī. Al-Zayla‘ī, vol. 3, 78.
114 It is ghārib in this version, however, all the sound compilations, except Ibn Mājah, have recorded traditions that convey the same meaning. Al-Zayla‘ī, vol. 3, 79.
of the ihram because of it. Thus, ramy has precedence over these two acts. Thereafter, shaving is one of the prohibitions of the ihram, therefore, slaughter has precedence over it. Slaughter has been made contingent upon one's wishes, because the slaughter undertaken by the murid pilgrim is voluntary, and the discussion here is about the murid. Shaving has greater merit, due to the words of the Prophet (God bless him and grant him peace), "May God have mercy on those who shave their heads."

He said this three times. The tradition in its apparent meaning implies mercy for those who shave their heads. Further, there is greater perfection in shaving with respect to cleanliness. In cutting the hair there is some shortcoming and the situation resembles bathing in comparison with wudu'. Shaving one-fourth of the head is sufficient on the analogy of rubbing of the head (mash), however, following the example of the Prophet (God bless him and grant him peace), shaving of the entire head is preferable. Cutting (tqaṣīr) is to take from the head hair equal to the fingertip.

These acts make all things lawful for him except women (sexual intercourse). Malik (God bless him) excludes perfume as well, as it is one of the things that leads to sexual intercourse. We rely on the saying of the Prophet (God bless him and grant him peace) about this, "Everything is lawful for him except women," and this saying has precedence over analogy. In our view intercourse outside the vagina is not permitted (either). Al-Shāfi`ī (God bless him) disagrees. The reason (in our view) is that it amounts to the satisfaction of desire through women, and is to be delayed till the completion of the disengagement from the ihram.

Thereafter, ramy (throwing of stones) is not one of the causes of release from the ihram, in our view. Al-Shāfi`ī (God bless him) disagrees saying that it is limited in time by the day of sacrifice, like shaving of the head, and is thus of the same status with respect to release from the

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**Notes:**

1. Slaughter.
2. Shaving.
3. Perfume.
4. The entire discussion in this chapter pertains to the murid performing the ifrād form of the hajj. The discussion about the qirān and tamattu' forms is to follow.
5. It is recorded by al-Bukhari and Muslim from Nāfi' from Ibn 'Umar (God be pleased with them). Al-Zayla'i, vol. 3, 79.
6. It is recorded by all the sound compilations, except Ibn Mājah from Anas ibn Malik (God be pleased with him). Al-Zayla'i, vol. 3, 80.
8. Which is after the tawāf.
9. He is answering an implied question: In this case tawāf would be a permitting factor with respect to women, but it is not prohibited even in the state of ihram, and this goes against your reasoning. He responds to it by saying that the permitting factor is prior to shaving of the head and its release is not due to tawāf. See also the statement below: "This makes women lawful for him."
10. Its first timing is the same. Its first timing is after the rising of the dawn on the day of sacrifice, because what is prior to that of the night is the time of staying at Arafah and the tawāf is subsequent to it. The day with the greatest merit out of these days is the first, as is the case with sacrifice. A tradition says, "The best out of these is the first out of these."

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Al-Hidayah Book V. Pilgrimage

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We maintain that the releasing factor is something whose commission would be an offence (against the ihram) if committed at a time set for sacrifice, like shaving of the head. Ramy, on the other hand, is not such an offence at times other than its appointed time. This is distinguished from tawāf, because release is due to prior shaving not because of it.

He said: Thereafter, he comes to Makkah on the same day or the next day or the day after, and circumambulates around the House, in what is called tawāf al-siyārah, completing seven circuits. The basis is the report made by the Prophet (God bless him and grant him peace) after he had his head shaved, departed for Makkah, and performed the tawāf of the House. Thereafter, he returned to Minā and offered zuhr at Minā. Its appointed time, however, is the day of sacrifice, because God, the Exalted, has mentioned the tawāf in conjunction with slaughter. He said, "And do what I have commanded you," and then said, "And perform the tawāf around the House." Consequently the timing of both is the same.

If he has performed the sa`i between al-Ṣafā and al-Marwah after the tawāfi al-qudi`am, he is not to perform ramal in this tawāf and there is no sa`i for him either, but if he has not performed the sa`i, he is to perform ramal in this tawāf and perform the sa`i thereafter. The reason is that sa`i has only been prescribed for a one time performance, while ramal has not been prescribed except once in a tawāf after which sa`i is performed.
He is to offer two rak'ahs after this tawaf, because each tawaf is ended with two rak'ahs whether the tawaf is a definitive obligation or supererogatory, as we have explained.

He said: This makes women lawful for him, but on the basis of the prior shaving of the head, because he has not been released due to the tawaf, except that the operation of shaving has been delayed for the legality of approaching women.

He said: This tawaf is a definitive obligation of the haji, and is one of its essential elements (ruku) for it has been required by a command in the words of the Exalted, "Perform the tawaf of the House." It is also called tawaf al-ifadah and tawaf of the day of sacrifice. Its performance after these (three) days is disapproved, and as we have explained it is limited in time through these days. If he delays it beyond these days, he becomes liable for atonement (dam), according to Abū Ḥanīfah (God bless him). We shall elaborate this in the chapter on offences, God, the Exalted, willing.

He said: Thereafter, he returns to Minā and stays there. The basis is that the Prophet (God bless him and grant him peace) returned as we have related. Further, the liability of ramy remains for him and its location is at Minā.

Thus, when the sun has declined on the second day out of the days of sacrifice, he is to throw stones at all the three jamārāt. He begins with the one that is next to al-Khayf mosque, and he throws seven stones pronouncing the takbir while standing next to it. He then throws stones at the one after it in the same way and stands next to it. Thereafter, he throws stones at the Jamrat al-'Aqabah in the same way, but he is not to stand next to it. This is what Jābir (God be pleased with him) has reported in the transmission about the rites of the haji of the Messenger of God (God bless him and grant him peace) along with its elaboration.

He is to stand near the two Jamrahs at the location where the people stand. He is to recite praises of God, to glorify Him, recite the tahlil and the takbir and he is to invoke blessings for the Prophet (God bless him and grant him peace). He is then to make supplications for his needs with hands raised. This is based on the words of the Prophet (God bless him and grant him peace), "The hands are not raised except on seven days, for then he grants him peace," and among these he mentioned the occasions near the two Jamrahs. The meaning intended is the raising of hands during supplications. It is essential that in his prayer he seek forgiveness for the believers at these stations, because the Prophet (God bless him and grant him peace) said, "O Lord, forgive those performing hajj and those for whom they seek forgiveness." The rule thereafter is that for each ramy after which there is another ramy, he is to stand (for supplications). The reason is that he is in the midst of worship and he should make supplications in between the two ramys. For each ramy after which there is no further ramy, he is not to stand, because the worship has ended. It is for this reason that he does not stand after throwing stones at the Jamrat al-'Aqabah on the day of sacrifice.

He said: When it is the next (third) day, he is to undertake ramy of all three jamārāt in the same manner after the declining of the sun. If he wishes to hasten his departure for Makkah, he may do so. If he intends to undertake the ramy of the three jamārāt on the fourth day after the declining of the sun, he may do so on the basis of the words of the Exalted, "But if anyone hastens to leave in two days, there is no blame on him, and if anyone stays on, there is no blame on him, if his aim is to do right." There is, however, greater merit in staying on till the fourth day. The basis is the report that the Prophet (God bless him and grant him peace) waited till he had performed ramy on the fourth day. If he has to leave, he should leave before the rising of the dawn on the fourth day. If the sun has risen, he should not leave due to the commencement of the time of ramy. Al-Shāfiʻī (God bless him) disagrees on this point.

If he undertakes ramy on this day, that is, the fourth day, prior to the declining of the sun and after the appearance of the dawn, it is valid according to Abū Hanīfah (God bless him). This is based upon istihsān. The two jurists said that this is not permitted on the analogy of the remaining days. The difference is based upon the exemption made for

Qurʿān 2:203

This tradition has been mentioned several times, in the topic of the description of prayer. Al-Zaylaʻi, vol. 3, 84.


Qurʿān 3:253

At Minā.

It is recorded by Abū Dāwūd, and has preceded. Al-Zaylaʻi, vol. 3, 85.
departure. If the exemption is not granted, the rule is associated with the other days. Imām Abū Ḥanīfah’s view is reported from Ibn ‘Abbās (God be pleased with both). 144 The reason for the view is that as the effect of leniency is visible for this day with respect to giving up ʿamal altogether, thus, it is appropriate that it be visible in the permissibility of ʿamal at all times. This is to be distinguished from the situation on the first day and second insofar as ʿamal is not allowed on these days prior to the declining of the sun, according to the well known narration. 145 As it is not permitted to give up ʿamal on these days, it continues to be governed by the reported rule. 146

As for the day of sacrifice, the first timing for ʿamal on this day commences with the rising of the dawn. Al-Shāfiʿī (God bless him) said that the first timing starts with the second half of the night on the basis of the report that “The Prophet (God bless him and grant him peace) made an exemption for the shepherds, permitting them to undertake ʿamal after the rising of the sun.” 147 We rely on the words of the Prophet (God bless him and grant him peace), “Do not stone the Jamrat al-Aqabah except when you move into the morning.” 148 It is also related that the time is when the sun has risen, 149 thus, the essential timing is established by the first and greater merit with the second report. The interpretation of what he (al-Shāfiʿī) has related is “the night of the second and the third,” because the night of the day of sacrifice is the time for the station (at Muzdalifah) and ʿamal follows it, therefore, its timing has to be after it by necessity.

Thereafter, according to Abū Ḥanīfah, this time extends up to the setting of the sun due to the words of the Prophet (God bless him and grant him peace), “The first of our rites on this day of ours is ʿamal.” 150 In this he deemed the entire day as the time for ʿamal and this time ends with the setting of the sun. According to Abū Yūsuf (God bless him), it extends up to the declining of the sun. Our proof against him is what we have related. 160

If he delays it (ʿamal) up to the night, he may undertake ʿamal, and he is not liable for atonement, due to the tradition about the supplication. However, he delays it till the next day, he may undertake ʿamal, as it is. However, he delays it till the next day, he may undertake ʿamal, as it is. If he delays it till the next day, he may undertake ʿamal, as it is. However, he delays it till the next day, he may undertake ʿamal, as it is. However, he delays it till the next day, he may undertake ʿamal, as it is. However, he delays it till the next day, he may undertake ʿamal, as it is. He said: If he undertakes ʿamal of the Jamīr while sitting on his riding animal, it is valid, as the act of ʿamal has been accomplished. It is better not to undertake ʿamal on foot, but if there is no subsequent ʿamal, he can do so. He said: If he undertakes ʿamal of the Jamīr while sitting on his riding animal, it is valid, as the act of ʿamal has been accomplished. It is better not to undertake ʿamal on foot, but if there is no subsequent ʿamal, he can do so.

Spending the nights of ʿamal away from Minā is disapproved, because the Prophet (God bless him and grant him peace) spent the nights there, 156 while ‘Umar (God be pleased with him) used to enforce disciplining for neglecting to stay there. 157 If he does intentionally stay the night at another place, he is not liable for any atonement, in our view. Al-Shāfiʿī (God bless him) disagrees with this. The reason (in our view) is that staying at Minā has been required to facilitate ʿamal for the worshipper during its special days. It is, therefore, not part of the acts of ḥajj and neglecting to do so does not invoke an enforcing factor.

He said: It is disapproved that a person send his baggage to Makkah and stay on till the completion of ʿamal. This is based on the report that ‘Umar (God be pleased with him) used to forbid this and disciplined people for doing so, because it led to the distraction of the worshipper. 155 If he leaves for Makkah, he is to descend upon al-Muḥabbat, which is a flat bed of a valley and the name for a location where the Messenger

144 It is recorded by al-Bayhaqi. Al-Zayla‘i, vol. 3, 85.
145 The other narration deems ʿamal prior to the declining of the sun as valid.
146 The rule reported earlier from Jābir (God be pleased with him).
147 It is related from several Companions (God be pleased with them) and the traditions are recorded by al-Ṭabarānī, Al-Dār‘qutni and others. Al-Zayla‘i, vol. 3, 85-86.
149 This has been recorded by the compilers of the four Sunān and has preceded. Al-Zayla‘i, vol. 3, 86.
150 This has preceded. Al-Zayla‘i, vol. 3, 67, 77, 87.
151 That is, “The first of our rites…”
152 That delaying a rite till after its appointed time gives rise to liability for dam.
153 It has preceded. It is recorded by Abū Dāwūd from ‘A‘ishah (God be pleased with her). Al-Zayla‘i, vol. 3, 87.
of God (God bless him and grant him peace) descended. It is recorded by Ibn Sa'd in al-Tabaqat in the section on the hajj that the Prophet (God bless him and grant him peace) descended.165 His descending upon this location was intentional, which is the sound view, so that he descended there amounted to a sunnah, because the Prophet (God bless him and grant him peace) said to his Companions (God be pleased with them), “We shall descend tomorrow at Khayf and Khayf is in Banu Hashim where the polytheists swore to abide by their polytheism.”166 He pointed towards their pact for deserting the Bana Hashim. Accordingly, it became sublike ramal during tawaf.167

He said: Thereafter, he enters Makkah and circumambulates the Ka’bah in seven circuits in which he does not perform ramal. This is the tawaf al-sadr. It is also called tawaf al-widad’ (the farewell circumambulation). This tawaf is the last act associated with the House, because the worshipper bids farewell to the House and moves forth from it. It is obligatory (wa’ib) in our view, with al-Shafi’i (God bless him) disagreeing. The basis (in our view) is, “Whoever undertakes the hajj of this House, let his last association with the House be the tawaf.”168 An exemption is made for women, who can forgo the tawaf when they have their periods.169

It is not wa’ib (obligatory) for the people of Makkah, because they do not leave it or bid it farewell. There is no ramal in it as we elaborated that it is stipulated as a one time obligation. He is to offer two rak’ahs of tawaf after it as we stated.

Thereafter, he is to proceed to Zamzam and drink of its water on the basis of the report that “the Prophet (God bless him and grant him peace) drew out a scoop from it himself and drank from it and then emptied the remaining scoop into the water.”170

43.1 MISCELLANEOUS ISSUES

If the worshipper in the state of ihram does not enter Makkah, but proceeds straight to ‘Arafah and stays there, as we have elaborated, the obligation of the tawaf al-qudam is waived for him, because he has commenced the rites of the hajj in a manner that all remaining acts are to follow, and the performance of other acts in a different order will not conform to the Sunnah. He is not liable for atonement for this omission, because it is a sunnah171 and there is no compensating penalty for a sunnah.

A person who is able to attain the station at ‘Arafah between the declination of the sun on the day of ‘Arafah and the rising of the dawn on the day of sacrifice, has caught the hajj. The first timing of the station is the declination of the sun, in our view, on the basis of the report that “the Prophet (God bless him and grant him peace) commenced the station after the declination of the sun.”172 This is an elaboration of the first timing. The Prophet (God bless him and grant him peace) said, “A person who makes it to ‘Arafah by night has caught the hajj, and a person who has lost ‘Arafah during the night has lost the hajj.”173 This is an elaboration of the completion of the hajj.

165 The Black Stone.
166 It is recorded by Abū Dāwūd in his Sunan. Al-Zayla’i, vol. 3, 91.
167 It is wa’ib according to Malik (God bless him).
168 This has preceded in the lengthy tradition from Jābir (God be pleased with him).
169 There are traditions reported on this by the compilers of the Sunan as far as the last part of the tradition is concerned. Al-Dār Quinn has recorded the entire tradition.
170 It is reported by Ibn Sa’d in al-Tabaqat in the section on the hajj of the Prophet (God bless him and grant him peace). Al-Zayla’i, vol. 3, 90.
the rising of the dawn or after sunrise, then the proof against him is what we have related.

Thereafter, if he comes to stay after the declining of the sun and leaves after a few moments, his hajj is valid, in our view, because the Prophet (God bless him and grant him peace) mentioned this with the word "or" that "the hajj is 'Arafah, thus, one who stays at 'Arafah for a moment of the day or night has completed his hajj." This is a statement that grants a choice (between day and night). Mālik (God bless him) said that it is not valid, unless he stays during the day and a part of the night; however, the proof against him is what we have stated. 66

If a person passes through 'Arafat while asleep or in a state of fainting or when he is not aware that it is 'Arafat, his station at 'Arafat is valid. The reason is that what is obligatory is the rukn and that is the station at 'Arafat. The occurrence of the rukn is not prevented by fainting and sleep as in the case of the rukn of fasting, but it is distinguished from the rukn of salah as that does not survive with fainting. Not being aware does affect intention, but not every rukn depends on niyyah as a condition.

If a person faints and his companions 67 wear the ithrām on his behalf, it is valid according to Abū Hanīfah (God bless him). The two jurists said that it is not valid. 68 If he orders a person that he should wear the ithrām on his behalf when he faints or goes to sleep, and the person ordered does wear the ithrām for him, it is valid. This is valid on the basis of ijmāl. 69 Thus, when he recovers or wakes up and brings about the acts of hajj, it is valid. The two jurists maintain that (in fact) he did not wear the ithrām himself nor did he permit another to do so on his behalf. 70 This person did not expressly permit another and implied permission depends on knowledge (of the person fainting) and the permissibility of permission for this is not known to many of the jurists how can the lay persons know it. This is distinguished from the case where he expressly

66 The statement attributed to Mālik (God bless him) may not be entirely correct.
67 Some maintain that it is not necessary that these people be his companions. However, according to the Imam (God bless them) this is based upon the compact of companionship.
68 That is, they wear the ithrām primarily for themselves and for him in a representative capacity. The reasoning is based upon the compact of companionship. See below.
69 This is the view of most jurists, but the rule approved here is otherwise. The disagreement is due to the absence of express permission of the person who has fainted. If such permission is there, there is no disagreement.
70 Of our jurists.
71 This pertains to the first part of the rule where there is no express permission.

We feel that there is great merit in the Imam's reasoning. The compact of companionship must be legally acknowledged.
72 It is recorded by al-Bayhaqi in his Sunan. Al-Zayla'i, vol. 3, 93.
73 It is recorded by Abū Dāwūd and Ibn Mājah. Al-Zayla'i, vol. 3, 93.
74 A recent attempt in Pakistan by some to make women participate in a marathon race in the streets may be referred to this.
75 It is gharib in this version and appears to be a compound tradition as there are traditions on shaving recorded by al-Tirmidhi, al-Nasa'i and others. Al-Zayla'i, vol. 3, 95.
and moves with it intending 

\[hajj\] then he has formed the intention of the \[ihram\]. This is based on the words of the Prophet (God bless him and grant him peace), "Anyone who places a symbolic garland around a sacrificial animal, has adopted the \[ihram\]." Further, the driving of the sacrificial animal amounts to the pronouncing of the talbiyah and the expression of a response (to the call of \[ihram\]) as no one does this, but a person intending the \[hajj\] or \[umrah\]. The expression of the response is sometimes undertaken through acts just as it is undertaken through words, and a person doing so comes to adopt the intention (\[ihram\]) due to the association of the intention with the act, which is a specific characteristic of the \[ihram\]. The description of \[taqlid\] is that a piece of a sandal, the handle of a haversack or the bark of a tree is tied to the neck of the sacrificial animal (\[badanah\]).

If he garlands the animal and sends it, but does not drive it himself, he has not adopted the \[ihram\]. The basis is the report from 'A'ishah (God be pleased with her), who said, "I used to entwine the garlands of the Messenger of God (God bless him and grant him peace) and then he used to send them while he himself stayed with his family in a state of permissibility." If he moves (towards the \[hajj\] or \[umrah\]) later, he does not move into the state of \[ihram\] till he catches up with the sacrificial animal. The reason is that by departing when he is not driving the sacrificial animal in front of him, the only thing to be found is mere intention, and by mere intention he does not enter the state of \[ihram\]. When he catches up with it and drives it or just catches up with it, his intention is linked to an act that is a characteristic of the \[ihram\] and with it he enters the state of \[ihram\], like driving it right from the start.

He said: The term \[budun\] applies to camels as well as cows. Al-Shafi'i (God bless him) said that it applies to camels alone, due to the words of the Prophet (God bless him and grant him peace) in the tradition pertaining to the \[jumu`ah\], to the effect that one who hastens to it is like one who has sent forth a \[badanah\] for sacrifice, while one who comes next is one who has sent forth a cow. Thus, he made a distinction between them. We maintain that the word \[badanah\] arises from \[badanah\], which means being fat, and this attribute is common between both animals. It is for this reason that each animal is accepted as sacrifice from seven persons. Further, the authentic narration mentions the word \[juzur\], (instead of \[budun\]).

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177 It is gharib and reported as \[marfu'u\] by Ibn Abi Shaybah. Al-Zayla'i, vol. 3, 97.
178 It is recorded by all the six Imams of the sound compilations. Al-Zayla'i, vol. 3, 98.
179 This reasoning is found in the previous rule, in the words: The reason is that by departing when he is not driving the sacrificial animal....
Chapter 44

Qirān

The qirān form of ḥajj has greater merit than the tamattu‘ and ifrād forms. Al-Shāfī‘i (God bless him) said that the ifrād form is better. Mālik (God bless him) said that tamattu‘ is better than qirān, because it is mentioned in the Qur‘ān—when (in reality) it is not mentioned in the Qur‘ān. Al-Shāfī‘i (God bless him) relies on the words of the Prophet (God bless him and grant him peace), “Qirān is a rukhsah (exemption),” and maintains that there are additional requirements of talbiyah, journey and shaving in ifrād. We rely on the words of the Prophet (God bless him and grant him peace), “O Family of Muḥammad, pronounce the tahlīl of performing ḥajj and ‘umrah together.” Further, there is a combination of two acts of worship in it, thus, it is like fasting along with iʿtikāf or being on guard during battle along with prayer during the night. In addition, the talbiyah is not limited by number, journey is not the object and shaving is the cause of exit from the act of worship, therefore, the tradition cannot be preferred on the basis of the attributes mentioned. The purpose of the tradition related (by him) is to refute the statement of the People of the Jāḥiliyyah that ‘umrah during the months of ḥajj is the most glaring form of immorality. Qirān is mentioned in the

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1 It is gharīb in the absolute sense. Al-Zayla‘i, vol. 3, 99.
2 As compared to qirān.
3 Wear the ihram.
4 It is recorded by al-Ṭahāwī from Umm Salamah (God be pleased with her) in Sharḥ al-Āthār. Traditions giving a similar meaning have been recorded by al-Bukhārī and Muslim. Al-Zayla‘i, vol. 3, 99.
5 He intends thereby the tradition relied upon by al-Shāfī‘i (God bless him) that “Qirān is a rukhsah.” The view of the People of Jāḥiliyyah is to be found in traditions recorded by al-Bukhārī and Muslim. Al-Zayla‘i, vol. 3, 106.
Qur'ān, because the meaning of the words of the Exalted, "And complete the hajj and the 'umrah for God," is that the iḥrām be adopted for both right from the huts of one's family, as we have related earlier. Thereafter, there is the hastening of the iḥrām and its continued adoption beginning from the miqāţ till one is free of the duties of hajj. This is not the case in tamattu'. Accordingly, qirān is better than it. It is also said that the disagreement between us and al-Shāfi'i (God bless him) is that the qirān, in our view, performs two tawāfūs and two sa'ís, when in his view he performs a single tawāf and a single sa'ī.

He said: The description of qirān is that the worshipper adopt the iḥrām of 'umrah and hajj together from the miqāţ, and that he say after the prayer, "O Lord, I wish to perform the hajj and the 'umrah, so make them easy for me and accept them from me." The reason is that qirān is the combining of hajj and 'umrah, as you would say, "I have combined one thing with another," when you combine two things. The same is true when one adds the hajj to the 'umrah before completing four circuits of the tawāf, because the combination takes place when a major part of the tawāf is still outstanding. When he resolves to perform them together, he is to seek ease in their performance. He is to perform the 'umrah prior to the hajj in such combination. It is for this reason that he is to pronounce the talbiyah for the 'umrah and the hajj together, because he is beginning with the acts of the 'umrah. Likewise, he is to begin by mentioning the 'umrah first. If, however, he mentions it after hajj in his supplication and talbiyah, there is no harm in it, as the character way in between them is for combining them. If he forms the inward intention (in his heart) for combining them and does not mention them expressly in the talbiyah, it is valid on the analogy of ṣalāt.

When he enters Makkah, he is to begin by circumambulating the House in seven circuits, while performing ramal in the first three circuits. After this he is to perform sa'ī between al-Ṣafā' and al-Marwah. These are the acts of the 'umrah. He then commences the acts of hajj and performs the tawāf al-ṣa'dūm in seven circuits and performs the sa'ī afterwards as we have explained in the case of the person performing the ifrād form. He is to perform the acts of 'umrah first due to the words of

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regulating the rites of *hajj* does not give rise to atonement (*dam*) in their view. In the Imam's view, the circumambulation of greeting is a *sumah* and giving it up does not give rise to atonement, therefore, advancing it does not give rise to it either. As for the *sa'i*, there is no atonement if it is delayed due to occupation with another act, thus, there is no atonement for being occupied with the *tawaf*.

When he has cast stones at the Jamrat al-'Aqabah on the day of sacrifice, he is to slaughter a goat, or a cow, or a *badanah*, or participate in the seventh part of a *badanah*. This amounts to the *dam* of *qirān*. The reason is that *qirān* is within the meaning of *mut`ah* and offering a sacrifice is expressly mentioned in this case. The sacrifice may be of a camel, a cow, or a sheep, as we shall mention in the chapter on the topic, God, the Exalted, willing. By the use of the word *badanah* here he means a camel, even though the term *badanah* applies to it and to a cow, as we have mentioned. Just as a seventh part of a camel is permitted so is that in a cow.

If he does not have an animal eligible for slaughter, he is to fast for three days the last of which is to be the day of 'Arafah, and for seven days when he returns to his family, due to the words of the Exalted, "For a person who does not find an animal there is fasting of three days during the days of *hajj* and seven when he returns. These are ten complete days." as these are within the month of *hajj*. We rely on the well known prohibition about fasting on these days, therefore, the text (verse) is qualified by this prohibition. From a different perspective a deficiency overcomes these facts so that he cannot meet through them an obligation imposed in its complete form.

He is not to offer the fasts after these days, because these fasts are a substitute and substitute duties (conflicting with analogy) are not altered except by the texts. The text, however, has made them specific to the time of *hajj* whereas the permissibility of the original duty of sacrifice is maintained according to the original rule. It is related from 'Umar (God be pleased with him) that in a similar case he ordered the slaughtering of a goat. If he is not able to offer a sacrifice, he is to come out of the *ihram* in such a case he is liable for two atonements, one for *tamattu'* and the other for releasing himself from the *ihram* prior to the sacrifice.

If the *qarin* does not enter Makkah and heads for 'Arafat, he has given up his *'umrah* through the station at 'Arafat, because it is not possible for him to perform it. In such a case he will be basing the acts of *'umrah* upon the acts of *hajj*, which is against the prescribed form. He does not give up the *'umrah* just by heading towards 'Arafat, and this is the sound opinion from Abū Ḥanīfah (God bless him) as well. The distinction between this case and the case of one who offers *zuhr* on a Friday, according to him, is that the person proceeding for the *jumu`ah* is doing so after the performance of *zuhr*, while one proceeding towards 'Arafat in

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13 Here he confines the meaning of *badanah* to a camel and mentions a cow separately.

14 In this place, the words shouldn't mean both a camel and a cow. The Author elaborates the use of these terms by al-Quduri, a few lines below.

15 Qur'an 2:196

16 This has preceded in the Book of Sawm, however, there is a tradition recorded from A`ishah (God be pleased with her), recorded by al-Bukhari, that runs counter to this view. Al-Zayla'i, vol. 3, 112.

17 This goes against al-Shafi'i's opinion.

18 It is a gharib tradition. The text appears in al-MabsUT. Al-Zayla'i, vol. 3, 112.
qirān and tamattu' is prohibited from doing so prior to the performance of the 'umrah. The two cases are, therefore, distinguished.

The atonement by sacrifice (dam) for qirān is waived for him. The reason is that by giving up the 'umrah he is no longer performing the two rites combined. He is liable for atonement for giving up the 'umrah after having commenced the rites. He is also liable for performing it by way of qadā due to the validity of commencing this (form of hajj). Here he resembles a person prevented from hajj (due to a siege). God knows best.

Chapter 45
Tamattu'

The tamattu' form of hajj has greater merit than the ifrād form, in our view. It is related from Abū Ḥanīfah (God bless him) that ifrād has greater merit. The reason is that for one performing tamattu' the journey is undertaken for his 'umrah whereas the journey undertaken by one performing the ifrād is for his hajj. The basis for the Zāhir al-Riwāyah is that in tamattu' there is a combining of two worship and, therefore, it resembles qirān. Thereafter, there are additional rites in it like making the blood flow (sacrifice) as well as journey that is undertaken for his hajj. This is so despite an intervening 'umrah as that is subservient to the hajj and is like the intervening sunnah between the jumu'ah and moving towards it.

The persons performing the tamattu' are of two types: those who drive the sacrificial animal and those who do not. The meaning of tamattu' is availing of the opportunity to perform two rites in a single journey without proper intercourse with one's family in between. There are disagreements about this that we will elaborate, God, the Exalted, willing.

The description of this form is that the worshipper begin from the miqāt during the months of hajj. He is to adopt the iḥrām of 'umrah and then enter Makkah. He is to perform the circumambulation, the sa'ī and shave his head or clip his hair. He is then to release himself from the

3This is the Zāhir al-Riwāyah.
2It is also al-Shāfi'i's opinion.
1This is the meaning of this form.
state of ihram. This is the elaboration of the 'umrah. The same is to be done if he intends to perform the 'umrah alone, that is, he is to do what we have mentioned. This is what the Messenger of God (God bless him and grant him peace) did in the 'umrah of qadî.' Malik (God bless him) said that there is no shaving of the head for him, and the 'umrah is the tawaf and the sa'i. Our proof against him is what we have related as well as the words of the Exalted, "With your heads shaved," a verse that was revealed for 'umrat al-qadî.' Further, as the ihram for it is adopted with the talbiyah, the release from it is to be through shaving, as for hajj.

He is to cease pronouncing the talbiyah when he commences the circumambulation. Malik (God bless him) said that he is to cease doing so when his eyes fall on the House, because 'umrah is a visit to the House, which is completed with this. We rely on the fact that the Prophet (God bless him and grant him peace) stopped pronouncing the talbiyah when he kissed the Stone. Further, the purpose is tawaf, therefore, he is to terminate the talbiyah on commencing it. It is for this reason that those performing hajj stop pronouncing it upon the commencement of tawaf.

He said: He is to stay at Makkah in a state of release from the ihram, as he has been released from the 'umrah.

He said: On the day of tarwiyyah, he is to wear the ihram of hajj from the Mosque. The condition is that he wear the ihram from the Haram. As for doing so from the Mosque, it is not essential. The reason is that this worshipper falls within the category of a Makki (resident of Makkah), and the miqat for the Makki during hajj is the Haram as we have elaborated.

4 After this he becomes like a resident of Makkah. Therefore, he is not to perform the tawaf of greeting.

5 He (God bless him and grant him peace), in the year of Ħadîth al-Bukhârî and Muslim, al-Zayla'i, vol. 3, 113.

6 Qur'ân 48:27

7 It is recorded by al-Tirmidhî from Ibrâhîm b. Khalîl from 'Ara' from Ibn 'Abbâs (God be pleased with both). He stated that it is a sound tradition. Abû Dâwûd has recorded a tradition with the words: "The person performing the 'Umrah is to pronounce the talbiyah till he kisses the Stone." Al-Zayla'i, vol. 3, 114.

8 That is upon casting the first stone at the Jamrat al-Aqabah, on the day of sacrifice.

9 The Author has altered this rule, therefore, the preferred rule is different. It requires the wearing of the ihram from the Haram and not from the Mosque.

He is to undertake the acts that are undertaken by the worshipper undertaking the 'ifrâd form of the hajj, as he is now performing the hajj. Thus, the offering of the three fasts is to take place after the tawaf of the house. [Hajj, as he has been released during the ihram, is not allowed prior to the existence of their cause.

If he keeps the fasts, at Makkah, after putting on the ihram for 'umrah, but prior to undertaking the tawaf, it is valid in our view. Al-Shâfi'i (God bless him) disagrees. He relies on the words of the Exalted, "Then fasting for three days during hajj." We maintain that it is performance after the coming into existence of the cause, and the meaning of the word hajj mentioned in the text is the time of hajj, as we have already elaborated. There is, however, greater merit in delaying them till their last time, which is the day of 'Arafah, on the basis of the explanation with respect to aqrâb.

If the person performing tamattu' wishes to drive the sacrificial animal, he is to put on the ihram and drive his sacrificial animal. There is greater merit in this as the Prophet (God bless him and grant him peace) drove his animals with him. Further, there is great blessing and devotion
If it is a badanah, he is to garland it with a handle of the haver sack or with a sandal, on the basis of the tradition of 'A'ishah (God be pleased with her) that we have already related.14 Taqlid (putting a garland around the neck) is better than tajtil (putting a covering over the animal), because it is mentioned in the Book (Qur'an) and because it is symbolic whereas tajtil is for adornment. He is to pronounce the talbiyah and then put the garland (around the neck of the animal), because it is with this that he enters the state of ihram, that is, with the taqlid of the sacrificial animal, as well as by moving with it as has preceded. It is preferable that he tie the ihram with the talbiyah and drive the sacrificial animal, which is better than leading it. The basis is that the Prophet (God bless him and grant him peace) pierced the hump by intention and the right side by exception. Further, it is most effective in publicising the fact. The exception is when the animals are not responding and in this case he is to lead them.

He said: He is to perform the ish'ār of the badanah, according to Abū Yūsuf and Muhammad (God bless them). He is not to do so, according to Abū Ḥanifah (God bless him), and it is disapproved. Ish'ār, in its literal meaning, is the drawing of blood with a cut. Its description is that he is to rip the hump by piercing the base of the hump on the right side or the left side. The jurists said that it is better to do so on the left side because the Prophet (God bless him and grant him peace) pierced the left side by intention and the right side by exception. He is to spread the blood over the hump for announcing the fact of sacrifice. This practice is disapproved according to Abū Ḥanifah (God bless him), while it is good according to the two jurists. According to al-Shāfi`ī (God bless him), it is a sunnah as it is reported from the Prophet (God bless him and grant him peace) and from the Khulafā' Rashidūn (God be pleased with them). The two jurists maintain that the purpose of placing a garland is that the sacrificial animal should not be pushed away when it approaches water and drive the sacrificial animal from the left side. The jurists say that the Prophet (Peace be upon him) disapproved the preference of putting land around the neck, while it is a necessary measure to hinder the animal from approaching the water. Therefore, it is permissible to do this even if it is not perfect. Furthermore, it is reported from the Prophet (Peace be upon him) that when there is a conflict of evidences preference is given to the prohibiting evidence. The ish'ār undertaken by the Prophet (God bless him and grant him peace), he maintained, was undertaken for the protection of the animal for otherwise the polytheists would not have been prevented from blocking his path. It is said that Abū Ḥanifah (God bless him) disapproved the ish'ār undertaken by the people in his time, due to their excesses in this that led to the apprehension of the wound spreading. It is also said that he disapproved the preference of ish'ār over taqlid.

He said: When he enters Makkah, he is to perform the tawāf and the sa'i. This is for the 'umrah that we have elaborated for the person performing tamattu' and not driving a sacrificial animal. He is not to take off the ihram until he wears the ihram for the hajj on the day of tarwiyah. The basis is the saying of the Prophet (God bless him and grant him peace), "If I had known earlier about my affair what I came to know later, I would not have driven my sacrificial animal and I would have made it an 'umrah and then released myself from it." This negates release when the sacrificial animals are driven.

He is to wear the ihram of hajj on the day of tarwiyah just like the residents of Makkah wear the ihram. If he advances the wearing of the ihram over this day, it is valid. The hastening of the ihram of the hajj by the person performing tamattu' is better insofar as there is enthusiasm in this and greater hardship. This merit is available to the person who has

14The Author does not say that the tradition about the prohibition of mutilation has abrogated the tradition about ish'ār, but he does say so indirectly through preference.
15This has preceded prior to the chapter on qiran. It has been recorded by all the six Imam's of the sound compilations. Al-Zayla'i, vol. 3, 115.
16This is the tradition above that has been recorded by al-Bukhari and Muslim from Ibn 'Umar (God be pleased with both). Al-Zayla'i, vol. 3, 115.
17Reported partly by Muslim and partly by al-Bukhari. Al-Zayla'i, vol. 3, 115-16.
18The narration about the act of the Prophet (God bless him and grant him peace) is recorded by al-Bukhari, while that from the Khulafā' is recorded by the rest of the five sound compilations. Al-Zayla'i, vol. 3, 117-18.
driven the sacrificial animal as well as to one who has not done so. And he is liable for the sacrifice (dam), which is the dam of tamattu', as we have elaborated.

When he shaves his head on the day of sacrifice, he is released from both ihram. The reason is that the shaving of the head is the cause of release from the rites of hajj, as is the case with salutation in the case of prayer. Thus, he is released from both ihram.

The residents of Makkah do not have the facility of performing tamattu' or qiran and the ifrad form is exclusively for them. Al-Shafi'i (God bless him) disagrees with this, and the proof against him are the words of the Exalted, "This is for one who is not a resident here being present in al-Masjid al-Haram." The reason is that the two forms have been prescribed as a facility by waiving one of the two journeys. This facility is provided to the worshipper coming from outside Makkah.

A person who is within the mawqit has the status of a resident of Makkah so that he is not eligible for the tamattu' form or qiran. This is distinguished from the case of the resident of Makkah when he goes to Kufah and then performs qiran, in which case it is valid. The reason is that now his umrah and hajj are commenced from the miqat, and he acquires the status of the aflaqi.

If the person performing tamattu' returns to his land after being free of his umrah, when he did not drive a sacrificial animal, his tamattu' stands nullified. The reason is that he has come to have proper relations with his family in between the two rites, and it is with this that his tamattu' has been nullified. This is what has been reported from a number of Tabi'in.

If he had driven the sacrificial animal, his relations with his family were not proper, and his tamattu' is not nullified, according to Abu Hanifah and Abu Yusuf (God bless them). Muhammad (God bless him) said that it stands nullified because he has performed them with long journeys. The two jurists maintain that he is obliged to return as long as

- Except for women who wait till the tawaf of ziyarah, because the ihram of the umrah for women is like the ihram of hajj. Al-Ayni, 313.
- If a resident performs the qiran or the tamattu' form, he is liable for dam for committing an offence. But see below.

Qur'an 2:196

It is recorded by al-Taba'i in his book Aqam al-Qur'an. It is also recorded by al-Jasha'i, Al-Zayla'i, vol. 3, 123.

He maintains the intention of tamattu'. The reason is that driving the animal prevents him from (complete) release, therefore, his relationship with his family is not proper. This is different from the case of the resident of Makkah, who travels towards Kufah, adopts the ihram of umrah and drives the animal when he was not performing tamattu', because returning was not required of him, therefore, his relation with his family was proper.

If a person who wears the ihram of umrah prior to the months of hajj performs the tawaf with less than four circuits, and when the months of hajj commence he completes the circuits and wears the ihram of hajj, he is one who is to perform tamattu'. The reason is that the ihram in our view is a condition, therefore, advancing it to a time before the months of hajj is valid. It is the performance of the acts that are taken into account. As most of the acts are found, they are given the rule of all the acts.

If he performs four or more circuits of the tawaf of his umrah prior to the months of hajj and then performs the hajj within the same year he is not performing tamattu'. The reason is that he has performed most of the acts before the months of hajj. He has now entered the state where his rites are not rendered invalid due to sexual intercourse. It is as if he has attained release from them prior to the months of hajj. Malik (God bless him) takes into account completion during the months of hajj. The proof against him is what we have mentioned. The reason is that the facility is for the performance of acts, and the person performing tamattu' has the facility of performing two rites in a single journey during the months of hajj.

He said: The months of hajj are Shawwâl, Dhul-Qadah, and the ten days of Dhul-Hijjah. This is how it is reported from the three 'Abd Allah (Abd Allah ibn Mas'ud, 'Abd Allah ibn 'Umar and 'Abd Allah ibn 'Abbas) as well as from 'Abd Allah ibn Zubayr (God be pleased with them all). The reason is that the hajj is lost with the passing of the tenth of Dhul-Hijjah, but the loss is not realised if there is time remaining. This indicates that the meaning of the words of the Exalted, "The hajj is in
known months,"\(^{29}\) is two months and part of the third, not the whole month.

If the worshipper advances the wearing of the ihram to a time before these months, his ihram is permitted and the hajj can be validly performed. Al-Shâfi‘i (God bless him) disagrees. In his view, he has worn the ihram of the umrah as that is a rukn in his view.\(^{30}\) It is a condition in our view and resembles purification when it is advanced to a time before its time. The reason is that the ihram is the prohibition of things and the obligation of things, and this is valid at all times. It is, therefore, like a thing whose location is advanced.

When a person from Kufah travels for the umrah during the months of hajj, is free after completing it, shaves his head or clips his hair, then takes up domicile at Basrah, and thereafter performs hajj during the same year, he is performing the tamattu' form of hajj. The first is that he has acquired the facility of two rites in a single journey during the months of hajj. It is said that this is agreed upon. It is also said that it is the opinion of Abu Hanifah (God bless him). The two jurists maintain that he is not performing tamattu', because such a person is one whose umrah begins from the miqât and his hajj from Makkah, while his two rites in this case are both from the miqât. The Imam maintains that the first journey continues as long as he does not return to his own land. As both rites have been combined in this journey, he becomes liberal for the sacrifice of tamattu'.\(^{31}\)

If he travels for the umrah, renders it invalid, is free from it, clips his hair, then takes up domicile at Basrah, and thereafter performs the umrah during the months of hajj and performs the hajj in the same year, he has not performed the tamattu' form of hajj according to Abu Hanifah (God bless him), while the two jurists say that he has. The reason is that this is a renewal of the journey and he performed two rites in it. The Imam maintains that he continues in his first journey as long as he does not return to his own land.

\(^{29}\)Qur'an 2:2197

\(^{30}\)Thus, it is not to be advanced like the other arkân. It is a condition according to the Hanafis as already stated.

\(^{31}\)We have taken the liberty of altering the text slightly in this paragraph to ensure comprehension. The text in this paragraph needs to be verified by those who have access to manuscripts.
the Prophet (God bless him and grant him peace) granted an exemption
to women, on account of menstruation, for giving up the tawaf al-sadr.34

A person who takes up residence at Makkah is not required to per-
form the tawaf al-sadr. The reason is that it is required for one who
departs from Makkah, unless he takes up residence in Makkah after the
release of the first group (on the third day after the day of sacrifice),
according to what is reported from Abū Ḥanīfah (God bless him), while
some report it from Muḥammad (God bless him). The reason is that the
tawaf has become obligatory for him due to the arrival of its time, ibn,
it cannot lapse due to the intention of taking up residence after this time.
God knows best.

34It is recorded by al-Bukhari and Muslim from Ibn ‘Abbas (God be pleased with

Chapter 46

Offences

If the worshipper in the state of ihram applies perfume, he is liable for
expiation. If he applies perfume to a whole limb or more, he is liable
for atonement by slaughter (dam). The limb is like the head, calf, thigh
and what is similar. The reason is that the offence is completed by com-
plete utilisation, and this occurs through a complete limb that leads to
the complete penalty.3

If he applies perfume to what is less than a limb, he is liable for
sadaqah (charity), due to deficiency in the offence. Muḥammad (God
bless him) said that it is imposed in proportion to the (value) of atone-
ment by slaughter (dam) by comparing the part with the whole. It is
stated in al-Muntaqa that if he applies perfume to one-fourth of a limb,
he is liable for dam on the analogy of shaving of the head. We will men-
tion the distinction between them,3 God the Exalted, willing. Thereafter,
the obligation of dam is met by the slaughter of a goat in all cases except
two, which we shall mention in the chapter on sacrifice, God the Exalted,
willing.

Any sadaqah pertaining to the ihram, that is not determined is met
with one-half ša‘ of wheat, except that imposed for killing lice and locust.
This is how it has been transmitted from Abū Yūṣuf (God bless him).

He said: If he dyes his head with henna, he is liable for dam. The
reason is that it is deemed a perfume. The Prophet (God bless him and
grant him peace) said, "Henna is a perfume." If he places some cover over his head (to prevent the soiling of the ihram), he is liable for dam twice, one for perfume and the second for covering.

If he dyes his head with wasimah (dye), he is not liable for anything, because it is not a perfume. It is narrated from Abū Yūsuf (God bless him) that if he dyes his hair with wasimah for purposes of treatment against headache, he is liable for compensation in consideration of the fact that he will cover his head. This is the sound view. Earlier, Muhammad (God bless him) has mentioned in al-Aṣl the head as well as the beard, however, he restricted himself to mentioning the head in al-Jāmiʿ al-Ṣaghīr, which means that each one of them creates liability for atonement.

If he applies oil, he is liable for dam, according to Abū Ḥanīfah (God bless him). The two jurists said that he is liable for sadāqah (charity). Al-Shāfīʿi (God bless him) said that if he applies it to his hair, he is liable for dam for trying to remove the ruffles in his hair. If he applies it to another place there is no liability for him due to the absence of such need. The two jurists maintain that it is a kind of food except that it has its utility in the meaning of killing of lice and the removal of ruffles, thus, there is a deficient offence in its use. According to Abū Ḥanīfah (God bless him) the argument is that it is a base for perfume. It cannot be excluded from the category of perfumes for it kills lice, smoothens the hair, and does away with dirt and ruffles, thus, the offence is complete with all these things and that leads to dam. The fact that it is a food does not negate its being a perfume as well, like saffron. This disagreement is over pure oil and pure vinegar. As for oil to which perfume has been added like that of violets and lilies, or whatever resembles them, if used gives rise to dam, by agreement, because it is perfume. This, however, is the case when it is used as a perfume.

If he applies it as medicine to his wound or to cracks in his feet, then, there is no expiation for it. The reason is that it is not perfume in itself, but a base for perfume or it is perfume in some ways, therefore, its use as a perfume is stipulated (for liability). This is distinguished from the case where musk or something similar is used by way of medicine.

If he wears a stitched garment, or covers his head, for a full day, then, he is liable for dam, but if it is less than this he is liable for sadāqah. It is narrated from Abū Yūsuf (God bless him) that if he wears it for more than half a day, he is liable for dam, and this is the first opinion of Abu Tālib, Abū Ḥanīfah (God bless him) as well. Al-Shāfīʿi (God bless him) said that he becomes liable for dam by just wearing it, because deriving a benefit from it is complete when it touches his body. We maintain that the meaning of utilization is intended in wearing, but it is necessary to take into account a period so that such benefit is attained completely and dam is imposed. This duration is fixed at one day, because a dress is usually worn for one day and it is then taken off. We consider as deficient what is less than this and impose sadāqah except that Abū Yūsuf (God bless him) gave the major part of the day the rule of the whole.

If he covers himself with a shirt or ties it around him like a belt or ties trousers (sarīwil) around his waist, then there is no harm in it. The reason is that he did not wear it in the sense of a stitched dress. Likewise, if he inserts his shoulders into an outer garment without putting his arms into the sleeves. Zufar (God bless him) disagrees. The reason (in our view) is that he did not wear it in the meaning of wearing an outer garment, therefore, he is being careful to avoid wearing it. The fixing of a duration in the covering of the head is as we have explained. There is no disagreement that if he covers his entire head for a full day, he is liable for dam as he is forbidden from doing so. If, however, he covers part of his head, then, the report from Abū Ḥanīfah (God bless him) is that he took into account one-fourth on the basis of shaving of the head and covering of the private parts. The reason is that covering part of it is the intended utilization according to the practice of some people. The report from Abū Yūsuf (God bless him) is that he took into account the major part of the head on the basis of what is actually done.

If he shaves one-fourth or more of his head or his beard, then, he is liable for dam. If it is less than one-fourth, he is liable for sadāqah. Malīk (God bless him) said that he is not liable unless he shaves the entire head. Bare minimum on the analogy of the vegetation of the Haram. We maintain that shaving off part of the head amounts to the derivation of full

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5There is no dam for applying grease or fat according to some.

6In other words, something that is primarily a perfume cannot be used as a medicine without giving rise to liability for dam.
benefit, as it is practised, thus, the offence is complete through it, but is
deficient in what is less than it. This is distinguished from applying per-

de uncomfortable to part of a limb, because that is not the intended purpose. Likewise,

shaving off part of the beard is practised in Iraq and the land of the Arabs.

If he shaves the entire nape of the neck, he is liable for dam, because it is a limb that is the object of shaving. If he shaves both armpits or one

of them, he is liable for dam, because each is the object of shaving for the elimination of ailments and for the attainment of ease. It, thus, resembles

shaving the pubic region. He has mentioned shaving of the armpits here,

while plucking is mentioned in Kitāb al-Asl and that is a sunnah.

Abū Yūsuf and Muhammad (God bless them) said that if he shaves a

limb, he is liable for dam, but if it is less than a limb, he is liable for feed-

ing. By this he (al-Qudūrī) means the chest or calf or what is similar. The

reason is that this is intended by way of whitening (applying a whitener),

thus, the offence is complete with the shaving of the entire limb, but is
deficient when only a part of it is shaved.

If he clips part of his whiskers, he is liable for food based on rea-

sonable estimation. The meaning is that the extent of the moustache

clipied is to be examined to determine what part of the one-fourth of

the moustache it is. He is liable for providing food proportionately, thus,

for example, if a fourth of the fourth is clipped he is liable for the value of

one-fourth of a goat. The word “clipping” of the beard indicates that the

sunnah in this is clipping and not shaving. The sunnah is to clip the hair

till they are level with the upper lip.

He said: If he shaves the locations of cupping, he is liable for dam

according to Abū Ḥanīfah (God bless him). The two jurists said that he is

liable for sadaqah. The reason is that he has shaved these locations for purposes of cupping, which is not one of the prohibited things, so also whatever is a means to it, except that there is in it the removal of

what is not to be removed, therefore, sadaqah is imposed. According to

Abū Ḥanīfah (God bless him), the shaving of these locations is intended,
because he cannot attain his ultimate objective without it and further the

removal of what is not to be removed is found with respect to a complete

limb, therefore, liability for dam is imposed.

If a person shaves the head of a person in the state of ihram with

without his order, then, the person who shaved is liable for sadaqah,


when he was asleep. The reason is that according to his principle a person coerced is completely exempted from liability for the act, and sleep

is an extreme case for this. In our view, due to the cause of sleep or coer-

cion the sin is eliminated but not the effect of the rule, and the cause has

been established, and that is the benefit derived from ease and adorn-

ment, thus, he is certainly liable for dam. This is distinguished from the

case of the person under duress who is given an option (between three

types of atonement), because the calamity afflicting him is that of nature,9

while here it is due to the act of individuals. Thereafter, the person whose

head is shaved does not have recourse to the person who shaved his head

(for expenses) as the dam is imposed due to the facility he has derived.

He is now like a person who has derived a benefit with respect to the right

of 'aqr. Likewise if the person who shaves his head is free of the require-

ments of ihram, because the response is no different with respect to the

person whose head is shaved. As for the person who shaves the head is

liable for sadaqah in this issue of ours in both instances. Al-Shāfī`i (God

bless him) said that he is not liable in any way. The same disagreement

applies when a person in the state of ihram shaves the head of a person

who is not wearing the ihram. He (al-Shāfī`i) maintains that the mean-

ing of deriving a benefit is not realised by shaving the head of another,

and that is the cause of the obligation. We maintain that the removal of

something that grows out of the body of a human being is one of the

prohibitions of ihram due to its entitlement to protection with the status

of vegetation within the Haram. Thus, a distinction cannot be drawn

between his own hair and that of another, except that the offence is com-

plete when it pertains to his own hair.

If he clips the whiskers of a person not in a state of ihram or clips his

nails, he is to feed the needy as he likes. The reasoning underlying this is

what we have stated. It is not devoid of a facility as he may find offence in

the tafath (dirt) of another, even if such offence is less than being affected

by his own tafath, therefore, he is liable for feeding.

If he clips the nails of his hands or feet,10 he is liable for dam, because

this is one of the prohibitions insofar as it is the elimination of dirt and

removal of what grows out of the body. If he cuts all of them, then this is

the availing of a complete facility, and he is liable for dam.

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9*Force majeure.*

10*Also called 'aqr. Compensation paid for unlawful intercourse with a female slave.*

11*He means thereby the clipping of all the nails.*
The atonement is not to be enhanced beyond *dam* if this is done in a single session, because the offence is of the same type. The same applies if the act is undertaken in different sessions, according to Muhammad (God bless him),10 because it is based upon concurrent assessment, and resembles the expiation of breaking the fast,11 unless the expiation is affected by an intervening expiation as the prior violation has been dealt with by the first expiation. In the opinion of Abū Ḥanīfah and Abū Yusuf (God bless them), he is liable for four *dam* if he clips (the nails of) one hand and one foot in each session. The reason is that the predominant meaning is that of *ʿibādah*, thus, concurrent imposition is restricted to a single session, as is the case with the verses of prostration.

If he clips the nails of one hand or one foot, he is liable for *dam*. This is done by assigning to one-fourth the rule of the whole, as in the case of shaving of the head.

If he clips less than five nails, he is liable for *sadaqah*. This means that *sadaqah* is to be paid for each nail. Zufar (God bless him) said that *dam* is imposed for cutting three nails, and this was Abū Ḥanīfah’s first opinion. The reason is that there is liability of *dam* for cutting the nails of one hand and three are the major part of these nails. The reasoning stated in the Book is that the nails of one hand are the minimum for whose clipping *dam* is imposed. We have already treated one hand as standing in place of all the nails, therefore, we cannot treat a major part of the nails to stand in place of the nails of one hand, as this leads to a situation to which there is no end.

If he clips five nails from different places of the hands and feet, he is liable for *sadaqah*, according to Abū Ḥanīfah and Abū Yusuf (God bless them). Muhammad (God bless him) said that he is liable for *dam* taking into account the analogy of clipping of the nails of one hand and the shaving of one-fourth of the head from different locations. The two jurists argue that the completion of the offence is through the attainment of facility and adornment. By clipping his nails in this fashion he feels offended and disfigured as distinguished from shaving (of one-fourth of the head) for that is sometimes practised as has preceded. When the offence is deficient, *sadaqah* is to be imposed. As the clipping of each nail entails the feeding of a needy person, it is the same if he clips more than five different nails, when the amount required for feeding equals that for the *dam*, in which case he is to reduce from it what he likes.

He said: If the nail of the person in a state of *ihram* is broken and is still attached and he takes it off, there is no liability for him. The reason is that it will not grow after being broken, thus, it resembles a dead tree from among the trees of the Ḥaram.

If he applies perfume or wears a stitched garment or shaves his head due to an excuse, then he is given an option. If he likes he may sacrifice a goat, or if he likes, he may give charity to six needy persons of three sa’s of food, or if he likes, he may fast for three days, due to the words of the Exalted, “The *fidyah* (ransom of fasting or *sadaqah* or the rites.”14 The word “or” grants an option, and the Messenger of God (God bless him and grant him peace) elaborated this as we have stated.15 The verse was revealed for the case of a person with an excuse. Thereafter, fasting is valid at any place he likes, because it is worship at all places, and so also *sadaqah*, in our view, as we elaborated. As for the rite of sacrifice it is specific to the Ḥaram, by agreement, because the flowing of blood does not lead to the attainment of nearness to God, except with reference to time and place. This *dam* is not specific to time, therefore, it is deemed specific to a place.

If he chooses feeding, it is valid if he does this for the morning and evening meal, according to Abū Yusuf (God bless him), on the analogy of the expiation for breaking an oath. According to Muhammad (God bless him), it is not valid as *sadaqah* is based on the transferring of ownership and that is the word mentioned (in the verse).

### 46.1 Conjugal Relations

If he looks at the private part (vagina) of his wife16 with desire and ejaculates, there is no liability for him. The reason is that what is prohibited is sexual intercourse, which is not found in this case,17 and it is as if he used his imagination and ejaculated. If he kisses her or fondles her with

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10That is, there is a single *dam*.
11There is a single expiation even when there is subsequent eating.
12There is a single expiation even when there is subsequent eating.
13Qur'an 2:203
14He points to the tradition of Ka'b that has been recorded by the six Imams of the sound compilations, Al-Zaylimi, vol. 3, 74.
15He mentions his wife here, however, the same act with respect to a strange woman is also prohibited, in this situation and otherwise too.
16Sexual intercourse is penetration with or without ejaculation.
The same is the response for intercourse outside the vagina. According to Al-Shafi'i (God bless him) his ihram is rendered invalid in all these cases if he ejaculates. He says this on the analogy of fasting. We maintain that the invalidity of hajj is contingent upon sexual intercourse, therefore, it is not rendered invalid due to all prohibitions. In these cases the activity is not intended to be sexual intercourse, thus, what is associated with intercourse is not to be associated with these acts, except when there is the idea of utilising and benefiting from a woman, and this is the prohibition of the ihram. Thus, he is made liable for dam as distinguished from fasting, because the prohibited element in it is the satisfaction of desire and that is not attained with ejaculation outside the vagina.

If he has intercourse through one of the passages prior to the station of 'Arafah, his hajj is not valid, and he is liable for sacrificing a goat. He is to continue with the hajj like one whose hajj has not become invalid. Therefore, he is liable for qada' (substitute later performance). The basis for this is the report that "the Messenger of God (God bless him and grant him peace) was asked about a person who had intercourse with his wife when both were in a state of ihram for the hajj. He replied, 'They have to make the dam flow, to continue with their hajj, and they are liable for hajj in the future.'" This is what has been transmitted from a group of the Companions (God be pleased with them all). Al-Shafi'i (God bless him) said that he is to sacrifice a badanah on the analogy of the situation where he has intercourse after the station at 'Arafah. The proof against him is the unqualified implication of what we have related. Further, when qada' is imposed, it is imposed for securing an interest, therefore, the impact of the offence stands lightened, and a goat is sufficient. This is distinguished from what is after the station as there is no qada' in that case. Thereafter, the two passages are treated as equivalent. It is narrated from Abū Hanifah (God bless him) that in the case of the passage other than the vagina, the hajj is not rendered invalid due to the deficiency in the meaning of intercourse. Thus, there are two narrations from him.

He is under no obligation to separate from his wife in the performance of qada' of what both have rendered invalid, in our view. Malik disagrees (saying that it is vitiated) if he has intercourse prior to their hjalj. Malik agrees (saying that it is vitiated) if he has intercourse prior to the saying of Ibn 'Abbas (God be pleased with both) or because it is similar to it. Thus, the sacrifice of a badanah is imposed due to the saying of Ibn 'Abbās (God be pleased with both) because it is the highest form of facility, therefore, the obligation is enhanced. If he has intercourse after the shaving of his head, he is liable for the sacrifice of a goat, due to the continued restriction of his ihram with respect to women and not the wearing of stitched clothing and what is similar to it. Thus, the offence is light and the sacrifice of a goat is sufficient.

If a person has intercourse after the station at 'Arafah, his hajj is not vitiated, and he is liable for sacrificing a badanah. Al-Shafi'i (God bless him) disagrees (saying that it is vitiated) if he has intercourse prior to the ramy (of Jamrat al-Aqabah); the basis (in our view) are the words of the Prophet (God bless him and grant him peace). "If a person stays at 'Arafah, his hajj is complete." The sacrifice of a badanah is imposed due to the deficiency in the ihram due to the permissibility of intercourse, nor does it make sense after it as they remember what happened to them in terms of severe hardship on account of a minor fleeting pleasure; their remorse will increase and so will the avoidance (of the act), thus, separation has no meaning.

18 It has been recorded by Abū Dāwūd in al-Marāṣil. Al-Zayla'i, vol. 3, 125.
20 The rectification of his error in losing the hajj.
21 But a badanah has to be slaughtered, and not a goat, due to the gravity of the offence. See next rule below.
22 The first saying that it is rendered invalid and the second saying that it is not.
23 This has preceded several times. Al-Zayla'i, vol. 3, 127.
24 He points to the tradition recorded by Imam Malik (God bless him) in al-Muwatta: Al-Zayla'i, vol. 3, 127.
more circuits of the tawaf,\textsuperscript{25} he is liable for a goat, but his 'umrah is not vitiated. Al-Shafi'i (God bless him) said that his 'umrah stands vitiated in both cases, and he is liable for sacrificing a badanah on the analogy of hajj as this is a definitive obligation in his view like hajj. In our view, it is a sunnah and is, therefore, of a lesser status than it. Thus, sacrificing a goat is imposed for its violation; while a badanah is imposed for hajj to give expression to the difference between them.

A person who has intercourse out of forgetfulness is in the same position as one who does it intentionally. Al-Shafi'i (God bless him) said that intercourse by one who does it out of forgetfulness does not vitiate the hajj. The same disagreement applies to the case of intercourse with a woman asleep and one who is coerced. He maintains that the prohibition is due to the element of obtaining a specific facility in the state of hajj as this is a definitive obligation in his view like hajj. In our view, it is a sunnah and is, therefore, of a lesser status than it. Thus, sacrificing a goat is imposed for its violation; while a badanah is imposed for hajj to give expression to the difference between them.

46.2 \textit{Tawaf in a State of Impurity and Deficient Performance}

A person who performs the \textit{tawaf al-qi	extdegree um} in a state of hadath, is liable for sadaqa. Al-Shafi'i (God bless him) said that his tawaf is not to be counted at all due to the words of the Prophet (God bless him and grant him peace), “The tawaf of the House is salat, except that God, the Exalted, has permitted speech in it.”\textsuperscript{28} Thus, taharah will be a condition for it. We rely on the words of the Exalted, “Perform the tawaf of al-Bayt al-'Atiq.”\textsuperscript{29} These words do not impose any restriction of taharah, thus, it is not a definitive obligation. Thereafter, it is said that it is a sunnah, but the correct view is that it is an obligation (wajib) so that a

\textsuperscript{25}Four circuits are the major part of the tawaf. The major part is assigned the rule of the whole.
\textsuperscript{26}Al-Shafi'i (God bless him) is focusing on intention and this is not found here.
\textsuperscript{27}In other words, the offence according to Hanafi jurists is one of strict liability. Accordingly, intention is not taken into account. The focus is on the form of the act.
\textsuperscript{28}This has preceded in the chapter on the ihram. Al-Zayla'i, vol. 3, 112.
\textsuperscript{29}Qu	extsuperscript{a}r'an 2:299.

compensatory penalty is imposed for relinquishing it. Further, the report (khabar) requires that it be acted upon, therefore, an obligation\textsuperscript{30} is established through it. Accordingly, if he commences this tawaf when it is a sunnah, it becomes an obligation (wajib) by its commencement,\textsuperscript{31} and a deficiency creeps into it by the relinquishment of taharah. This is rectified by sadaqa so as to express its lower status as compared to a wajib. Al-Shafi'i deemed a wajib by God, and that is the \textit{tawaf al-ziyara}. The same rule applies to each tawaf that is voluntary.\textsuperscript{32}

If he performs the \textit{tawaf al-ziyara} in a state of hadath, he is liable for sacrificing a goat. The reason is that he has caused a deficiency in a rukn (essential element), thus, it is more grievous than the first, and it is subjected to dam.

If he is in a state of janabah, he is liable for a badanah. This is how it has been related from Ibn `Abbas (God be pleased with both). The reason is that janabah is an enhanced form of hadath, therefore, it is necessary to compensate its deficiency with a badanah for expressing the difference. The same applies if he performs the major part of the tawaf in a state of minor or major ritual impurity, because the major part of a thing is assigned the rule of the whole.

It is better if he repeats the tawaf as long as he is in Makkah, and there is no sacrifice by slaughter for him. In certain manuscripts it is stated that he is under an obligation to repeat the tawaf. The correct view is that in the case of hadath he is ordered by way of recommendation to repeat the tawaf, and in the case of janabah he is ordered by way of obligation to repeat it. The reason is that the excessive deficiency due to janabah and a lesser deficiency due to hadath. Thereafter, if he repeats it, after having performed it in a state of hadath, there is no sacrifice by slaughter even if he repeats it after the day of sacrifice. The reason is that after repetition nothing but a suspicion of deficiency remains. If he repeats it, after having performed it in a state of janabah during the days of sacrifice, there is no liability of atonement for him, because he repeated it within its time. If, however, he repeats it after the days of sacrifice, he is liable for dam according to Abū Hanifa (God bless him) due to delay as is known from his opinion. If he returns to his family, when he had performed it.
in a state of janābah, he is under an obligation to return, because he has neglected the major part, and it is as if he has not performed the tawāf at all. If a person gives up four circuits, he remains in a state of janābah for the entire tawaf. The reason is that what is given up is excessive. Thus, he is liable for sacrificing a goat. If he returns to his family and does not repeat the tawaf, he is liable for dam. The reason is that he caused a deficiency in his tawaf by relinquishing what comes close to a fourth, and sadaqah cannot compensate this.

If a person performs the tawaf al-sadr without minor ablution (wudū'), while he performs the tawaf al-sadr at the end of the days of tashriq in a state of purity, he is liable for dam. If he performs the tawaf al-sadr in a state of major impurity (janābah), he is liable for two dams according to Abū Hanīfah (God bless him). The two jurists said that he is liable for a single dam. In the first situation, the tawaf al-sadr is not transferred to the tawaf al-siyarah, because it (the former) is wājib, while the repetition of the tawaf al-siyarah on account of hadath is not wājib; it is mustahabb (recommended), therefore, the other cannot be transferred to it. In the second situation, the tawaf al-sadr is transferred (converted into) the tawaf al-siyarah, because it requires repetition. Thus, he is now one who has relinquished the tawaf al-sadr after the tawaf al-siyarah till later than the days of sacrifice. Accordingly, one dam becomes obligatory on account of relinquishing sadr, by agreement, and another one, with disagreement, for delaying it. He is, however, directed to repeat the tawaf al-sadr as long as he is at Makkah, but he is not given this direction after he has returned, as we elaborated.

A person who performs the tawaf for 'umrah and performs the sa'ī without wudū' and then releases himself from the ihram, is to repeat both (the tawaf and sa'ī) as long as he is in Makkah and he will not be liable for anything. As for the repetition, it is imposed for bringing about a deficiency in it due to hadath, and as for the sa'ī, it is subservient...
(dependent upon) the tawaf. If he repeats them, he will not be liable for anything due to the removal of the deficiency.

If he returns to his family prior to the repetition, he is liable for dam, because of giving up purification during performance. He is not ordered to go back due to the occurrence of release (from the ihram) by the purification of the rukn (essential element). The reason is that the deficiency is minor and he is not liable for anything on account of the sa’i, because he performed it as a legal effect of a tawaf that he has reckoned as such. Likewise, if he repeats the tawaf and does not repeat the sa’i, according to the sound view.

A person who relieves the sa’i between al-Safâ and al-Marwâh, is liable for dam, but his hajj is complete. The reason is that the sa’i is one of the obligations in our view, therefore, its relinquishment entails dam and not vitiation.

A person who moves out of ‘Arafât prior to the imam is liable for dam. Al-Sha‘bî (God bless him) said that he is not liable for anything as the rukn (essential element) is the station itself, therefore, he is not liable for not prolonging his stay. We maintain that staying on till the setting of the sun is obligatory due to the words of the Prophet (God bless him and grant him peace), “Go forth after the setting of the sun.” Thus, giving it up gives rise to the obligation of dam. This is different from the case where he stays during the night, because prolonging of the stay is for one who makes the stay during the day and not the night. If he returns to ‘Arafah after the setting of the sun, the liability for dam is not waived according to the Zâhir al-Riwayah, because what was relinquished cannot be caught again, but the jurists disagree about the situation where he returns prior to the setting of the sun.

A person who relieves the station at Muzdâlifâh is liable for dam, because it is one of the obligations.

A person who relieves the throwing of stones (ramy) at the Jâmâr on all the (required) days, is liable for dam, as the relinquishment of an obligation is realized. A single dam is sufficient in his case, because the category is common as in the case of shaving. Relinquishment is realized upon the setting of the sun on the last of the days appointed for ramy. The reason is that nearness to God is not acknowledged except on these days. As long as the days remain, repetition is possible and he may undertake ramy in a combined sequential order. Thereafter, due to the delay in ramy, the liability of dam arises according to Abû Ḥanîfah (God bless him), but the two jurists disagree.

If he relinquishes the ramy of one day, he is liable for dam, because it is a complete rite in itself. A person who relinquishes the ramy of one of the three Jâmârs is liable for sadaqah, because on this day the entire ramy is a single rite, while the relinquished part is less than this, unless the relinquished part increases to more than half, in which case he will be liable for dam due to the neglect of the major part. If he gives up the ramy of the Jamrat al-Aqabah on the day of sacrifice, he is liable for dam, because it is the entire ritual of ramy for this day. Likewise if he relinquishes a major part of it. If he gives up the throwing of one, two or three stones, he is to make a sadaqah of one half sa’ for each stone, unless the total reaches the value of dam, in which case he can lessen whatever amount he likes from the total. The reason is that what is given up is the minor part, therefore, sadaqah suffices.

A person who delays shaving of the head till after the passing of the days of sacrifice, is liable for dam according to Abû Ḥanîfah (God bless him). Likewise, if he delays the tawaf al-ziyarah, until the passing of the days of tashriq, he is liable for dam in his view. The two jurists said that there is no liability for atonement in both situations. The same disagreement applies in the delaying of ramy, the advancing of one rite before another, the sacrifice of one performing qirân before ramy and the shaving of the head prior to sacrificial slaughter. The two jurists maintain that what is lost can be recaptured by qada’, and with qada’ nothing else is to be imposed. The Imam relies on the tradition of Ibn Mas‘ûd (God be pleased with him) that he said, “He who advances one rite before another is liable for dam.” Further, delaying a rite till after its location gives rise to dam in rites determined by location like the ihram. The same applies to delay with respect to time in things determined according to time.

If he shaves his head during the days of sacrifice in a place other than the Haram, he is liable for dam. A person who performs the ‘umrah and then moves out of the Haram, is liable for dam according to Abû Ḥanîfah and Muḥammad (God bless them). Abû Yûsuf (God bless him)
said that he is not liable for anything. He (the Author) (God be pleased with him) said: The opinion of Abū Yusuf (God bless him) is mentioned in al-Jāmi’ al-Sāhir with respect to the person performing the 'umrah, but the person performing the ḥajj is not mentioned. It is said that there is agreement about the latter, because the sunnah prevailing in the case of ḥajj was shaving of the head at Minā, which is part of the Haram. The correct view, however, is that there is disagreement about it. Abū Yusuf (God bless him) maintains that shaving of the head is not specific to the Haram. The reason being that the Prophet (God bless him and grant him peace) and his Companions (God be pleased with them) were confined to al-Hudaybiyah, and they shaved their heads at a place other than the Haram. The two jurists maintain that as shaving of the head has been deemed a cause for release from the ḥaram, it is like the salutation at the end of ṣalāt. Thus, it is one of the obligations of the ḥaram even though it is the cause of release. As it is a rite, it is specific to the Haram like slaughter. Further, part of al-Hudaybiyah is within the Haram, and perhaps they shaved their heads there. The conclusion is that shaving of the head is determined by time as well as location according to Abū Ḥanīfah (God bless him), while according to Abū Yusuf (God bless him), it is not determined by either. According to Muhammad (God bless him) it is determined by location and not time. According to Zufar (God bless him) it is determined by time and not location. This disagreement about determination applies to compensation through dam. As for release from the ḥaram, it is not determined (by anything) by agreement.

Clipping of the hair and shaving of the head in the case of the 'umrah are not determined by time on the basis of consensus (ijmā’), because the 'umrah itself is not determined by time as distinguished from the location; which is determined.

He said: If he does not clip his hair until he returns, and then clips it, he is not liable for anything in the opinion of all the jurists together. The meaning is that the person performing the 'umrah departs from the Haram and then comes back to it. As he has undertaken the clipping or shaving at his location in the Haram, he is not liable for compensation.

If the person performing qirān shaves his head prior to sacrificial slaughter, he is liable for two dams, according to Abū Ḥanīfah (God bless him), one dam for shaving his head at other than its appointed time, which is after the slaughter, and another dam for delaying the slaughter till after the shaving of the head. According to the two jurists, he is liable for one dam and that is the first. He is not liable for anything on account of delay, on the basis of what we have said.

46.3 GAME AND REPARATION FOR HUNTING

Know that game\(^8\) on land is prohibited for a person in the state of ḥaram, while prey in the sea is permissible due to the words of the Exalted, “Lawful to you is the pursuit of water-game.”\(^9\) Game on land is one that has been born on land and has its habitat on land, while game in the sea is one that is born in the water and has its habitat in water. Game is one that protects itself and is wild in its original creation. The Messenger of God (God bless him and grant him peace) exempted five of the vicious animals: a mordacious dog, wolf, kite, crow, snake and scorpion.\(^10\) These animals attack on their own to cause injury. The meaning of crow here is one that feeds on filth. This is narrated from Abū Yūsuf (God bless him).

He said: If the muhrim kills game or points it out to someone who kills it, he is liable for compensation. As for the rule for killing, it is based upon the words of the Exalted, “Kill not game while in the sacred precincts or in a state of pilgrimage.”\(^11\) The verse explicitly mentions compensation. As for pointing to the animal, there is disagreement with al-Shāfi’i (God bless him). He says that compensation pertains to killing, and pointing out is not killing and is similar to pointing by one who is not under the restriction of ḥaram towards a permissible animal. We rely on what we related of the tradition of Abu Qatadah (God be pleased with him).\(^12\) 'Atā’ (God bless him) said that the jurists arrived at a consensus that whoever points out game is liable for compensation. The reason is that pointing out game is a prohibition of the ḥaram and it amounts to the

\(^8\) Hunting in all its forms is prohibited, whether the animal is owned or wild and whether it is permitted for consumption or otherwise.

\(^9\) Qur’an 5:96

\(^10\) In other words, these five can be killed without giving rise to liability for hunting.

\(^11\) There are two traditions on this, however, they indicate different rules and one cannot stand in place of the other. He appears to combine the ahkām arising from the two traditions. Al-Zayla’i, vol. 3, 130.

\(^12\) Qur’an 5:95

\(^13\) It is gharrīb. Al-Tabāwī (God bless him), however, says that this has been reported from a number of Companions (God be pleased with them). Al-Zayla’i, vol. 3, 132.
destruction of the sanctuary of the animal that feels safe in its being wild and concealed. Thus, the act is like destruction of property.\(^4^4\) Further, the muhārim by virtue of his ihram has undertaken to refrain from harassing animals, therefore, he is liable for relinquishing his undertaking just as the custodian of property may do.\(^4^5\) This is distinguished from the case of the person not under the restrictions of ihram, because there is no such undertaking on his part. In addition to this, even the unrestricted person is liable for compensation as is narrated from Abū Ḫayr and Zuqar (God bless them).\(^4^6\) Pointing out game that leads to compensation is one in which the person for whom the animal is pointed out is not aware of the location of the animal, and also that the pointing out is truthful so that if he is lying and another person points out truly, there is no liability for the liar.

If the person pointing out (the animal) is not in the state of ihram in the Haram, he is not liable for anything on the basis of what we said. The person who does so intentionally and one who does so out of forgetfulness are the same. The reason is that it is compensation whose existence depends upon destruction, thus, it is similar to financial penalties for destruction of wealth.

The first time offender and one who repeats it are equal, because the cause of compensation is not different.

The mode of compensation according to Abū Ḫanīfah and Abū Yūsuf (God bless them) is that the game be valuated at the place where it has been killed or at the nearest location from this place that is populated where two persons in possession of probity valuate it. Thereafter, he has an option with respect to ransom (fīda). If he likes he may purchase an offering and slaughter it if the value is that of an offering or he may purchase food with it and give it as charity to the needy at one-half sā' of wheat, one sā' of dates or barley or if he likes he may fast, as we will state. Muhammad and al-Shāfi`i (God bless them) said that an equivalent animal is due on account of game where such an equivalent is possible. Thus, in the case of a gazelle a goat is due, for a hyena also a goat is due, for a rabbit a kid, for a jerboa a four month old kid, for an ostrich a camel, and for a zebra a cow. This is based on the words of

\[\text{44}^{4}\text{There is the act of one who points out the animal. He violates the protection available to the animals, thus causing their destruction.}\]

\[\text{45}^{4}\text{By wearing the ihram, he undertakes to protect the animals.}\]

\[\text{46}^{4}\text{This is claimed to be a statement in Mukhtasar al-Karkhi.}\]

the Exalted. “The compensation is an offering, brought to the Ka`bah, of an animal equivalent to the one he killed, as adjudged by two just men among you.”\(^4^7\) The similar for a quadraped is what resembles it in form, because value is not a quadraped. The Companions (God be pleased with them) imposed similars on the basis of the nature and look of the quadraped.\(^4^8\) The ostrich, gazelle, zebra and rabbit are compensated as we have explained. The Prophet (God bless him and grant him peace) said, “The hyena is game and there is a goat for it.”\(^4^9\) An animal for which there is no similar is compensated by value according to Muhammad (God bless him), like sparrows, pigeons and others. When value is imposed, the opinion of these two jurists is like that of the other jurists. Al-Shāfi`i (God bless him) imposes a goat for a pigeon and establishes the similarity between them by saying that each one of them gulps down water and makes a noise. According to Abū Ḫanīfah and Abū Yūsuf (God bless them) absolute similarity is one that is so in form and meaning and it is not possible to interpret the verse in such terms, therefore, it is interpreted to mean similarity in meaning alone as this is known to the law, as in the case of the rights of individuals or because this is the meaning fixed by consensus (ijma`) or because this is the meaning that gives it generality, while its opposite (form) restricts it. In the meaning of the text—God knows best—“the reparation of the wild animal killed,” the word “animal” applies to the wild as well as the domesticated animal. This is what Abū `Ubaydah and al-Asma`i (God bless them) said. The meaning of what he related is estimation through it rather than the imposition of a specific thing.

Thereafter, the killer has an option in deeming it an offering, or food, or fasting, according to Abū Ḫanīfah and Abū Yūsuf (God bless them). Muhammad and al-Shāfi`i (God bless them) said that the option belongs to the two valuators. If they give the ruling of an offering, an equivalent has to be found, as elaborated by us. If they give a ruling of giving food or fasting, then the ruling is what is maintained by Abū Ḫanīfah and Abū Yūsuf (God bless them). These two jurists argue that the option has been prescribed by way of facility for one who is in haste to meet the

\[\text{47}^{4}\text{Qur`an 5:95}\]

\[\text{48}^{4}\text{It is recorded by Imam Malik (God bless him) in \textit{Muwatta}, Al-Zayla`i, vol. 3, 132.}\]

\[\text{49}^{4}\text{It is recorded by the compilers of the four Sunan. Al-Tirmidhi said that it is hasan śahih. Al-Zayla`i, vol. 3, 134.}\]
obligation, therefore, it belongs to the killer, as in the case of exploitation
for breaking an oath. Muhammad and al-Shaib'ī (God bless them)
(just men), or it is the object of the ruling of valuation. Therefore, the
words “food” and “fasting” are mentioned with the word “or,” thus, the
option belongs to the two valuators. We maintain that the term expiation
is mentioned in conjunction with compensation and not offering on the
evidence that it is in the nominative (like compensation). Likewise, the
words, “Or estimated it to be fasting” are in the nominative. Thus, there
is no evidence in these of the option belonging to the valuators. There-
after, their authority is to provide valuation of the destroyed animal, af-
fter which the option belongs to the person with the liability.

They are to undertake the valuation at the place where he struck
it down, because there is a difference in valuation due to a difference in
locations. If the place is a wilderness where game is not sold, they are
to assign the value at the nearest location where sale and purchase takes
place. The jurists said that evidence that one witness is sufficient, but two are better as
that entails greater precaution and is less likely to be erroneous, as is done
in the rights of individuals.

The offering is not to be slaughtered at a place other than Makkah,
due to the words of the Exalted, “An offering that reaches the Ka'bah
Feeding the needy may be undertaken at a place other than Makkah.
Al-Shaib'ī (God bless him) disagrees. He treats it like the offering on the
basis of the common meaning of ease for the residents of Makkah. We
maintain that the offering is a method of attaining nearness to God that
cannot be rationalized; therefore, it is associated with place and time. As
for sadaqah, it can be rationalized in terms of nearness at all times and
locations.

Fasting is permitted at a place other than Makkah as it attains near-
ness to God at all places.

If he slaughters the offering at Kufah, it is deemed valid by treating
it like feeding the needy. The meaning is that gives a sadaqah of meat.

In doing so, he does greater justice by matching the value of the meat (of
the animal hunted). The reason is that slaughter (at a place other than
Makkah) cannot be a substitute for the offering at Makkah.

If the option is granted for the offering, he is to make an offering that
is valid for sacrifices, because an unqualified use of the term offering is
valid for slain. Muhammad and al-Shaib'ī (God bless them) said that even younger animals are valid for this purpose, because
the Companions (God be pleased with them) imposed the obligation of
offering a one year and a four month old kid (goat). According to Abū
Hanifah and Abī Yūsuf (God bless them), younger animals are permitted
by way of feeding the needy, that is, when he gives sadaqah. When the
option is exercised in terms of food, the animal killed is valued in terms
of food in our view, because it is now compensated in terms of its value.

If he buys food with the value, he is to give each needy person one-
half sā' of wheat or one sā' of dates or barley. It is not permitted that he
give food to a needy person that is less than one-half sā'. The reason is
that when food is mentioned it is interpreted in terms of the amount of
food known to the law (shar').

If the option is exercised in terms of fasting, the animal killed is valuated
in terms of food, then, a fast of one day is to be kept for every
one-half sā' of wheat or one sā' of dates or barley. The reason is that
estimating fasts (directly) in terms of the animal killed is not possible,
because fasts have no value, therefore, we estimated them in terms of
food. Estimation in this way is known to the law (shar'), as in the case of
ransom (fidyah).

If a surplus of less than one-half sā' is left over from the food, the
worshipper has a choice of either making a sadaqah of it or of fasting
for one complete day. The reason is that fasting for less than a day is not
lawful. The same applies if the obligation (as a whole) is less than what
is to be given to one needy person; he is to give up to the extent of the
obligation or fast for one complete day, as we have stated.

If he injures the animal, plucks out its hair or cuts off one of its limbs,
he is to compensate the damage caused, on the analogy of the whole for
the part, as is done for the right of individuals.

If he plucks out the feathers from the wing of an animal (bird) or
cuts its fore and hind legs, the animal moves out of the category of those
animals that can protect themselves, thus, the offender is liable for its
entire value. The reason is that he has destroyed the security of the animal

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by destroying the instrument of defense; he is, therefore, penalized for its entire compensation.

A person who breaks the eggs of an ostrich is to pay their value. This is related from 'Ali and Ibn 'Abbās (God be pleased with them). The reason is that it is the source of game and it possesses the attributes of becoming game, therefore, it is treated like game by way of precaution as long as it has not become rotten.

If a dead young one emerges from the egg, the person is liable for the value of a young one that is alive. This is based upon istihāṣ. Analogy dictates that he should not compensate anything other than the egg as nothing is known about the life of the young one. The basis for istihāṣ is that the egg is potentially ready to give birth to a living young bird, and breaking the egg prior to its appointed time is the reason for its death. It is, therefore, interpreted to mean this by way of precaution. On the same reasoning if he strikes the belly of a gazelle and it drops a dead fetus and then dies, he is liable for the value of both.

There is no compensation for killing a crow, kite, wolf, snake, scorpion, mouse and a mordacious dog. This is based on the words of the Prophet (God bless him and grant him peace), “Five vicious things are to be killed in permissible territory as well as in the Haram: the kite, the snake, the scorpion, the mouse and the mordacious dog.” The Prophet (God bless him and grant him peace) also said: “The muhārim is to kill the mouse, the crow, the kite, the scorpion, the snake and the mordacious dog.” The wolf is mentioned in some of the narrations. It is also said that by mordacious dog is meant the wolf, or it is said that the wolf falls within the same meaning. The crow is one that feeds on filth and wholesome food (at other times). The reason is that it initiates the reasoning if he strikes the belly of a gazelle and it drops a dead fetus and then dies, he is liable for the value of both.

There is no liability for the muhārim if he slaughters a turtle. The reason is that it belongs to the category of pests and insects and resembles beetles and geckoes. It is possible to catch it without a trap and likewise going after it for catching it is not needed, thus, it is not game.

A person who kills locust is to make a sadaqah of what he likes. The reason is that locust are part of game of the land, and game is something that cannot be caught except by means of a trap and the hunter intends to catch it. A date is better (as sadaqah) than one locust, due to the saying of 'Umar (God be pleased with him) that a date is better than a locust (when people were paying one dirham per insect). There is no liability for killing mosquitoes, ants, fleas and ticks, as these are not game. Further, they do not arise from the human body. Yet, they do not arise from the human body. Yet, they do not arise from the human body. Yet, they do not arise from the human body. Yet, they do not arise from the human body. Yet, they do not arise from the human body.

A person who kills a louse is to give sadaqah of whatever amount he likes, like a fistful of food. The reason is that it arises from the dirt (tufah) of the body. In al-Jāmi’ al-Šaghīr it is stated that he is to feed something (to a needy person). This indicates that it is valid if he gives a little something to a needy person to eat by way of permissibility even though it does not satisfy his hunger.

A person who kills a game animal whose meat is not eaten, like a predator or something similar, is liable for compensating it, except those that the law (sahr) has exempted, and we have already enumerated them. Al-Shafī‘ī (God bless him) said that compensation is not obligatory as these animals are dangerous by instinct and are to be included in those vicious animals that have been exempted. Likewise, the word “dog” literally covers all predators. We maintain that predators are game due to their being wild and because they are hunted as game, either for their skins or for use in hunting or for repelling the injury they cause. Analogy constructed upon vicious animals is not permitted insofar as it leads to

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54 The report from 'Ali (God be pleased with him) is gharih, while that from Ibn 'Abbās (God be pleased with both) is recorded by 'Abd al-Razzāq. Al-Zaylahi, vol. 3, 135.
55 It is recorded by al-Bukhārī and Muslim from 'Aishah (God be pleased with her).
57 It is recorded by Imam Mālik (God bless him) in Ṣaḥrah. Al-Zaylahi, vol. 3, 137.
58 Like the tiger, leopard or the lion.
59 From 'Ali (God be pleased with him) that a date is better than a locust.
the negation of the number (five). Further, the term dog does not apply in technical terminology, and it is the technical meanings that govern.

Its value is not to exceed the value of a goat. Zufar (God bless him) said that its value, whatever it is, is to be paid on the analogy of those animals whose meat is consumed. We rely on the words of the Prophet (God bless him and grant him peace), “The hyena is game and there is a goat due for it.” Further, the consideration of its value is in lieu of the benefit to be derived from its skin and not because it is aggressive and dangerous. It is from this perspective that its value is not to exceed the apparent value of a goat.

If a predator attacks a muhri m and he kills the animal, there is no liability for him. Zufar (God bless him) said that the compensation is to be assessed in comparison with camels that attack. We rely on the report from Umar (God be pleased with him) that he killed a predator and gave an offering of a ram saying, “We attacked it first.” Further, the muhri m is prohibited from being aggressive, not from defending himself against harm. It is for this reason that he is permitted to repel apprehended harm, as in the case of the (exempted) vicious animals, therefore, it is better if he is permitted to repel expected injury. With the existence of permission from the Lawgiver, it is the right of the Lawgiver that compensation should not be made obligatory. This is distinguished from the case of an attacking camel as there is no permission from the owner of the camel, who is an individual.

If the muhri m is under duress to kill game and he kills it, he is liable for compensation, because the permission is restricted through expiation by the text that we recited earlier.

There is no harm if the muhri m slaughters a goat, a cow, a camel, a hen and a domesticated duck. The reason is that these things are not game as they are not wild. The meaning of a duck is one that is found in houses and ponds as it has been created essentially tame.

If a person slaughters a pigeon with feathered legs, he is liable for compensation. Malik (God bless him) disagrees. He argues that it is tame and domesticated and does not defend itself with its wings due to the slowness of its movement. We maintain that such a pigeon is wild by

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60Al-Zayla'i says that this tradition is ghari b in the absolute sense. He says, however, that it is recorded by the compilers of the four Sunan. There must be a misprint somewhere. Al-Zayla'i, vol. 3, 134, 136.

61It is ghari b in the absolute sense. Al-Zayla'i, vol. 3, 137.

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“There is no harm if the muhrim eats meat of a hunted animal as long as he has not hunted it down himself or it has not been hunted for his slave.”

We rely on the report that “the Companions (God be pleased with them) discussed the meat of a hunted animal with respect to the muhrim, so the Prophet (God bless him and grant him peace) said, ‘There is no harm in it.’”

In the tradition that he (Mālik) has narrated, the character lām is the lām of ownership, therefore, the tradition will be interpreted to mean that the game was offered to him and not the meat, or the meaning is that it was hunted at his command. Thereafter, not pointing out the prey was stipulated and this is explicit in showing that pointing out is prohibited. The jurists said that there are two narrations in this, and the basis for the prohibition is the tradition of Abū Qatadah (God be pleased with him) and we have stated this tradition.

In the case of game in the Haram, if it is slaughtered by a person not in the state of iḥrām, the obligation is its value and has to be given to the poor as sadaqa. The reason is that game is entitled to safety on account of the Haram. The Prophet (God bless him and grant him peace) said in a lengthy tradition, “Game in the Haram is not to be driven away.” Fasting will not be valid for him, because this is a financial penalty and not expiation. Thus, it resembles compensation in matters of wealth. The reason is that the financial penalty has been imposed on account of an attribute within the subject-matter, and that attribute is safety. On the other hand, the obligation for the muhrim by way of expiation is compensation for his act, because the prohibition is due to a meaning within his act and that is his iḥrām. Fasting is a suitable compensation for acts and not as compensation for him on the analogy of what was imposed on the muhrim. The distinction has been stated by us. Is an offering valid in his case? There are two narrations for this.

If a person enters the Haram with game, he is under an obligation to release it within the Haram if it is in his possession. Al-Shafti (God bless him) said that he is under an obligation to release it, because he is restraining the animal by holding it in his ownership, which he is doing in person as the animal is safe at the house or in the cage and is not accompanying him. The animal, however, is in his ownership. Thus, he is like one who has physical possession of the animal. We maintain that the Companions (God be pleased with them) used to wear the iḥrām when in their houses there were hunted animals and poultry, and it has not been related that they released them. The well known and continuous practice has prevailed, and is one among legal proofs. Further, the obligation is not to indulge in physical restraint and he is not doing so in person as the animal is safe at the house or in the cage and is not accompanying him. The animal, however, is in his ownership. Thus, if he releases the animal in the wilderness, it will continue to be owned by him. Accordingly, continued ownership cannot be taken into account (as an effective factor). It is said that if the cage is in his hand, it is binding on him to release it, but in a manner that it is not wasted.

He said: If a person, who is not in a state of iḥrām (hunts and) captures an animal and then enters the state of iḥrām after which another person releases the animal from his possession, he will have to compensate him (the first person), according to Abū Hanifah (God bless him). The two jurists say that he is not to compensate him. The reason (they maintain) is that the person releasing the animal is enjoining good and
the cause of compensation when the killing is linked to his act. The killer by his act of killing has rendered the act of the captor the 'illah (cause), and if the act of the captor has been linked to his act, he directly brings about the 'illah of the 'illah and the compensation is transferred to him.

If a person cuts the grass of the Haram or a tree that is not owned, which is one that people have not planted, he is liable for its value, except for one that has gone dry. The reason is that the prohibition has been established on account of the Haram. The Prophet (God bless him and grant him peace) said, “The green grass of the Haram is not to be cut nor are its thorns to be broken.” Fasting has no role to play with respect to this value, because the prohibition of acquiring it is due to the Haram and not due to the ihram. It is, thus, the compensation of the subject-matter, as we have explained. The value is to be given to the poor as sadaqah. Once he has paid the value, he comes to own what he has cut, as in the case of the rights of individuals. Its sale, after cutting, is disapproved because it has come into his ownership through a legally prohibited act.

If he is given freedom to sell it, people will be encouraged to commit similar acts. The sale, despite disapproval, is allowed as distinguished from game. The difference is what we will mention. The vegetation that is planted by people usually is known to us as not entitled to protection, on the basis of consensus. Further, the prohibited category is attributed to the Haram, and it can be attributed completely to it only when its plantation is not attributed to another. A plant that does not grow in the normal course is linked to what grows on its own when human beings plant it. If it grows naturally of its own in someone's property, then, there are two values to be paid by one who cuts it: one value for the prohibition due to the Haram, as the right of God, and another value for compensating the owner, like game privately owned within the Haram. There is no compensation for trees that go dry (dead), because they are not growing.

The grass of the Haram is not to be used for pasture, and is not to be cut, except for the idhkar. Abu Yusuf (God bless him) said that there is no harm in pasturing it as there is a necessity in it, and preventing the animals from pasturing is difficult. We rely on what we have related. Cutting with the lips or with teeth is the same as cutting with a sickle. Further, cutting grass from the Hil is possible, thus, no necessity is established.

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69 This should not mean that a person can take the law into his own hands, that is, even when the basis is al-amr bi 'l-mu’ruf.

70 Violating such protection means taking the law into your own hands.

71 And is not entitled to protection due to the lack of ownership.

72 Of our school.

73 Qur'an 2:96

74 Think about this case and the one above about musical instruments with respect to taking the law into your own hands. In the case of musical instruments, Abu Yusuf (God bless him) maintains that compensation is due.
The position is different for *idhkar*, because it has been exempted by the Messenger of God (God bless him and grant him peace), therefore, cutting and pasturing are allowed for *idhkar*. The position is also different for mushrooms for these are not grass.

If the *qārin* commits any of the acts that we have mentioned, and for doing which the *mufrid* is liable for one *dam*, then, the *qārin* is liable for two *dams* (for the same act), one *dam* for his ḥajj and another for the ‘umrah. Al-Shaftī (God bless him) said that he is liable for a single *dam* based on the fact that he becomes a *muthrim* through one ihram, in his view. In our view, he becomes a *muthrim* with two ihrams, and this has preceded.

He said: Unless he crosses the *miqāt* without the *ihrām* for the ‘umrah or for the ḥajj, in which case he is liable for a single *dam*. Zufar (God bless him) disagree. The reason (in our view) is that what is required from him at the *miqāt* is a single *ihrām*, thus, due to the delay of a single obligation only a single compensation is due.

If two *muthrims* participate in killing a hunted animal, then, each one of them is liable for full compensation. The reason is that each one of them, due to participation, commits an offence that is alone more grievous than pointing towards a hunted animal. Thus, multiplicity of offences leads to a multiplicity of compensation.

If two persons not in the state of *ihrām* participate in killing a hunted animal of the Haram, they are together liable for a single compensation. The reason is that compensation is a substitute for the subject-matter and not a penalty for the offence, thus, the compensation is combined due to the unity of the subject-matter. This is parallel to the case of two persons who kill another person by mistake (*khata‘*). They are together liable for a single *diyah* (blood-money) and each is liable for separate expiation.

If a *muthrim* sells a hunted animal or buys it, the sale is void (*bātîl*). The reason is that selling a live animal amounts to restraining a secure animal, while its sale after killing it is the sale of carrion.

If a person takes away a gazelle from the Haram, and it gives birth to offspring, and then the gazelle and the offspring die, this person is liable for compensating all of them. The reason is that a hunted animal after being taken away from the Haram retains its entitlement to security by

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25 This has preceded. Al-Zayla‘ī, vol. 3, 143.
26 We do not feel the need to elaborate the parallel and distinguished cases. *Fiqh* can be acquired only by pondering over the cases.
27 That is, protection against hunting.
Chapter 47

Crossing the Miqāt Without the Iḥrām

If a person from Kūfah arrives at Bustān Banī ‘Āmir’ and wears the iḥrām for the ‘umrah, then, if he goes back to the Dhāt ‘Irq and pronounces the talbiyah, the dam of crossing the miqāt is nullified. If he returns to it and does not pronounce the talbiyah until he enters Makkah, and then performs the tawāf for his ‘umrah, he is liable for dam. This is so according to Abū Ḥanīfah (God bless him). The two jurists 3 said that if he returns to it in the state of iḥrām, he is not liable for anything whether or not he has pronounced the talbiyah. Zufar (God bless him) said that the liability is not annulled whether or not he pronounces the talbiyah, because liability for the offence is not removed by his return; he is now like one who departs from ‘Arafāt and returns to it after sunset. We maintain that it amounts to the recovery of what was relinquished within its appointed time, and that is prior to the commencement of the acts of worship. 4 Thus, dam is waived as distinguished from the case of departure (from ‘Arafāt), because he was not able to recover what was given up, as has preceded. The distinction (in the school) is that according to the two jurists, recovery takes place when he returns in a state of iḥrām, because he has acknowledged the right of the miqāt, just as he would when he passes by it silently. According to the Imām (God bless him), he does so by his return in a state of iḥrām and pronouncing the talbiyah, because the initial requirement of the rule is

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1 A place close to Makkah, within the miqāt, but outside the Haram.
2 This is mentioned in relation to a person coming from Kūfah, however, this person can go to any of the miqāt for avoiding the liability of dam.
3 This is one view held by al-Shāfi‘ī (God bless him) as well.
4 That is, the acts of ḥajj.
that he do so from the huts of his people. If he has claimed an exemption of delaying it up to the miqāṭ, he is under an obligation to pay off its debt due from him, and it cannot be performed without an agreement of the resident. If he returns after wearing the miqāṭ, the liability of dam is not removed, by agreement. If he returns to it prior to wearing the ihram, the liability is removed, by agreement. This, that we have mentioned, is so when he intends to perform the hajj or the ‘umrah.

If he enters the Bustān to meet some need, then, he is to enter Makkah without the ihram. His miqāṭ is the Bustān and he and a resident there have the same status. The reason is that there is no obligation to revere the Bustān, thus, there is no obligation to wear the ihram. If he returns after meeting a need, and so also this person. The meaning of his (al-Qudūrī’s) statement that “the resident’s miqāṭ is the Bustān” means the entire Hil between it and the Haram and this has preceded. Likewise, the miqāṭ of the visitor who has been linked with him.

If they wear the ihram from the Hil and stay at Arafah, they are not liable for anything. He means thereby the resident of Bustān and the visitor, because they wore the ihram from their miqāṭ.

If a person enters Makkah without the ihram and then moves out of it the same year towards the miqāṭ and wears the ihram for the hajj that is now obligatory upon him, it is considered valid in place of what was obligatory for entering Makkah without the ihram. Zufar (God bless him) said that it is not valid and this is analogy constructed upon what was binding on him due to a vow (nadhr). It is as if the year has been changed. Our reasoning is that he rectifies what was neglected, within its appointed time, because what is obligatory for him is reverence of the territory (Ka`bah) through the ihram. It is as if he has come to it for the hajj of Islam in the state of ihram right from the start. This is different from the case where the year has changed, as in such a case it has become a debt due from him, and it cannot be performed without an ihram with a specific intention, as in the case of 'īrikāf for which a vow was made, because it can be performed with the fast of Ramaḍān of this year and not that of another year.

A person who crosses the miqāṭ and wears the ihram for the ‘umrah and renders it vitiated is to continue performing it and then offer it by way of qadā’. The reason is that ‘umrah is a binding compact, and it is as if he has rendered the hajj vitiated. He is not liable for a dam for neglecting the miqāṭ. On the analogy of the opinion of Zufar (God bless him), it is not waived. The disagreement is parallel to the disagreement about one who loses the hajj when he crosses the miqāṭ without the ihram and to the disagreement about the person who crosses the miqāṭ without the ihram and then wears the ihram of hajj, but thereafter renders his hajj fāsid. Zufar (God bless him) considers such crossing of the miqāṭ without the ihram on the analogy of the prohibitions. Our reasoning is that he renders the claim of the miqāṭ by wearing the ihram from it in the performance of qadā’, and qadā’ recalls the lost worship, however, qadā’ does not do away with prohibitions other than this. The difference is, therefore, evident.

If a resident of Makkah moves out intending to perform the hajj, wears the ihram, but does not return to the Haram, and proceeds to stay at Arafah, he is liable for sacrificing a goat. The reason is that the miqāṭ for him is the Haram and he has crossed it without the ihram. If he returns to the Haram, pronounces the talbiyah or does not pronounce it, then, his case is subject to the disagreement that we have mentioned about the ʿafāqī (person coming from outside).

If the person performing the tamattu’ form of hajj, after he is free of the ‘umrah, moves out of the Haram, wears the ihram and makes the stay at Arafah, he is liable for dam. The reason is that when he entered Makkah and brought about the acts of ‘umrah, he acquired the status of a resident of Makkah, and the ihram of the resident of Makkah is from the Haram, on the basis of what we said. Thus, he is liable for dam for delaying the ihram till after the miqāṭ. If he returns to the Haram, pronouncing the talqīf there prior to the station at Makkah, he is not liable for anything. This is subject to the disagreement that has preceded with respect to the ʿafāqī.
Chapter 48

Combining One *Iḥrām* with Another

Abū Ḥanīfah (God bless him) said: If a resident of Makkah wears the *iḥrām* of the ‘*umrah*, performs one circuit of the *tawaf*, then adopts the *iḥrām* of the *ḥajj*, he is to relinquish the *ḥajj*. He is liable for *dam* for relinquishing the *ḥajj* and is now under an obligation to perform ‘*umrah* as well as *ḥajj*. Abū Yūsuf and Muḥammad (God bless them) said that relinquishing of ‘*umrah* and its performance as *qadā’* is better in their opinion,’ and in this case he will be liable for *dam*. The reason is that it is necessary to relinquish one of them, because combining the two is not legal for the resident of Makkah. Relinquishing the ‘*umrah* is better as it has a lesser status, has less acts and is easier to perform by way of *qadā’* for it is not restricted by time. Likewise if he wears the *iḥrām* of the ‘*umrah* and then that of *ḥajj* when he has not undertaken any act of the ‘*umrah*, on the basis of what we said.

If he (the resident of Makkah) performs four circuits of the *tawaf* and then wears the *iḥrām* of *ḥajj*, he is to relinquish the *ḥajj* without any disagreement. The reason is that the major part of the *tawaf* is assigned the rule of the whole, and in such a case it is difficult to relinquish it for it is like being free of the *tawaf*. This is not the case when he performs less than four circuits of *tawaf*, according to Abū Ḥanīfah (God bless him). His view is that the *iḥrām* of the ‘*umrah* is confirmed by the performance of any of its acts, whereas the *iḥrām* of *ḥajj* is not confirmed in

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1Because it is easier to offer it as *qadā’*.
2Al-Shafī’ī (God bless him) disagrees with this.
3As compared to *ḥajj* as that is offered in a specified month.
4That is, it has a lesser status.
5That is, more than half the circuits.
The relinquishment of something that is not confirmed is easier. Further, in the relinquishment of the 'umrah, when some acts have been performed, is the nullification of acts, whereas in the relinquishment of hajj there is a prevention of such nullification. Thus, his case is similar to that of one who is under siege. The difference is that in the relinquishment of the 'umrah there is qadd of the 'umrah alone and nothing else, while in relinquishment of hajj there is qadd of hajj as well as the 'umrah, for the situation is like that of one who has lost the hajj.

If he continues to perform them, it is valid, because he has performed the acts of both just as he undertook to perform them, except that he is prohibited from such performance, however, prohibition does not prevent the realization of the act, as he has been understood from our principle. He is liable for dam for combing the two acts of worship, because he facilitated deficiency in his acts by committing what was prohibited. In the case of the resident of Makkah this dam is a penalty (he cannot eat from it), but in the case of the afqa it is the dam of gratitude (and he can eat from it).

A person wears the ihram of hajj and then on the day of sacrifice (10th Dhi 'l-Hijj) he wears the ihram of another hajj. If he shaves his head for the first, the second hajj becomes binding for him, and there is no atonement for him. If he does not shave his head in the first the second hajj is binding on him and he is liable for dam of clipping, whether or not he clipped his hair. This is so according to Abū Hanifah (God bless him). The two jurists said that if he did not clip his hair, he is not liable for atonement. The reason is that combining two ihrams of hajj or two ihrams of the 'umrah amounts to innovation (bid`ah). If he shaves his head, even though this is a rite for the first ihram, it is an offence against the second, because it takes place at a time that is not its appointed time, which makes him liable for dam on the basis of consensus (ijma'). If he does not shave his head until he performs the hajj in the following year, he has delayed the shaving of his head till after its appointed time for the first ihram. This gives rise to the liability of dam according to Abū Hanifah (God bless him). According to the two jurists, it does not make him liable for anything, as we have stated. Thus, clipping or not clipping is the same in his view, but clipping is stipulated (for dam) in the opinion of the two jurists.

If a person who is free of his 'umrah except for the clipping of the hair, wears the ihram for another 'umrah, he is liable for dam for his hair prior to its appointed time. The reason is that he combined two ihrams for another 'umrah. This is disapproved (makrāh), therefore, he is liable for dam, which is the dam of jabr and expiation.

A person who performs the ihram of hajj (pronounces the tahli) and then wears the ihram of the 'umrah is under an obligation to perform both. The reason is that combining the two is permitted for the afqa. The problem here is that by doing so he becomes a gārin, but he has gone against the sunnah and has, therefore, brought about something bad.

If he stays at 'Arafat, but does not perform the acts of the 'umrah, he has relinquished his 'umrah, because it has become difficult to perform it as 'umrah built upon hajj is unlawful. If he heads towards 'Arafat, he does not relinquish his 'umrah until he stays there, and we have mentioned this earlier. If he performs the tawaf of the hajj and then wears the ihram of 'umrah and continues to perform them, they become binding on him, but he is liable for dam for combining the two. The reason is that combining the two is lawful, as has preceded, thus, the ihram meant for both is valid. The meaning of tawaf here is the tawaf of greeting, which is a sunnah. This tawaf is not a rukn (essential element) so that giving it up does not give rise to any liability. If he does not perform an act that is a rukn, it is possible for him to perform the acts of the 'umrah followed by the acts of the hajj. Therefore, if he continues to perform them it is valid. In this case, however, he will be liable for dam for combining the two, and this dam will be that of jabr and expiation, which is the sound view. The reason is that he has based the acts of 'umrah on those of hajj in some respects. It is recommended that he relinquish his 'umrah, because the ihram of the hajj has been established by the performance of some of its acts, as distinguished from the situation where he has not performed the

6 The time for the second is after shaving and clipping for the first.
7 For the afqa.
8 This is stated to counter the view of Shams al-Annimah and Qadi Khān that it is the dam of gratitude (shukr).
9 The tawaf of greeting is part of the hajj.
10 According to most this is the tawaf al-qudam, however, some do not consider it to be part of hajj.
Chapter 49

Siege/Confinement

If the muharrim is under siege (ihṣār) by the enemy or he falls ill, thus, being prevented from completing the pilgrimage, he is to release himself from the hajj. Al-Shāfi`i (God bless him) said the ihṣār is only through the verse of iḥṣār has been revealed in the case of confinement due to illness, on the basis of consensus (ijmā`) of the specialists in language. They maintain that the word ihṣār is used for illness and ḥaṣr for the enemy. Further, release prior to its appointed time is for repelling the consequential hardship due to the extension of the ihram whereas the patience required for wearing it in the case of illness is much more.

When release is permitted, it will be said to him, “Send a goat that will be slaughtered in the Haram.” He is to take an undertaking from the person whom he sends with the goat about a particular day on which it will be slaughtered. He will then take off the ihram on that day. He is to send the goat to the Haram, because the dam of ihṣār is for attaining nearness to God, and slaughter can only be treated as nearness in terms of time and place, as has preceded. This, nearness cannot be attained without this nor will release be available without it. This is indicated in the words of the Exalted, “Do not make slaughter a condition.” The term ḥaṣr is used for an offering made to the Haram. Al-Shāfi`i (God bless him) said that the location is not to be confused with the Haram, because the offering has been prescribed as an exemption and restricting it to a location annuls the leniency. We would

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BOOK V. PILGRIMAGE

Chapter 49

Siege/Confinement

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ّMuhammad ibn `Abd Allah al-Handawani.
say that ease is essential taking into account the leniency, but not its consequences. A goat is permitted as an offering, because what is stated in the context is offering, and a goat is the least form of an offering. The offering of a cow or a camel, or a seventh part of these two, is also valid as in the case of sacrifices (da'hayyah). By the sending of a goat, as mentioned, we do not mean the goat itself as this may be difficult. In fact, he may send its value so that the goat can be bought there and slaughtered on his behalf. The statement “He will then take off the ihram,” indicates that this person is under no obligation for shaving his head or clipping his hair. This is the opinion of Abū Ḥanīfah and Muhammad (God bless them). Abū Yūsuf (God bless him) said that he is under an obligation to do so, if he does not do it he is not liable for anything. He argues that the Prophet (God bless him and grant him peace) shaved his head in the year of al-Hudaybiyyah when he was under siege there, and asked his Companions (God be pleased with them) to do so too. The two jurists argue that shaving leads to nearness to God when it follows the acts of iḥrām.

It is not permitted to slaughter the dam of iḥṣār except in the Haram. It is permitted to slaughter it prior to the day of sacrifice, according to Abū Ḥanīfah (God bless him). The two jurists said that slaughter on account of a person under siege, intending to perform the hajj, is not permitted except on the day of sacrifice. As for the person under siege intending an 'umrah, it is permitted whenever he likes, on the analogy of the offering for tammattu' and qirān. Perhaps, it is so on account of shaving of the head, as each one of them is released due to it. According to Abu Ḥanīfah (God bless him), this is the dam of expiation,4 so that it is permitted (to him) to eat of it, therefore, it is specific to a place and not time, like all the dams of kaffārah. It is distinguished from the dam of tamattu' and qirān as that is the dam of a rite. It is also distinguished from shaving of the head as that is at its appointed time, because the most important act of hajj comes to an end with it.

He said: If a person under siege, intending hajj, releases himself from the ihram, he is liable for hajj as well as 'umrah. This is how it has been related from Ibn 'Abbas and Ibn 'Umar (God bless them).5 The reason is that hajj gives rise to qadā' due to the validity of its commencement. It also gives rise to the qadā' of the 'umrah because this person falls within the meaning of one who has lost the hajj. The person under siege intending the 'umrah is to offer the 'umrah as qadā'. Being confined through siege in the case of 'umrah is established in our view. Mālik (God bless him) said that it is not established as there is no fixed time for this. We maintain that the Prophet (God bless him and grant him peace) and his Companions (God be pleased with them) were under siege at al-Hudaybiyyah when they were proceeding for the 'umrah.6 Further, release is prescribed for the removal of hardship, and this attribute is found in the ihram of the 'umrah. If siege is acknowledged with respect to it, then he is liable for qadā' if he releases himself from it, as in the case of hajj.

The qarīn is liable for a hajj and two 'umrahs. As for a hajj and 'umrah, the reason for the liability is what we have already elaborated.7 The reason for the second 'umrah is that he came out of it after commencing it in a valid manner.

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4Because it amounts to disengagement from the ihram prior to its appointed time, and that is an offence. Accordingly, what is imposed as a consequence amounts to kaffārah.
5It is recorded by Abū Bakr al-Rāzi. Al-Zayla'i, vol. 3, 144.
6It has preceded in the first chapter. There is also a tradition recorded by al-Bukhārī. Al-Zayla'i, vol. 3, 144-45.
7In the case of the mufrid losing the hajj.
If the qarin sends two offerings and takes an ungdeer staoki venrg hey, Mon him to depart; he is to exercise patience till he cannot make it for the hajj or catch up with the offering. If he does depart so that he can be released from the acts of the hajj, he may do so because he is one who has lost the hajj.

If he is able to catch the hajj and the offering, it is binding on him to depart, due to the removal of the inability prior to the attainment of the objective through a substitute.

If he catches up with his offering, he may do with it what he likes, because it is his property and it was specifically meant for a purpose that is no longer required. If he catches up with the offering and not the hajj, he is to release himself from the ihram, due to his inability to attain the main purpose. If he catches the hajj and not the offering, it is permitted to him to release himself from the ihram, on the basis of istihsan. This classification by them cannot be maintained in conformity with the view of the two jurists in the case of the person under siege intending the hajj. The reason is that the dam of siege, in the opinion of the two jurists is restricted to the day of sacrifice. Accordingly, a person who catches up with the hajj catches up with the offering. It is, however, in conformity with the opinion of Abü Hanifah (God bless him). In the case of the person under siege intending the 'umrah, the classification can be maintained by agreement, due to the absence of a limitation for restricting it to the day of sacrifice.

The basis of analogy is the opinion of Zufar (God bless him) that he is able to perform the main act, which is hajj, prior to the attainment of the objective through the substitute, which is the offering. The basis of istihsan is that if we make it binding for him to proceed, his wealth will be lost, because what is sent ahead of him is the offering that he has to slaughter, thus, his purpose will not be attained. Further, the sanctity of wealth is like the sanctity of life. He has an option either to wait at this location or at another so that the offering can be slaughtered on his behalf so that he can be released from the ihram or, if he likes, he can proceed with the performance of the rites that are binding on him due to the ihram, and this has greater merit as it is closer to the commitment that he made.

A person who stays at 'Arafah and then comes under siege is not treated as one under siege, because the apprehension of losing the hajj is not there. A person who comes under siege at Makkah so that he cannot perform the tawāf or stay at 'Arafah, is under siege, because it is not possible for him to complete the hajj. He is, therefore, like one who comes under siege in the Hil. If he is able to perform either of these two rites, he is not one under siege. As for the tawāf, the person who loses the hajj can release himself from the ihram on account of the tawāf with the dam being a substitute for it, on account of release. With respect to the stay at 'Arafah, the basis is as we have explained. It is said that there is a disagreement between Abū Hanifah and Abū Yusuf (God bless them) on this issue. The correct view is that which we have made known to you in detail. God, the Exalted, knows best.
Chapter 50

Lost Rites

If a person wears the *ihrām* of *hajj*, but loses the stay at ‘Arafah till the rising of the dawn on the day of sacrifice, he has lost the *hajj*. The basis, as we have mentioned, is that the time of the stay extends up to the dawn. He is under an obligation to perform the *tawāf* and the *saʿi* and then release himself from the *ihrām*. Thereafter, he performs the *hajj* as *qadāʾ* in the future, and there is no liability of *dam* on him. This is based on the words of the Prophet (God bless him and grant him peace), “A person who loses the stay at ‘Arafah has lost the *hajj*. He should perform the *‘umrah* and release himself from the *ihrām*. The next year *hajj* is obligatory on him.”

*‘Umrah* is nothing but *tawāf* and *saʿi*, and once the compact of *‘umrah* is concluded there is no way of coming out of it except through the performance of the two rites, as in the case of the uncertain *‘umrah* (where the intention does not specify the worship). Here he is unable to perform the *hajj*, therefore, the *‘umrah* stands determined for him. There is no *dam* for him, because the release has occurred through the acts of the *‘umrah*. This *‘umrah* for the person who has lost the *hajj* has the same status as *dam* has for the person under siege, therefore, the two (*‘umrah* and *dam*) cannot be combined.

The *‘umrah* is not lost, and it is valid throughout the year, except during the five days in which its acts are disapproved; these days are the day of ‘Arafah, the day of sacrifice, and the (three) days of *tashrīq*. This is based on the report from ‘Ā’ishah (God be pleased with her) that she used to disapprove *‘umrah* during these days. Further, these days are the days of *hajj* and are determined for it. It is narrated from Abū Yūsuf (God

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1. It is recorded by al-Dār‘ūqūṭi in his *Sunan*. Al-Zaylaʿi, vol. 3, 146.
2. It is recorded by al-Bayhaqī. *Al-Zaylaʿi*, vol. 3, 146.
bless him) that it is not disapproved on the day of ‘Arafah prior to the declining of the sun, because the commencement of this time is the rukn of ḥajj and this time is after the declining of the sun not before it. The foremost opinion in the school is that which we have mentioned (in the matn). Despite this if the worshipper performs it during these days, and if he continues to be in the state of ḫīrām it is valid, because the disapproval is due to a different matter, and that is respect for the command of ḥajj and the devotion of his time to it. Thus, commencement of the ‘umrah is valid.

The ‘umrah is a sunnah. Al-Shafi’i (God bless him) said that it is an obligation due to the words of the Prophet (God bless him and grant him peace), “The ‘umrah is an obligation (far‘idah) like the obligation of ḥajj.” We rely on the words of the Prophet (God bless him and grant him peace), “The ḥajj is an obligation, while the ‘umrah is voluntary.” Further, it is not associated with a fixed time, and it can be performed with a niyyah for another worship, as is the case with the person who has lost the ḥajj. This is a sign of a supererogatory worship. The interpretation of what he has related is that it consists of defined acts like ḥajj. The reason for this (interpretation) is that an obligation is not established where there is a conflict between the reports.

He said: It consists of tawaf and sa‘ī. We have already mentioned this in the chapter on tamattu’. God knows best.

The principle in this chapter is that each human being has the right to assign the spiritual reward (thawāb) of his act to another, whether that is salāh, sawm, ṣadqah or another act of worship. This is so according to the Ahl al-Sunnah wa-al-Jama‘ah, on the basis of what is reported from the Prophet (God bless him and grant him peace) that “he sacrificed two black and white rams, one on his own behalf and the second on behalf of those of his ummah who had acknowledged the unity of God and had stood witness to the truth of his message.” Thus, he deemed the sacrifice of one goat to be on account of his ummah. The ‘ibādat (acts of worship) are pure financial duties like zakāt, pure bodily acts like ṣalāt and a combination of the two like ḥajj. Representation operates in the first type in situations of choice as well as necessity for the attainment of the purpose through the act of a representative. It does not operate on the second type under any conditions, because the purpose, which is the placing of a burden on the body, is not attained through representation. Representation does apply to the third type in case of inability for the second meaning and that is the undertaking of hardship through the spending of wealth. It does not apply when ability is present, because in such a case the burden placed on the body does not exist. The condition of inability means perpetual inability up to the time of death, because the ḥajj is an obligation of a lifetime. In the case of supererogatory ḥajj, representation is

Chapter 51

Ḥajj on Behalf of Another

3Once in a lifetime.

4That is, mu‘akkadah—the emphatic form.

5It is ghārib. It is recorded by al-Ḥakim and al-Dār‘ul-qunf. Al-Zayla‘i, vol. 3, 147.

6It is a marfû‘ tradition recorded by Ibn Abī Shaybah. Al-Zayla‘i, vol. 3, 149.

7It has been related from a large number of Companions (God be pleased with them). The traditions have been recorded by Abū Dāwūd and Ibn Mājah, among others.

8Those interested in the details for all types of acts should refer to the discussions of the maštakām fitḥ in books on usūl, especially those by al-Sarakhshī and Šārī‘ah.
permitted even with the existence of ability, because the category of nafiz is much wider. Thereafter, the foremost opinion in the school is that the hajj is attributed to the one for whom it is performed. This is supported by reports available about this category. These are like the tradition of Khath'amiiyyah, as in this tradition the Prophet (God bless him and grant him peace) said, “Perform the hajj on behalf of your father, as well as the 'umrah.” It is narrated from Muhammad (God bless him) that the hajj is reckoned for the one performing the hajj whereas the one ordering the performance gets the spiritual reward for bearing the expenses, because this is a bodily form of worship and in case of inability the expenditure is deemed to act as the substitute of bodily burden, just as fidyah (ransom) acts as a substitute for fasting.

He said: If a person is asked by two persons to perform the hajj for each one of them and he wears the ihram of hajj on behalf of both, the hajj is reckoned for the worshipper himself, and he is liable for repaying the expenses. The reason is that hajj goes to the credit of the person ordering so that the person ordered does not move out of the hajj of Islam. Here each one of them has ordered him to perform the hajj exclusively for him without any participation (by another). It is not possible that it be counted in favour of either one of them due to a lack of priority. It is also not possible for him to assign it to one of them afterwards. This is distinguished from the case where he performs the hajj for his parents. Here he has the right to assign it to any one of them he likes as he has the option of identifying any worship he likes. The reason is that the worship that binds him is unknown. In the present case, however, the unknown thing is the person who had the right to claim hajj. The basis of istislah is that the hajj has been presented as a means towards certain acts and is not intended for itself. A vague thing is capable of becoming vague, this is a bodily form of worship and in case of inability the expenditure is deemed to act as the substitute of bodily burden, just as fidyah (ransom) acts as a substitute for fasting.

He is liable for repaying the expenses if he spends out of their wealth, because he allocated the expenses of the person ordering to himself.

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3 Al-Zayla`i says that the conclusion by the Author with respect to the 'umrah is not sound as far as this tradition is concerned, as it refers to hajj alone. The tradition is recorded by the six Imams in their books, Al-Zayla`i, vol. 3, 156.

4 Without determining who he is performing it for.

5 A basis for assigning it to one rather than the other.

If the intention of the ihram becomes vague, like forming of the intention for one of them without specifying the person, and he continues with the hajj, he has opposed their orders. The reason is the absence of priority (for either). If he identifies one of them prior to continuing, the same rule applies according to Abū Yūsuf (God bless him), and this is based upon analogy (qiyās). The reason is that he is the person ordered on the basis of identification of the person ordering, and leaving the matter vague goes against it, thus, hajj is performed on his own behalf. This is distinguished from the case where he has not ascertained hajj or 'umrah (in his intention) insofar as he has the option of identifying any worship he likes. The reason is that the worship that binds him is unknown. In the present case, however, the unknown thing is the person who had the right to claim hajj. The basis of istislah is that the hajj has been presented as a means towards certain acts and is not intended for itself. A vague thing is capable of becoming the means through ascertaining, therefore, a vague yet contingent ihram is acceptable. This is different from the situation where he performs the acts with the vagueness persisting, because the acts already performed cannot be ascertained (with respect to the intention). Accordingly, he has opposed the orders.

If another person asks him to perform qiran on his behalf, then the dam (of qiran) is the liability of the person in the state of ihram. The reason is that it has been made obligatory by way of gratitude for permission to combine the two rites. It is the person ordered to whom this blessing is exclusively available, because the actual acts are being performed by him. This issue is witness to the authenticity of the report from Muhammad (God bless him) that the hajj goes to the credit of the person ordered. The same rule applies if one person orders him to perform the hajj on his behalf, while the other orders him to perform the 'umrah on his behalf. The two collectively give him an order to perform qiran, therefore, the liability of dam is on him, on the basis of what we said.

The dam of ihsar is on the person ordering. This is so according to Abū Ḥanifah (God bless him), while Abū Yūsuf (God bless him) said that it is on the person performing the hajj. The reason is that it has been made an obligation for seeking release from the 'umrah so as to avoid the hardship ensuing from the extended duration of the ihram. As this

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5 That is, the obligation of dam for the person ordered.
hardship pertains to the person ordered, therefore, the dam is his liability. The two jurists maintain that it is the person ordering who has brought him into this state, therefore, it is up to him to have him released.

If he is performing the hajj on behalf of a deceased person and comes under siege, then the dam is claimed from the wealth of the deceased, according to the two jurists with Abu Yusuf (God bless him) disagreeing. It is said thereafter that it is claimed from one-third of the wealth of the deceased, because it is silah (payment with no counter-value) like zakāt and other payments. It is also said that it is claimed from the entire wealth, because it is obligatory as a debt claim of the person ordered and is, therefore, like a dam (debt).

The dam of sexual intercourse is the liability of the person performing the hajj. The reason is that it is dam for an offence and he is an offender by choice. He is also liable for repaying the expenses. The meaning here is that if he has sexual intercourse prior to the stay (at Arafah) so that his hajj stands vitiated, because what has been ordered is the performance of a valid hajj. This is distinguished from the case where he loses the hajj, in which case he is not to repay the expenses, because he has not lost it by choice. In case he has sexual intercourse after the stay, his hajj is not vitiated, and he is not to pay back the expenses, as the objective of the person ordering has been attained. He is, however, liable for the dam out of his own wealth, as we have explained. Likewise all the other dams that are in lieu of expiation; they are the liability of the person performing the hajj.

A person makes a bequest that the hajj be performed on his behalf and a person is deputed (by the relatives) to perform hajj for him. When this person reaches Kūfah, he dies or his expense amount is stolen, and he had spent half of it. The relatives are to pay for the performance of hajj on his behalf from one-third of the wealth with the new representative starting from his home. This is the view according to Abu Hanifah (God bless him). The two jurists said that hajj is to be performed starting from the place where the first representative died. The discussion here pertains to the consideration of the one-third and the place of (com mencement) of hajj. As for the first, the opinion stated is that of Abu Hanifah (God bless him). According to Muhammad (God bless him) the Hanifah (God bless him). According to Muhammad (God bless him) the Hanifah (God bless him). According to Muhammad (God bless him) the Hanifah (God bless him). According to Muhammad (God bless him) the Hanifah (God bless him). According to Muhammad (God bless him) the Hanifah (God bless him).

Ascertainment by the executor is like ascertainment by him. According to Abu Yusuf (God bless him) the hajj is to be performed on his behalf with what is left of the initial one-third, because that is the subject-matter for the execution of the bequest. According to Abu Hanifah (God bless him) division and payment of wealth by the executor is not valid except by delivery in a manner that has been mentioned by the legator, because there is no claimant who will take possession of it. Delivery of the amount has not been made in such a manner, and it is as if the person died before the amount was separated and set aside. Thus, the hajj is to be performed with a third of the entire amount left. As for the second point, the basis for the opinion of Abu Hanifah (God bless him) is analogy to the effect that the existing extent of the journey has been nullified for purposes of the rules pertaining to this world. The Prophet (God bless him and grant him peace) said, "When the son of Adam dies his acts are cut off except with respect to three things." The execution of the bequest concerns the rules of this world. Thus, his bequest remains effective from his place of residence, as if departure had not taken place. The basis for the opinion of the two jurists is istīḥāsān to the effect that his journey has not been nullified due to the words of the Exalted, "He who forsakes his home in the cause of God, finds in the earth many a refuge, wide and spacious: should he die as a refugee from home for God and His Messenger, his reward becomes due and sure with God." Further, the Prophet (God bless him and grant him peace) said, "A person who dies on way to the hajj, for him a blessed hajj will be counted every year." Thus, if his journey has been nullified, the bequest will be effective from that location. The basis for the disagreement lies in the case of the person who performs the hajj himself and on this is structured the case of the person ordered to perform hajj for another.

He said: If a person wears the ihram of hajj on behalf of his parents, it is permitted to him to deem it a hajj for either one of them. The reason is that a person who performs the hajj for another, without his permission, assigns the spiritual reward (thawāb) of his hajj for him. This takes place after the performance of the hajj, therefore, his intention prior to...
the performance is superfluous. The assigning of the thawāb to either of them after performance is valid, but this is distinguished from the case of the person ordered to perform hajj, according to the distinction we have drawn earlier. God, the Exalted, knows best.

Chapter 52

The Offering (Ḥādy).

The minimum offering is a goat, due to the report that the Prophet (God bless him and grant him peace) was asked about the offering and he said, "The least is a goat."

He said: The offering is of three kinds: camels, cows, and sheep. The basis is that when the Prophet (God bless him and grant him peace) deemed a goat to be the least form of an offering, it is necessary that the best be cows and camels. Further, an offering is what is offered to the Haram so that nearness to God is attained through it. The three kinds, however, are equivalent for this purpose.

In offerings, things not permitted are those that are not permitted for sacrifices (dāḥāyah). The reason is that it is a form of qurbah (nearness) that is attained by making the blood flow, as in the case of sacrifices. Thus, the attributes are specific to these two forms.

The offering of a goat is valid for all cases except for two cases: a person who performs the tawaf al-ziyarah in a state of major impurity at 'Arafah. In these two cases only a badanah is valid, and we have elaborated its meaning in what has preceded.

It is permitted to eat of the offering made by way of nafl, tamattu' or qirān. The reason is that it is the dam of a rite, therefore, eating of it is permitted as in the case of the sacrifices. It has been proved to be authentic that the Prophet (God bless him and grant him peace) ate out of his offerings and drank their broth. It is recommended that he eat of

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1. Al-Zayla'i says that it is gharib, and he found this in a statement of Aţā'. Al-Zayla'i, vol. 3, 150.
2. It has preceded in the lengthy tradition from Jābir. Al-Zayla'i, vol. 3, 160.
the offering, on the basis of what we have related. Likewise it is recommended that he give it away as sadaqah in the same way as is done for sacrifices.

It is not permitted to the person making the offering to eat of the meat of the other offerings. The reason is that the rest are the dam of expiation. In an authentic report, the Prophet (God bless him and grant him peace), when he was under siege at al-Hudaybiyah, sent offerings with Najiyah al-Aslami and said to him, “You and your companions are not to eat anything out of these.”

It is not permitted to slaughter the voluntary, tamattu’ and qiran, offerings except on the day of sacrifice (10th Dhil-Hajj). This humble servant (of God) says: In Kitāb al-Asl, it is stated that it is permitted to slaughter voluntary offerings prior to the day of sacrifice, though slaughtering them on the day of sacrifice has greater merit, and this is the correct view. The reason is that nearness is attained through voluntary offerings in view of the fact that they are offerings, and this is realized when they reach the Haram. If this element is found, it is permitted to slaughter them on a day other than the day of sacrifice though there is greater merit if this is done on the day of sacrifice. The reason is that the desire to attain nearness by making the blood flow is more obvious in such offerings. As for the dam of tamattu’ and qiran, it is based on the words of the Exalted, “Eat thereof and feed the needy.” The qada’ of tafath is specific to the day of sacrifice. Further, it is a dam of a rite and is specific to the day of sacrifice like sacrifices.

It is permitted to slaughter the remaining offerings at any time that the person likes. Al-Shafi’i (God bless him) said that it is not permitted except on the day of sacrifice on the analogy of the dam of tamattu’ and qiran, as each one of these is compulsory in his view. In our view, these types of dam are for expiation, thus, they are not specific to the day of sacrifice. The reason is that as they were prescribed for making up a deficiency, it is better to hasten them for the removal of the deficiency through them and without any delay. This is distinguished from the dam of tamattu’ and qiran because that pertains to a rite.

He said: It is not permitted to slaughter offerings at a place other than the Haram, on the basis of the words of the Exalted, “An offering that reaches the Kabah.” Accordingly, this serves as a principle for every dam meant to be an expiation. Further, hady is a term that is applied to what is offered at a place, and the place for it is the Haram. The Prophet (God bless him and grant him peace) said, “The entire area of Minā is a place of sacrifice and the paths of Ka’bah are all a place of sacrifice.”

It is permitted that he make a sadaqah of it to the needy of the Haram and to others as well. Al-Shafi’i (God bless him) disagrees. In our view, sadaqah is a mode of attaining nearness that can be rationalized, and sadaqah given to any poor person amounts to nearness.

He said: Notification (ta’rif) of an offering is not obligatory. The reason is that an offering conveys the information of transfer to a place so that nearness to God can be attained by making its blood flow at that place and this is not done through notification, thus, it is not obligatory. If, however, the ta’rif of the offering tamattu’ is undertaken, it is considered good (hasan). The reason is that it is limited to the day of sacrifice. It is possible that the worshipper will not find someone who can hold on to it and he will be in need of taking it to ‘Arafah (ta’rif). Further, it is the dam of a rite, therefore, its basis is its notification. This is distinguished from the dam of expiation, because it is permitted to slaughter it even before the day of sacrifice, as we have stated; its cause is an offence, therefore, it is suitable that it be concealed.

He said: In the case of budun there is greater merit in nahr (cutting from the base of the neck), while slaughter is to be undertaken for cows and sheep. This is based on the words of the Exalted, “Turn to your God in prayer and perform nahr.” It is said by way of interpretation of the verse that it pertains to camels. God, the Exalted, has said, “God commands you that you slaughter a cow.” And the Exalted said, “And We ransomed him with a momentous sacrifice.” The word dhīb (in the verse) means what is presented for slaughtering. It has been proved as...
authentic that the Prophet (God bless him and grant him peace) undertook *nahr* for camels and slaughter for cows and sheep. Thereafter, from among the offerings, if he likes, he may undertake *nahr* of the camels while they are standing or when they are made to kneel, and whichever method he adopts is deemed good. There is, however, greater merit in doing so when they are standing on the basis of the report that the Prophet (God bless him and grant him peace) undertook the *nahr* of the offerings while they were standing, and his Companions (God be pleased with them) used to do so while the animals were standing with their left foreleg tied.

Cows and sheep are not to be slaughtered while they are standing. The reason is that in the lying posture of the animal to be slaughtered, the location of slaughter is easily seen and that makes it easier. Slaughtering is a *sumrah* in the case of these animals.

He said: It is preferable that the worshipper undertake the slaughter of the animals himself, if he can do so proficiently. The basis is the report that “the Prophet (God bless him and grant him peace) drove a hundred camels for the farewell pilgrimage and undertook the *nahr* of a little over sixty camels himself and delegated the remaining to 'Ali (God be pleased with him).” The reason is that these are meant for seeking nearness to God, and persgation to another.

He said: He is to give by way of *sadaqah* the coverings and ropes of the offering and he is not to pay the wages of the butcher with these. The basis is the saying of the Prophet (God bless him and grant him peace) to 'Ali (God be pleased with him), “Make a *sadaqah* of the coverings and ropes and do not pay the wages of the butcher with these.”

If a person drives a *badanah* and is compelled to ride it he may do so, but if he can do without this, he is not to ride it. The reason is that he has meant it to be purely for God, the Exalted, therefore, it is not lawful for him to utilize anything of its corpus or benefits for himself, until it reaches its destination. The exception is where he is in need of riding it, on the basis of the report that the Prophet (God bless him and grant him peace) saw a man driving a *badanah* and said, “Ride it. Woe unto you.” The reason is that these are meant for seeking nearness to God, and permission to consume it is contingent upon its reaching its intended destination. Thus, it is not lawful for consumption at all prior to this, however, giving it to the poor as *sadaqah* has greater merit than leaving it as fodder for predators. There is a kind of nearness in this and the seeking of nearness is what is intended. In case it was obligatory, he is to replace it with another, and is part of the lengthy tradition of Jabir (God be pleased with him). Al-Zayla'i, vol. 3, 163.

If a person drives a badanah and it dies, then, in case the offering was voluntary he is not liable for another (substitute) offering. The reason is that the seeking of nearness to God became linked to this subject-matter and it is lost. In case the offering was obligatory, he is under an obligation to substitute another for it. The reason is that the obligation remains for him. If the animal suffers a major defect, it is to be substituted with another animal. The reason is that the obligation is not met with such a defective animal, therefore, another animal must be provided. He is to do with the defective animal what he likes, because it is now part of his remaining assets. If the *badanah* is damaged on the way, and in case it is a voluntary offering, he is to slaughter it, colour its garland with its blood, and put a blood mark on its hump. He and other well off people are not to eat of it. This is what the Messenger of God (God bless him and grant him peace) ordered Nājiyah al-Aslami (God be pleased with him) to do. The meaning of the word *nahr* here is the garland. The benefit of doing this is that people should know that it is an offering so that the poor can eat of it and not the rich. The reason is that permission to consume it is contingent upon its reaching its intended destination. Thus, it is not lawful for consumption at all prior to this, however, giving it to the poor as *sadaqah* has greater merit than leaving it as fodder for predators. There is a kind of nearness in this and the seeking of nearness is what is intended. In case it was obligatory, he is to replace it with another, and is part of the lengthy tradition of Jabir (God be pleased with him). Al-Zayla'i, vol. 3, 164.

*It is recorded in the lengthy tradition of Jabir (God be pleased with him). Al-Zayla'i, vol. 3, 165.*

*It is recorded by al-Bukhari and Muslim from Anas (God be pleased with him). Al-Zayla'i, vol. 3, 165.*

*It is part of the lengthy tradition of Jabir (God be pleased with him). Al-Zayla'i, vol. 3, 165.*

*It is recorded by al-Bukhari and Muslim from Anas (God be pleased with him). Al-Zayla'i, vol. 3, 165.*

*It is recorded by most of the sound compilations, especially al-Bukhari and Muslim. Al-Zayla'i, vol. 3, 165.*

*It is recorded by all the sound compilations except al-Tirmidhi. Al-Zayla'i, vol. 3, 165.*

*This tradition has preceded in this chapter. See also Al-Zayla'i, vol. 3, 165.*
he is to do with this one what he likes. The reason is that it is no longer suitable for what he intended, and it is his property like the rest of his property.

He is to garland the voluntary offering and those of tamātū' and qirān. The reason is that such an offering is an offering of a rite. In garlanding is an expression of this and its notification, therefore, it is suitable for it.

He is not to garland the dam of siege nor the dam of offences, because its cause is an offence and keeping it concealed is suitable for it. The dam of ihşār is compensation and is linked to those of the same category. He mentioned an offering, but he intended thereby a badanah, because a goat is not usually garlanded and it is not deemed a sunnah in our view as there is no benefit of garlanding it, as has preceded. God knows best.

Chapter 53

Scattered Issues

If the residents of 'Arafah stay at 'Arafah on a day about which a group of people testify that they stayed on the day of sacrifice, then hajj is to be deemed valid. Analogy (qiyās), however, would dictate that it should not be deemed valid taking into account the ruling if they had made the stay on the day of tarwiyyah (the 8th of Dhi 'l-HaJJ). The reason is that stay at 'Arafah is a worship that depends upon both time and place, and without these two conditions being met it is not worship that is valid. The interpretation for the ruling based on īstihlān is that this testimony is based on negation with respect to a matter that is not covered by the ruling. The purpose of this testimony is to negate their hajj (the haJJ of all the people), and the issue of hajj is not an issue of this ruling, therefore, the testimony of this group of people is not to be accepted. The reason is that there is general confusion due to the difficulty of avoiding it (the error) and rectification is not possible. In giving an order of repeating the hajj there is manifest hardship. It is, therefore, obligatory to deem the rejection sufficient in case of such confusion. This is distinguished from the case where these people make the stay on the day of tarwiyyah, as in this case rectifying the error is possible as a whole, so that the confusion will be removed on the day of 'Arafah (even if the evidence is accepted). Further, there is a parallel for permitting something that is to happen with a delay, but there is no precedent for permitting something that had to occur earlier. The jurists said that it is essential for the īmām not to hear

1This applies to the dam of offences.
2That is, it is not a dam in lieu of an offence.
3That is, the compulsory category like that of offences.
4Which is one day after the day of 'Arafah.
5In such a case, rectification is possible.
6What has been done cannot be undone.
7Of the testimony.
such testimony and he should say that the hajj of the people is complete, therefore, they should go away. The reason is that there is nothing in such testimony except the raising of fitnah (trial). The same applies if some people testify in the evening on the day of 'Arafah that they saw the moon (of Dhi 'l-Hajj on the way and the ninth day has actually started now), when it is not possible for the imam to stay on with the people for the rest of the night or where most people do not act upon this testimony.

He said: A person who undertakes ramy of the second and third Jamrahs on the second day when he has not undertaken the ramy of the first, then, it is good if he undertakes ramy of the first and then the rest, because he will be observing the sequence according to the Sunnah. If he performs the ramy of the first Jamrah (after throwing stones at the second and third), it is valid. The reason is that he has caught within the prescribed time what had been given up, and he has only given up the sequence. Al-Shafi'i (God bless him) said that it is not valid, unless he repeats the ramy of all three. The reason is that it has been prescribed in a sequential way, and it becomes similar to performing the sa'i prior to the tawaf or beginning with al-Marwah instead of al-Safa. Our reasoning is that each Jamrah represents the seeking of nearness to God (qurbah) in its own right, therefore, permissibility does not rest upon advancing some others. This is distinguished from the sa'i, because it is dependent upon the tawaf, and is lesser than it in status. Al-Marwah, on the other hand, is identified as the point of termination of the sa'i through the text, therefore, commencement cannot be linked to it.

He said: A person who has made it binding upon himself to perform the hajj on foot is not to take a ride until he has performed the tawaf al-ziyarah. In Kitab al-Ajl, this person has been given an option between riding and walking. This is an indication of an obligation, and that is the principle, because he has undertaken the seeking of nearness by way of perfection, therefore, it becomes binding for him in the same manner as it would if he were to make a vow for keeping consecutive fasts. The acts of the hajj come to an end with tawaf al-ziyarah, thus, he is to walk till he has performed this tawaf. Thereafter, it is said that he is to commence walking from the time he wears the ihram and it is said that he should do so from his house as that is the obvious intention. If he takes a ride he is liable for dam, because he has caused a deficiency in his undertaking. The jurists said that he is to take a ride when the distance is long and walking will cause a hardship for him. When he comes close, and the person is one who is accustomed to walking and such distance will not cause a hardship, it is essential for him not to ride.

If a person buys a slave girl who is in a state of ihram, which was permitted to her by her master, then, this buyer has a right to have her released from the ihram and to cohabit with her. Zufar (God bless him) said that he has no such right, because this (ihram) is a contract that preceded his ownership, thus, he cannot be empowered to revoke it, and it resembles the case where he buys a slave girl who is married. Our reasoning is that the buyer is the representative of the seller, and the seller had the right to require her release from the ihram. Likewise, the buyer, except that it is considered disapproved for the seller to do so insofar as it amounts to backtracking on a promise. This meaning of disapproval is not to be found in the case of the buyer. This is distinguished from nikah, because the seller has no right to revoke it if she entered the contract with his permission, thus, this right does not belong to the buyer either. When the buyer has the right to release her from the state of ihram, he is not able to return her (to the seller) on the basis of defect, in our view. According to Zufar (God bless him), he has such a right, because the seller is prohibited from deceiving the buyer. In some manuscripts the statement is "or to cohabit with her." The former statement indicates that he can release her from the state of ihram without cohabiting with her, with the clipping of her hair or the cutting of nails, and then he can cohabit with her. The second statement indicates that he releases her from the state of ihram with cohabitation, because cohabitation amounts to touching that results in release. It is preferable, however, that he release her without intercourse out of respect for the command of hajj. God knows best.

This rule cannot be generalised where the legal system is concerned. The imam here should mean the Khalifah and not the chief justice who is supposed to hear testimony about the sighting of the moon. Further, the issue indicates that the imam here concerns all the Muslims in the world and not a smaller segment like a modern state today.

In other words, such a vow leads to simple obligation (wajib) and not definitive obligation (fard).

This rule appears to have been derived by reconciling the narration in al-Jami' al-Saghir, stated in the main, and that of Kitab al-Ajl, which grants an option.

That is, he has acquired all the rights of the seller.
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Chapter 54

The Formation of the Contract of Nikāḥ

He said: The contract of nikāḥ (marriage) concluded is through offer (ijāb) and acceptance (qabūl) using words that express the past tense. The reason is that the form (ṣīghah), even though it is meant for notification, has been employed for formation by the sharʿ (law) due to the need for making the contract certain (when it was kept vague during Jāhiliyyah). And, it is concluded with two expressions where one of them expresses the past and the other the future, like one party saying, “Marry me”, and the other saying, “I have married you”. The reason is that this amounts to the delegation of authority for nikāḥ with one person acquiring the authority to make both statements, as we will be elaborating, God the Exalted, willing. The contract is also concluded with the words nikāḥ (marriage), tazwīj (marriage), hibah (gift), tamlik (transfer of ownership) and ṣadaqah (free will offering). Al-Shāfiʿi (God bless him) said that it is not concluded except with the words nikāḥ and tazwīj, because

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1. The term nikāḥ in its original application meant union. Thereafter, the term came to be applied to union in marriage.

2. The Hanafi school maintains that there is only one element for contracts, and this is the ṣīghah (form). Șīghah or form consists of ijāb (offer) and acceptance (qabūl). Offer and acceptance are based on consent of ridā. As ridā is an internal matter and subjective intent is exceedingly difficult to determine and prove, Islamic law follows the objective theory of contracts. Thus, outward șīghah is taken as evidence of subjective intent. İjāb is a statement that issues forth from one of the parties to the contract, and qabūl is the statement of the second party in response to the ījāb.

3. To ensure certainty. The purpose is to convey the meaning that the contract has already taken place in conformity with the intention of the parties. The form must be such that it cannot be interpreted as a query, surprise or something else.

4. In the section dealing with wakālah (agency) in nikāḥ.
The contract of nikāh is concluded by using the word bay' (exchange). This is correct due to the employment of the figurative meaning. It is, however, not concluded with the word ijarah (hire) according to the sound narration, because hiring is not the cause of exclusive ownership that enables utilisation. It is also not concluded with the words ibahah (permissibility), ihlāl (making lawful) and t'ārah (commodate loan), due to what we said, nor with the word waṣīyyah (bequest), because it leads to ownership when reference is made to what comes after death.

He said: The contract of nikāh of Muslims is not concluded unless there are present two Muslim, free, major and sane male witnesses, or one male and two women, whether or not they possess moral probity or whether they have been awarded the penalty of qadhf (false accusation of unlawful sexual intercourse). The Author (God be pleased with him) said: know that witnessing is a condition for the legal category of nikāh, due to the words of the Prophet (God bless him and grant him peace), “There is no nikāh without witnesses,” and this is proof against Malik (God bless him) for stipulating publicising (notification) without witnesses. It is necessary to stipulate freedom for witnessing, because a slave does not have wilāyah (legal authority for acting as a wāli). It is also necessary to take sanity and majority into consideration, because there can be no wilāyah without these either. It is also a must to take Islam into account for marriage, because an unbeliever cannot be a witness for a

5That is, the use of any word that conveys the meaning of transfer of ownership or tāmlık.
6He says this to indicate that there is a contrary view as well.
7It is ḥāṣib in these words, however, there are other traditions that convey the same meaning. Among these is a tradition recorded by Ibn Hibbān in his ʿṢaḥīḥ. Al-Zaylaʾī, vol. 3, 167.
8That is, it should be publicly proclaimed. This is based on a tradition that conveys the meaning that nikāh has to be proclaimed even if this is done by the beating of drums.

Muslim. The attribute of being a male is not stipulated so that the contract is concluded in the presence of one man and two women. There is disagreement about this, however, and you will know about this under the topic of testimony (shahādah), God, the Exalted, willing. Moral probity (ʿadālah) is not stipulated so that the contract is concluded in the presence of witnesses who are fāsiq (disobedient), in our view, with al-Shāḥī (God bless him) disagreeing. He maintained that being a witness belongs to the legal category of honour whereas a fāsiq is one who is the object of scorn. We maintain that a fāsiq is one who possesses wilāyah, thus, he is one who can render testimony as well. The reason is that he does not deny it for another (who is marrying) as they fall in the same category (Muslims). Further, as he (being a fāsiq) qualifies for being the sultan (one who appoints — according to the Hanafi view), he is also eligible for being one who is appointed to exercise authority (like a qādi). Thus, he can be appointed as a witness. A person awarded ḥadd in a case of qadhf can possess wilāyah, thus, he can be eligible for bearing testimony. What is lost for this person, due to the proscription pertaining to his offence, is the effect of rendering testimony (not bearing of testimony). Thus, this lost qualification does not affect the conclusion of the contract of nikāh as in the case of witnessing by the blind and the children of the contracting parties.

He said: If a Muslim marries a Dhimmi woman with the marriage witnessed by two Dhimmis, it is valid according to Abū Hanīfah and Abū Yūsuf (God bless them). Muhammad and Zufar (God bless them) said that it is not permitted. The reason is that listening (to the offer and acceptance statements) in nikāh amounts to witnessing, but an unbeliever cannot be a witness for a Muslim. Thus, the situation is as if he has not heard the statements of a Muslim. The two jurists (Abū Hanīfah and Abū Yūsuf) maintain that shahādah has been stipulated in nikāh for the purpose of proof of ownership as it pertains to a very important subject-matter, and it does not pertain to the obligation of mahr (dower), because no witnessing is really needed for the obligation of wealth. The two are (in reality) witness to her statement. This is distinguished from the case where they did not hear the statement of the groom because the contract...
is concluded with the statements of both;" while the shahādah is stipulated for the contract.

He said: If a person orders a man to marry away his minor daughter and he does not marry her away in the presence of the father along with one man besides the two as a witness, the nikāh is valid, because the father will be deemed the person maintaining the contract due to the unity of the session. Thus, the agent will be acting as an emissary and as one who expresses the consent. Consequently, the person who is marrying away the girl will remain a witness. If the father is not present, the contract is not valid, because the session of the contract has changed due to which the father cannot be deemed the mubāshīr. On the same reasoning, if a father marries away his daughter who is a major in the presence of a single witness, then the contract is valid if the woman is present,4 but if she is absent the contract is not valid.

54.1 STATEMENT OF THE PROHIBITED CATEGORIES OF WOMEN

He said: It is not permitted to a man to marry his mother or his grandmothers, both maternal or paternal, due to the words of the Exalted, "Prohibited to you (for marriage) are: your mothers, daughters, sisters; father's sisters, mother's sisters; brother's daughters, sister's daughters; foster-mothers who gave you suck, foster-sisters; your wives' mothers; your step-daughters under your guardianship, born of your wives to whom you have gone in—no prohibition if you have not gone in—(those who have been) wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time." Grandmothers are mothers as the mother is literally the origin or because their prohibition has been established on the basis of ijma` (consensus).

He said: And he is not to marry his daughter, due to what we have recited,6 nor the daughters of his children howsoever low, on the basis of ijmā` (consensus). He is not to marry his sister nor the daughters of his sister nor his paternal aunt or his maternal aunt. The reason is that their prohibition is mentioned in this verse. Included in this are the paternal aunts of different categories (father's paternal aunt and mother's paternal aunt and so on), maternal aunts of different categories, daughters of sisters of different categories and daughters of brothers of different categories (that is, daughters of half and step brothers and so on), because the term is construed in a general way.

He said: He is not to marry the mother of his wife whether or not he has consummated marriage with her daughter, due to the words of the Exalted, "And mothers of your wives"," and in this there is no restriction of consummation. He is not to marry the daughter of his wife with whom he has consummated marriage, due to the restriction of consummation established by the text, irrespective of this daughter being under his guardianship or that of another. The reason is that guardianship is mentioned as a matter of practice and not as a condition. It is for this purpose that the negation of consummation has been deemed sufficient for permissibility.

He said: He is not to marry his father's wife or the wives of his grandfathers, due to the words of the Exalted, "And marry not women whom your fathers married." He is not to marry the wives of his sons, due to the words of the Exalted, "Wives of your sons proceeding from your loins." The word ašlāb is mentioned to exclude tabanī and not for permitting the wife of a foster son.

He is not to marry his foster mother nor his foster sister, due to the words of the Exalted, "Their mothers who have suckled them..." and also due to the words of the Prophet (God bless him and grant him peace), "Prohibited on the basis of raḍā' are those who are prohibited on the basis of lineage."7

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He is not to combine two sisters through nikāḥ nor through lawful ownership permitting intercourse,²³ due to the words of the Exalted, “And that you take two sisters...”,²⁴ and the words of the Prophet (God bless him and grant him peace), “One who believes in God and the last day should not gather his water in the wombs of two sisters.”²⁵

If he weds the sister of a slave girl of his and with whom he has had sexual intercourse, the nikāḥ is valid, because of the issuance of the offer and acceptance by eligible parties for a subject matter that is lawful. When the nikāḥ is valid he is not to have intercourse with the slave girl even though he has not yet had sexual intercourse with the sister he married, because the sister’s marriage stands consummated legally²⁶ and he is not to have sexual intercourse with her until he deems the slave woman prohibited for himself in one form or another.²⁷ It is after this that he can have intercourse with the woman he married as there is now an absence of intercourse in a combined state. He can have intercourse with the woman he married if he has not had intercourse with the slave girl he owns due to a lack of combination through intercourse, because the woman owned as a slave has not been subjected to intercourse legally.

If he marries two sisters through separate contracts²⁸ and does not know which one of them he married first he is to be separated from both, because the nikāḥ of one of them is valid with a certainty. There is no basis for identifying one due to the lack of priority nor for the execution of the contracts with lack of knowledge, as there would be no benefit in this or there would be harm. Thus, what comes to be ascertained is separation. Each one of them gets one half of the mahr, because it was due to the first of the two, but the priority is not known due to a lack of information, thus, it is paid (equally) to both. It is said that each one of them should file a claim that she was the first or both should negotiate a settlement, because it is not known which one is entitled to it.

²³In other words, this is not permitted even in the case of two slave girls.
²⁴Qur’ān 4:23
²⁵This tradition is ghārib, but there are other traditions that support the rule. Some of these are recorded by al-Bukhārī and Muslim. Al-Zayla`i, vol. 3, 168.
²⁶That is, consummation has now become legally permissible, and permission itself acts as a legal barrier.
²⁷By sale, manumission, and so on.
²⁸Had it been through a single contract, the contract would have been void and none of them would be entitled to mahr. In this case, the second contract is void, but he cannot identify the first contract.

²⁹It is recorded by Muslim, Abū Dāwūd, al-Tirmidhi and al-Nāṣī` from Abū Hurayra (God be pleased with him). Al-Zayla`i, vol. 3, 169.
³⁰That is, of the mashaḥūr category, in the opinion of the Author.
³¹This is the tradition stating that prohibited on the basis of radda' are those who are prohibited on the basis of lineage.
³²The text followed for this rule is the one appearing in al-‘Aynī’s al-Bināyāh.
A person whom a woman touches with desire, for him the woman's mother and daughter become prohibited. Al-Shafi'i (God bless him) said that they are not prohibited. The same disagreement applies where he touches the woman with desire, and where he looks at her vagina with desire and she looks at his penis with desire. He argues that touching and looking are not within the meaning of penetration. It is for the same reason that these two acts do not invalidate fasting and the *ihram* nor do they give rise to the obligation of bathing. Thus, they are not to be linked with penetration. Our reasoning is that touching and looking (in this context) are the causes leading to intercourse. Accordingly, they are assigned the rule of penetration by way of precaution.\(^{33}\) Thereafter, by touching with desire we mean one that leads to erection or an increase in size (when there was prior erection), and this is the correct view. "Looking" that is given consideration is at the internal opening of the vagina and this is not realised until she is reclining. If he touches her and ejaculates, it is said that it leads to prohibition. The correct view, however, is that it does not lead to prohibition, because by ejaculation it becomes obvious that intercourse was not intended. This also applies to having sexual intercourse with a woman through the rectum.

When a man divorces his wife through an irrevocable divorce or through a revocable divorce, it is not permitted to marry her sister until her waiting period ('iddah) is over. Al-Shafi'i (God bless him) said that if the 'iddah follows an irrevocable divorce or one pronounced thrice, marriage is permitted due to the complete termination of the nikah acting upon the terminating factor (final divorce). Accordingly, if he has sexual intercourse with her with the knowledge of the prohibition, the *hadd* penalty becomes obligatory. We maintain that the first nikah subsists (even in this case) due to the continuity of the rules of maintenance, prohibition of going out, and awaiting the birth of a child (or vacation of the womb). The operation of the terminating divorce is delayed for which reason the restrictions apply.\(^{34}\) *Hadd* does not become obligatory according to the indication in the *Book of Divorce*, but it does become obligatory according to the statement in the *Book of Hudūd*, because the reason in the latter is that the ownership of the subject-matter which would permit this, is lost, thus, *zina* is affirmed. This ownership is not lost on the basis of the former as we have stated. Thus, he will be combining the two sisters in marriage.

A master (mawla) is not to marry his slave girl nor is a woman to marry her slave ('abd). The reason is that nikah has been prescribed to give rise to fruits shared between the two parties to the contract and being owned negates being an owner and prevents the joint sharing of the fruits of nikah.

It is permitted to marry (more than one) Kitābi woman, due to the words of the Exalted, “The multiplied from among those given the Book,"\(^{35}\) that is, chaste women. There is no distinction between a free Kitābi woman and one that is a slave, as we will explain later, God willing.

It is not permitted to marry a Magian woman, due to the words of the Prophet (God bless him and grant him peace), “Deal with them in the manner you deal with the People of the Book, but without marrying their women or eating of their slaughtered animals,"\(^{36}\) nor idol worshipping women, due to the words of the Exalted, “Do not marry polytheist women until they believe.”\(^{37}\)

It is permitted to marry Sabian women if they follow the religion of a Prophet and acknowledge a Book, because they are from among the People of the Book.\(^{38}\) If, however, they worship the stars and have no (revealed) Book, it is not permitted to marry them, because (in this case) they are polytheists. The disagreement transmitted on this issue is to be assigned to the confusion about their beliefs. Each jurist has responded accordingly to what he has heard. It is also on the basis of this rule that their slaughtered animals are lawful.

He said: It is permitted to a man and a woman in the state of *ihram* to wed while in the state of *ihram*. Al-Shafi'i (God bless him) said that it is not permitted. It is this disagreement that governs the case of a wife in the state of *ihram* giving away his ward in marriage. He relies on the saying

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\(^{33}\)This is the basis of the rule. In our view, this rule can operate *diyānat* and not *qadā*.

\(^{34}\)That is, the restriction of going out. The text in Badr al-Din al-Ayni’s commentary is somewhat different here. The text there says “the restrictions apply if he has intercourse with the woman undergoing *iddah.*” He interprets the restrictions then to mean “the taking of another spouse.” We feel that the text in al-Ayni is correct.
of the Prophet (God bless him and grant him peace), "The muḥrim is not to wed nor is he to give away another in marriage." We rely on the report that the Prophet (God bless him and grant him peace) married Maymūnah (God be pleased with her) when he was in a state of ḥiṭām. What al-Shāfiʿi (God bless him) has related is interpreted to mean sexual intercourse.

It is permitted to marry a slave girl whether she is a Muslim or a Kitābī. Al-Shāfiʿi (God bless him) said that it is not permitted to a freeman to marry a Kitābī slave. The reason is that nikāh with slave girls is permitted on the basis of necessity, in his view, insofar as it amounts to presenting a part of himself to a slave (the child will be a slave). Further, the necessity is removed by marrying a Muslim slave girl. It is for this reason that he deemed the ability to marry a freewoman a prevention from marrying the slave. In our view, the permissibility is unrestricted due to the unrestricted nature of the requiring text. In this nikāh there is a prevention from acquiring a part (child) that is free not passing it off into slavery. Further, he has the right not to produce an issue (by way of 'aḍl) and he also has the right not to acquire the attribute of slavery (by avoiding marriage).

He is not to marry a slave girl when he already has a wife who is a freewoman, due to the words of the Prophet (God bless him and grant him peace), "A slave woman is not to be married over a freewoman." In its unrestricted sense it is proof against al-Shāfiʿi (God bless him), in permitting this to the male slave, and also against Mālik (God bless him), in permitting this with the consent of the freewoman. The reason is that slavery has an effect on the distribution of blessings by making them half, as we will establish in the Book of Talaq, God willing, and the permissibility of the subject-matter in the state of being single will be established and not in the state of being married.

It is permitted to marry a freewoman when there is an existing slave wife, due to the words of the Prophet (God bless him and grant him peace), "A freewoman can be married when there is a slave wife." The reason is that it is lawful to marry her under all circumstances for there is no splitting of benefits in her case.

If he marries a slave girl, while there is a freewoman as a wife who is undergoing her 'iddah after an irrevocable divorce or a divorce pronounced thrice, it is not valid according to Abū Hanīfah (God bless him). It is permitted according to the two jurists. The reason is that this is not marriage, while the freewoman is his wife, and that is the prohibiting factor. Thus, if he were to take an oath that he will not marry while being married to her he would not be violating this oath (with this marriage). According to Abū Hanīfah (God bless him) the nikāh of the freewoman still subsists due to the continuance of some of the ḥākām, therefore, the prohibition is to be maintained as a precaution, as distinguished from the oath, because the purpose there is that no one other than her will be part of her share.

A freeman has the right to marry four freewomen and slave girls, but he is not to marry more than this number, due to the words of the Exalted, "If you fear that you shall not be able to deal justly with the orphans, marry women of your choice, two or three or four; but if you fear that you shall not be able to deal justly with them, then only one, or (a captive) that your right hands possess, that will be more suitable, to prevent you from doing injustice." The occurrence of a number in a text prevents an increase over it. Al-Shāfiʿi (God bless him) said that he is not to marry more than one slave girl, because this is due to necessity, in his view. The proof against him is the verse we recited, because a married slave is included in the meaning of the word nisā', as in the case of ḥiṭār (vow of continence).

A slave is not permitted to marry more than two women. Mālik (God bless him) said that it is permitted, because in the case of nikāh he is like a freeman, in his view, so much so that he possesses this right without the permission of his master. In our view, things are halved due to slavery, thus, the slave marries two, while the freeman may marry four to give expression to the higher status of freedom.

If a freeman divorces one of the four wives through an irrevocable divorce, it is not permitted to him to take a fourth wife unless the

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19 It has been recorded by all the sound compilations except al-Bukhārī. Al-Zayla'i, vol. 3, 170.
20 It has been recorded by all the six Imāms in their books. Al-Zayla'i, vol. 3, 171.
21 Which is chapter 4, verse 3.
22 See next tradition.
23 Qur'an 4:3
divorced wife completes her 'iddah.\(^{45}\) Al-Shafi'i (God bless him) disagrees with this. The case is parallel to that of the nikah of one sister during the 'iddah of the other.\(^{46}\)

He said: If he marries a woman who is pregnant on account of zina,\(^{47}\) the nikah is valid, however, he is not to have sexual intercourse with her till she delivers her burden. This is the view according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf (God bless him) said that the nikah is fasid (vitiating). If the pregnancy is through valid lineage (like a woman in her 'iddah), the nikah is valid by consensus (ijma'). According to Abū Yūsuf (God bless him), the prohibition is essentially for the sanctity of the foetus, and this pregnancy is protected for there is no offence connected to it, therefore, it is not permitted to abort it.\(^{48}\) The two jurists argue that the pregnant woman can be lawfully wed on the basis of the text, and intercourse is prohibited so that his water should not irrigate what another person has sown. Prohibition in the case of a lawful pregnancy is because of the right of the father, but such a protection is not available to one who has committed zina. If he marries a pregnant woman from among the prisoners of war, the nikah is fasid, because she has a lawful pregnancy.\(^{49}\) If he gives his slave girl, who bears his child (umm walad), in marriage to another, the nikah is void. The reason is that her pregnancy is associated with the master so that the child's paternity is established for the master without filing a claim (da'wah) for it. If the nikah were deemed valid, it would amount to mingling two claims of causing the pregnancy. The claim of the master about causing the pregnancy is not strong, however, so that the child's paternity can be denied by mere denial without going through with the li`ān procedure. Thus, it is not to be considered until the child is associated with him.

He said: If a person has intercourse with his slave girl and then gives her away in marriage, the nikah is valid. The reason is that she is not linked to her master through a pregnancy. If she delivers a child, the paternity of this child cannot be established (for the master) without filing a claim (da'wah). It is, however, his duty to verify the vacation of her womb (before her marriage) for the protection of his lineage.

When the nikah has been deemed valid, the husband should have intercourse with her prior to the time of verifying the vacation of her womb, according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that he would prefer that he abstain from sex till the vacation of her womb is established, because it would amount to mingling his lineage with that of the master just like he would in the case of buying the slave. The two jurists maintain that the ruling of validity of the nikah is a (legal) sign of the vacation of the womb, thus, the husband is not to be asked to verify it either by way of recommendation or obligation. This is distinguished from purchase, because sex outside of nikah is permitted in such a case.

Likewise, knowing that a woman indulges in zina, if he marries her, it is permitted to him to have intercourse with her without verifying the vacation of her womb, according to the two jurists. Muḥammad (God bless him) said that he would not like him to do so until he has carried out the verification. The idea is the same as we have stated.

He said: A nikah of mut`ah is void. This is the nikah where he says to a woman that he would like to utilise her for a certain period and for a certain sum. Malik (God bless him) said that it is valid, because it was permitted and remains so till an abrogating evidence becomes evident.\(^{50}\) We maintain that the abrogation is established through the consensus (ijma') of the Companions (God be pleased with them), and Ibn 'Abbas (God be pleased with both) changed his opinion to conform with theirs, thus, ijma' was established.

A temporary nikah is void, like one marrying a woman with two witnesses witnessing that the marriage is for (say) ten days. Zufar (God bless him) said that it is valid and binding (perpetually), because a contract of marriage cannot become void due to fasid (vitiating) stipulations. We maintain that he has created the meaning of mut`ah here, and it is the

\(^{45}\)In other words, this operates like an 'iddah for the man as well.

\(^{46}\)This has been discussed above.

\(^{47}\)That is, one whose pregnancy cannot be attributed to anyone.

\(^{48}\)That is, by treatment or other medical methods.

\(^{49}\)"Except for these, all others are lawful." Qur'an 4:24.

\(^{50}\)This shows that a marriage in enemy territory among the unbelievers is recognised. The presumption is that the unbelievers do get married.
content that is considered in contracts. There is no difference whether the duration is lengthy or is short because limiting the contract with time gives rise to the meaning of *mut‘ah*, and that is found in this case.

If a man marries two women through a single contract when one woman is such that her *nikāh* with him is not permitted, then the *nikāh* of the (other) woman with whom marriage is permissible is valid, while *nikāh* with the first is void. The reason is that the attribute that renders the contract void is found in one of them. This is distinguished from the case where he buys a freeman and a slave (through a single contract), because a sale is rendered void due to vitiating conditions, and the acceptance of a freeman in the purchase is a condition here. Therefore, the entire amount named belongs to the woman whose *nikāh* is valid, according to Abū Ḥanīfah (God bless him). The two jurists maintain that it is to be divided between them on the basis of reasonable *mahr* for each. This issue is from the *Kitāb al-Asl*.

If a woman brings a claim against the man that he married her and brings evidence to the effect, with the *qādi* declaring her his wife, when this man did not actually marry this woman, then the woman is at liberty to stay with this man and is also at liberty to permit him to have sexual intercourse with her. This is the position according to Abū Ḥanīfah (God bless him), and it is also the first opinion of Abū Yūsuf (God bless him), while in a later opinion, which is also the view of Muhammad (God bless him), she is not to let him have intercourse with her. The latter view is also held by al-Shafi‘i (God bless him). The reason is that the *qādi* has made an error in admitting evidence, because the witnesses have committed perjury. The situation is as if they turned out to be slaves or unbelievers (whose evidence is not admitted against a Muslim). According to Abū Ḥanīfah (God bless him), the witnesses appear truthful to the *qādi*, and such evidence is deemed sufficient proof due to the difficulty of discovering the reality about their truthfulness. This is different from being a slave or an unbeliever, because the discovering of truth in this case is possible. If he based his judgement on such testimony and it is possible to implement it morally as well as by the declaration of *nikāh*, it is implemented to avoid further dispute. This is different from absolute claims (that are not supported by evidence for the basis of acquisition).

51This issue explains a clash between what is to be done morally (*diyānatan*) and what is the impact of a judgement (*qad‘ān*) even if it is based upon false evidence.
Chapter 55

Awliya’ (Guardians) and People of Equal Status

The nikāh of a sane and major freewoman stands concluded, when it is with her consent, even if the wali (guardian with legal authority granted by the shari‘ah) did not undertake this contract. This is so according to Abū Ḥanīfah and Abū Yūsuf (God bless them) recorded as the Zāhir al-Riwayah. It is narrated from Abū Yūsuf (God bless him) that it is not concluded, while according to Muhammad (God bless him), it is concluded but is suspended (mawqūf, subject to ratification by the wali).

Mālik and al-Shāfi‘ī (God bless them) said that nikāh is not concluded at all through a statement of women, because a nikāh is intended to meet certain objectives and delegating such authority to them upsets these objectives. Muhammad (God bless him) said that such upsetting of objectives is remedied after ratification of the contract by the wali. The basis for permissibility (according to the Zāhir al-Riwayah) is that she has undertaken an act that pertains to something that is purely her personal right, and she possesses the legal capacity to do so being sane and in possession of discretion. It is for the same reason that she can undertake transactions in wealth and possesses the right to choose a husband. The wali is asked to undertake her marriage so that she is not characterised as being immodest. Thereafter, according to the Zāhir al-Riwayah, there is no difference between a husband who is equal in status to her and one who is not, however, the wali has the right to object when the husband is not equal in status. It is also reported from Abū Ḥanīfah and Abū Yūsuf (God bless them) that in the case of a husband of lesser status it is not permitted, because there are many matters (between husband and wife) that
cannot be resolved by resort to the law. It is reported that Muhammad (God bless him) withdrew his opinion and upheld the one followed by the two jurists.

It is not permitted to the wali to force a virgin, who is a major, to marry. Al-Shafi'i (God bless him) disagrees. He decides the issue on the analogy of a minor girl. The reason is that the minor is unaware of the son cannot be resolved by resort to the law. It is reported that Muhammad ammd a d marry. Al-Shafil (God bless him) disagrees. He decides the issue on the two jurists.

(God bless him) withdrew his opinion and upheld the one followed by (God bless him) on the evidence that the communication from the Lawgiver, therefore, no one has authority over her to compel her. The authority over the minor is due to her asking him to do so. We maintain that she is a freewoman addressed directly by the communication from the Lawgiver, therefore, no one has authority over her to compel her. The authority over the minor is due to the lack of maturity of thought, which becomes complete upon (attaining her puberty) on the evidence that the communication from the Lawgiver becomes directed towards her. She is, therefore, just like a young man, and her capacity for being free with respect to marriage is just like her freedom to undertake transactions in her wealth. The father takes possession of her sadaq on the basis of her implied consent for he cannot do so if he forbids it.

He said: If the wali seeks her permission and she remains silent or laughs, then, that is taken to be her permission, due to the words of the Prophet (God bless him and grant him peace), “The permission of the virgin is to be obtained about her marriage. If she remains silent she has consented.” The reason is that the inclination to give her consent is greater, because she is shy about expressing her willingness, but that is not so in the case of denial. Laughter has a greater implication about consent greater, because she is shy about expressing her willingness, but that is not an indication of annoyance and disapproval. It is said that if she laughs in a sarcastic manner at what she hears, then, this is not to be taken as consent, but if she cries without making a sound, it does not amount to rejection.

He said: If this is done by a person other than the wali, that is, someone other than the wali seeks her permission, or someone else becomes her wali at a removed level (like a brother instead of the father), consent is not given unless she expresses this in words. Silence in this case is due to the need of discussing the matter for which reason it is not taken as consent. When it is taken as such, it is possible. Deeming such consent to be sufficient is only due to need, and there is no such need in the case of people other than the awliya. This is to be distinguished from the case where the person seeking permission is a messenger of the wali for he stands in his place. The seeking of permission deemed valid is one where the husband to be is named in a manner in which he can be identified, so that her desire to marry him can be distinguished from her desire not to marry him.

The stating of the mahr is not stipulated, and this is the correct view, because the nikah is valid without it.

If he marries her away and the news reaches her, but she remains silent, then, the legal position is as we have stated. The reason is that the implication to be understood in the case of silence does not differ. Thereafter, the report, if it is by an unauthorised person, the stipulation of number and moral probity is required according to Abū Ḥanīfah (God bless him) with the two jurists disagreeing. If it is brought by an authorised messenger, the requirements are not stipulated by consensus, and there are precedents for this.

If a deflowered woman’s permission is sought, her consent is to be given through an express statement, due to the words of the Prophet (God bless him and grant him peace), “The deflowered woman is to be consulted.” The reason is that speaking out is not deemed a defect with respect to her, and there is less shyness in her due to her experience. Consequently, there is nothing to prevent an express statement in her case. If

1. That is, these matters are not justiciable. Many of these matters are those where women claim mistreatment at the hands of men. The remedy for such things depends upon education and cultural practices prevalent in societies.

2. This is an outstanding passage by the Author and highlights the position of the Hanafi school.

3. That is, of a girl who has attained puberty.

4. Traditions conveying this meaning have been recorded by all the sound compilations except al-Bukhari. Though this tradition is gharib in these words, a tradition conveying the same meaning has been recorded from Abū Hurayrah (God be pleased with him) by all the six Imāms. Al-Zayla’ī, vol. 3, 194.

5. Neither the wali nor his messenger.

6. The number of persons—two.

7. That is, there are precedents for this disagreement between Abū Ḥanīfah and his two disciples (God bless them) with respect to the reports of the fudūl. Among these are removal of an agent, the termination of partnership and so on.

8. It is gharib in this version, but the meaning has preceded in previous traditions from Abū Hurayrah (God be pleased with him). Al-Zayla’ī, vol. 3, 195.
her virginity has been lost due to jumping, menstruation, a wound or due to increase in age, then, the rule for virgins applies to her, because she is a virgin in reality. The physical contact that she will have will be her first contact. It is from this that the words bâkîrah (first blossom) and bûkrah (early morning) are derived. The reason is that she is shy due to lack of experience.

If it is lost due to zînâ, that is, her virginity, then she takes the same rule according to Abû Ḥanîfah (God bless him). Abu Yûsuf, Muḥammad and al-Shâfi`î (God bless them) said that her silence is not sufficient, because she is deflowered in reality and this will be a recurrence of the physical contact. It is from this meaning that the words mathâbah (spiritual reward), mathîbâh (place of repeated return) and tathwîb (repeated prayer) are derived. According to Abû Ḥanîfah (God bless him), the people know her as a virgin and they will find fault with her for speaking out, therefore, it is to be avoided. Accordingly, her silence is sufficient so that her interests are not lost. This is distinguished from cases where she has had intercourse due to shubhâh (mistrust) or a vitiated nikâh. The reason is that the law has publicised it so that the âhkâm can apply to her. As for zînâ, it is recommended that it be concealed. If, however, her affair has become public, her silence will not be deemed sufficient.

If the husband says to her, “The report of nikâh reached you and you remained silent,” and she replies, “I rejected the nikâh,” then her statement will be given legal precedence (accepted by the judge). Zufar (God bless him) said that his statement will be accepted, because silence is the primary response and express rejection is accidental. Thus, it is like the case where a khiyâr al-shart has been stipulated for a party to sale and he claims rejection after the stipulated period is over. We say that he is claiming a binding contract (of marriage) and the ownership of the benefits, while the woman is denying this. Thus, she is denying like a custodian when he claims the return of the deposit, as distinguished from the case of khiyâr as in that the binding nature of the contract has become obvious with the passage of the duration.

If the husband adduces evidence about her silence the nikâh is established. The reason is that he has established his claim with proof. If he does not possess evidence, then, no oath will be administered to her.

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9 This is a basic rule that has been flouted in the implementation of the hadâd in Pakistan.

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10 According to Abû Hanîfah (God bless him). This is an issue that pertains to oaths taken in six things, and it will be coming up in the Book of Da`wâh, God willing.

The nikâh of a minor boy or a minor girl is permitted if they are married away by the wâli irrespective of the girl being a virgin or deflowered. The wâli here belongs to the `asabât. Malik (God bless him) disagrees with us with respect to the wâli other than the father and the grandfather, and he also disagrees about the deflowered minor girl. According to Malik (God bless him), wilâyâh (authority) over a free woman depends upon the need for it, and there is no need here due to the absence of desire for sex, except that the wilâyâh of the father has been established on the basis of the text and against analogy (therefore it is affirmed). The grandfather does not fall in this category and is not to be linked with the father. We would say that it is actually in complete conformity with analogy, because nikâh involves the securing of interests and these are not usually secured completely except between those of equal status. Equality of status, however, cannot be found at all times, therefore, we have affirmed wilâyâh in the state of minority in order to avoid equality of status. The basis for al-Shâfi`î’s opinion is that investigation (of these matters) cannot be completed through delegation to persons other than the father and the grandfather due to the lack of affection in the distant relationship of such other persons. It is for this reason that such other person is not authorised to undertake transactions in the wealth of the minor, even though authority over wealth is less important, therefore, it is better to deny him authority over the person, which is more important. We maintain that close relationship leads to proper investigation as in the case of the father and the grandfather. The deficiency that remains has been covered by us through the denial of binding wilâyâh, as distinguished from transactions in wealth, because these are undertaken repeatedly and an error cannot be undone, therefore, only binding wilâyâh will be beneficial for wealth. In the case of parties to the contract, binding wilâyâh is not established due to deficient affection.

In the case of the second issue, his (al-Shâfi`î’s) opinion is based on the reasoning that loss of virginity becomes a cause of forming an informed opinion due to the gaining of experience, therefore, we have rested the
rule on experience for ease. We rely on what we stated with respect to
the realisation of need and the availability of affection. Further, there is
no experience that can give rise to an informed opinion without accom-
panying sexual desire, accordingly the rule will revolve around minority.

Thereafter, what supports our reasoning is the preceding saying of the
Prophet (God bless him and grant him peace), “Nikah is delegated to the
asabat,” which gives no detail. The order in the case of asabat (male
relatives on the father’s side) with respect to nikah is the same as that of
residuaries in inheritance with the more distant being excluded by the
nearer.

He said: If they are married away by the father or the grandfather,
that is, the minor boy and the minor girl, they have no option, after
they attain puberty. The reason is that these two (relatives) possess an
informed opinion and abundant affection, therefore, the contract will
become binding if it is concluded by them. It is just as if it was concluded
with their consent after they had attained puberty.

If they are married away by someone other than the father and the
grandfather, then, each one of them will have the option upon attaining
puberty. If they like they can maintain the contract and if they like they
can revoke it. This is the view according to Abū Ḥanīfah and Muḥammad
(God bless them). Abū Yūṣuf (God bless him) said that they have no
option on the analogy of the father and the grandfather. The two jurists
argue that the relationship of the brother is deficient and the deficiency is
felt due to the lack of affection that may lead to a disturbance in the objec-
tives of the contract, however, recovery is possible through the option of
discretion. The unrestricted application of the reasoning about those
other than the father and grandfather applies to the mother as well as the
qādī which is a sound narration, due to the lack of an informed opinion
in one of them and the deficiency of affection in the other.

He said: A judicial decree is stipulated in this case. It is distinguished
from the option of manumission. In this case revocation is for repelling
injury that is not apparent (is concealed), and the injury is the occurrence
of disaffection (among the spouses). It is for this reason that the option is
given to the male as well as the female. As the exercise of this option will
be binding upon the other spouse, there is a need for a judicial decree.
The option of manumission is for repelling manifest injury, which is the
continuance of ownership over her. It is for this reason that the option has
been granted to the female alone. It is the repelling of manifest injury, and
repelling such an injury does not require a judicial decision.

Thereafter, if the minor girl attains puberty, and she has come to
know about the nikah, but she remains silent, it will be treated as con-
sent. If she has not come to know about the nikah, she has the option
until she does and then falls silent. It is the knowledge of nikah itself
that is stipulated, because she is unable to act without such knowledge.
As the wali alone possesses this knowledge, she possesses the excuse of
ignorance. Knowledge about the option is not stipulated, because she is
free to gain knowledge of the āḥkām of the shari’ah. As the dār is the dār
of knowledge, ignorance does not amount to an excuse. This is distin-
guished from the case of a slave girl set free, because the slave girl had no
freedom to gain the knowledge of the āḥkām; therefore, she possesses
the excuse of ignorance about the availability of an option.

Thereafter, the option available to a virgin is annulled by her silence,
but the option available to a boy is not annulled, unless he says, “I con-
sent,” or he does something that conveys the meaning of consent, the
latter rule applies to a girl as well if her husband has had intercourse
with her prior to her puberty. These situations are analogous to the situ-
ations at the time of the conclusion of the nikah contract.

The option of puberty for the virgin girl does not extend up to the
end of the session, but it is not annulled by moving away from the ses-

12The text in al-Zayla’i is missing for this tradition. Al-Zayla’i, vol. 3, 199. This tradi-
tion has been quoted by Imām al-Sarakhsi (God bless him). It has not been recorded by
any of the sound compilations. The Imāms of the four schools of law have unanimously
accepted this tradition. It is, however, reported as mawqūf and marfi’ from ‘Ali (God
be pleased with him). See al-Ayni, vol. 5, 93.
13That is, khiyar al-bulūgh.
14Idrāk, the same thing as bulūgh, according to some, however, discretion (rashd) is
an additional condition for purposes of wealth at least.
option is not established through an act of the spouse, but is due to a suspicion of disaffection between the spouses, thus, it is annulled through consent, however, the consent of a virgin girl is her silence. This is distinguished from the option of manumission, because this is established through the act of the master; namely, manumission. Accordingly, the session is taken into account for it, as is the case with the woman granted the choice (of divorce).

Thereafter, separation resulting from the exercise of the option of puberty is not divorce, because the option can be exercised by the female as well when the right of talāq has not been granted to her. Likewise, due to the exercise of the option of manumission, on the basis of our explanation. This is different from the case of the woman granted the choice of repudiating marriage, as in that case it is the husband who has made her own this right, and it is he who owns the right of divorce.

If either one of them dies prior to puberty, the other inherits from him or her. Likewise, if one dies after puberty, but prior to separation, because the contract in its essence is valid and ownership is established through it, but it has come to an end with death. This is distinguished from the act of an unauthorised agent (fudūlī) (conveying the information), when one of the spouses dies prior to ratification as in such a case the contract is suspended (becomes mawqūf), but in the present case it stands executed and the rights are established through such contract.

He said: There is no wilāyah for the slave, for the minor or for the insane. The reason is that they have no wilāyah over their own persons, thus, it is apparent that it should not be established over another. There is also no wilāyah for the kafir (unbeliever) over a Muslim, due to the words of the Exalted, “And never will God grant to the unbelievers authority over the believers.” It is for this reason that the testimony of an unbeliever regarding a believer is inadmissible and they do not inherit from each other. As for the unbeliever, his wilāyah for purposes of marriage is established over his unbelieving child, due to the words of the Exalted, “The unbelievers are protectors, one of another: unless he gives her away in marriage at the place where he is, it is permitted, but the wilāyah cannot pass to one removed in relationship when his wilāyah is continuing. We maintain that this

and great mischief.” It is for this reason that the testimony of an unbeliever is admissible against an unbeliever and they can inherit from each other.

Close relatives other than the 'asabāt do have wilāyah of marriage according to Abū Hanīfah (God bless him). This means in the absence of the 'asabāt, and the rule is based upon istihar. Muḥammad (God bless him) said that it is not established. His opinion is based on qiyās (analogy), and it is also the opinion of Abū Hanīfah (God bless him) in one narration. The opinion of Abū Yūsuf (God bless him) varies on this issue, but the best known view is that his opinion is the same as that of Muḥammad (God bless him). The two jurists rely on what we have related. Further, wilāyah is established for protection by the close relatives against associating someone with her who does not have the same status, and such protection is provided by the 'asabāt. According to Abū Hanīfah (God bless him), this type of wilāyah is for the formation of an informed opinion on the basis of affection, and such an opinion is formed by delegation to one who is singled out as a close relative, which is something that gives rise to affection.

A woman who has no wali, that is, from among the 'asabāt, if her mawla, who emancipated her, gives her away in marriage.

When there are no awliyā, the wilāyah belongs to the imām and the hākim, due to the words of the Prophet (God bless him and grant him peace), “The sultan is the wali of one who does not have a wali.”

If the closest wali is absent without possibility of contact, it is permitted to the one next removed from him to undertake the marriage. Zufar (God bless him) said that this is not permitted, because the wilāyah of the closest relative is still in force. The reason is that it was established as his right for the protection of the relationship, and it cannot be annulled due to his absence. Accordingly, if he gives her away in marriage at the place where he is, it is permitted, but the wilāyah cannot pass to one removed in relationship when his wilāyah is continuing. We maintain that this

17 Quran 4:141
18 By this he means: “Nikāh is delegated to the ‘asabāt.”
19 By the imām he means the Khalīfah and by the hākim he means his deputy. It is also said that by hākim he means the qādi.
20 It is recorded by Abū Dāwūd, al-Tirmidhī and Ibn Mājah as well as others from A'īshah (God be pleased with her). Al-Zayla'i, vol. 3, 195.
wilayah is one of the informed opinion, and delegation to one from whose opinion one cannot benefit does not lead to an informed opinion. Thus, we delegate the matter to one more distant than him. This person has a higher priority than the sultan, and the situation is similar to the one where the closest wali has died. If he gives her away in marriage at the place where he is, it is disallowed. After conceding this, we will say that the distant wali is distant in relationship but closer for making the arrangement, while the closer wali possesses the opposite, thus, they descend into the same position and become equivalent walis. Thus, whoever undertakes the contract, it will be executed and will not be rejected.

Absence without a possibility of contact occurs where the wali is in a land that cannot be reached more than once by the caravans in one year. This is what al-Qudūrī has preferred. It is said that this is the minimum for a journey, because the maximum has no limit, and this has been preferred by later jurists. It is also said that such absence occurs when he is in a situation that a proposal of equal status will be lost while attempting to secure his opinion. This view is the closest to fiqh, because maintaining his wilayah does not lead to the securing of interests.

If in the case of an insane woman the wilayah is contested between her father and her son, then the wali for arranging her nikākh is her son, according to Abū Hanīfa and Abu Yusuf (God bless them). Muhammad (God bless him) said that it is her father, because he possesses greater affection for her than her son. The two jurists maintain that the son has precedence among residuaries (excludes the father), and this wilayah is based on 'asabiyāh, while abundance of affection is not to be considered, as it is not so in the case of the maternal grandfather in comparison with some of the residuaries. God knows best.

55.1 Kafā'ah (Equality of Status)

Kafā'ah in nikākh is legally acknowledged. The Prophet (God bless him and grant him peace) said, “Beware! Women are to be given away in marriage only by the awliya’; and they are to be married only to those of equal status.” The reason is that the interests of the family are usually best secured among those of a similar status. The reason is that a woman of nobility will refuse to cohabit with a man of base origin, therefore, equality of status must be taken into account. This is different from considering status on the woman's side, because it is the husband who is setting up cohabitation, therefore, he will not be offended by a woman of low origin.

If a woman arranges her own marriage with someone of a lower status, the awliya’ have the right to seek separation between the two, in order to repel the criticism that will be levelled against them (for not performing their duty).

Thereafter, equality of status is taken into account with respect to lineage, as honour is linked to it. Thus, some Quraysh are equal in status to Quraysh, while Arabs are equal in status to the Arabs. The source for this is the saying of the Prophet (God bless him and grant him peace), “The Quraysh are equal in status sub-tribe by sub-tribe, the Arabs are equal in status tribe by tribe, and the clients are equal in status man for man.” There is no preference of status within the Quraysh on the basis of what we have related. The same has been narrated from Muhammad (God bless him) unless the lineage is very well known like the families of the Caliphs. It appears that he said this out of respect for the families of the Caliphs and for keeping the finah subdued. The Bani Bāhilah are not equal in status to the Arabs in general, because they are well known for their low origin.

As for the clients, if both father and grandfather or those above them were Muslims then such clients are equal in status to each other, that is, those whose forefathers were Muslim. As for a person who converts to Islam by himself, or if he has a father who is a Muslim, he is not equal in status to one who had a Muslim father and grandfather, because lineage is completed with the father and the grandfather. As for Abu Yusuf (God bless him), he linked the person with a Muslim father with one who has a Muslim father as well as grandfather, as is his view in the case of tu'rīf (identifying a person with his father’s name).

A person who converts to Islam is not equal in status to one who has a Muslim father (though not a Muslim grandfather). The reason is that honour among the clients is on the basis of Islam. All that we have said about Islam applies to freedom as well, because slavery carries the marks
of unbelief and bears the meaning of humility. Accordingly it has to be taken into account for the rule of equality of status.

He said: Equality of status is also taken into account for purposes of commitment to Din, that is, diyānah (moral uprightness and fear of God). This is the opinion of Abū Hanifah and Abū Yūsf (God bless them), and it is the sound view, because it is the highest form of honour. A woman is looked down upon more due to the fisq (disobedience) of her husband than she is due to his low origin. Muhammad (God bless him) said that it is not to be taken into account, because there is no permanence in it, and that is deemed deferred in practice. It is narrated from Abū Yasuf (God bless him) that he took into account the ability to provide maintenance, and that he should own the mahr and maintenance. This is what has been acknowledged in the Zāhir al-Riwayāt. Thus, if he does not own these two things or one of them, he is not equal in status, because mahr is the counter value of access to physical contact, therefore, it must be paid. Maintenance is the basis for establishing married life and continuing it. The meaning of mahr is what is to be paid promptly, as what is beyond that is deemed deferred in practice. It is narrated from Abū Yūsf (God bless him) that he took into account the ability to provide maintenance, but not mahr, because in the case of dower ease is practised and a man is considered able to provide it due to the financial ease of his father. As for equality of status in the possession of abundant wealth, it is to be considered according to the opinion of Abū Ḥanīfah and Muhammad (God bless them). Thus, a woman having abundant wealth cannot have as her equal a man who is merely able to provide mahr and maintenance. The reason is that people take pride on the basis of wealth and are looked down upon on the basis of poverty. Abū Yūsf (God bless him) said that it is not to be taken into account, because there is no permanence in it, wealth comes in the morning and departs by evening.25

Equality of status is to be given consideration in the case of skills and craftsmanship. This is the view according to Abū Yūsf and Muḥammad (God bless them). From Abū Ḥanīfah (God bless him) there are two narrations on the issue. According to Abū Yūsf (God bless him), it is not to be considered unless these are the lower professions like those of the weaver and the tanner. The basis for giving consideration to the professions is that the people take pride in the nobility of their professions and are looked down upon due to the lower types of professions. The basis for the other view is that having a profession is not binding and it is possible to move from a lower to a higher type of profession.

He said: If a woman is married and the dower received is less than what was reasonably due to her (on account of her status), then the awliyā' have a right to object to her marriage, according to Abū Ḥanīfah (God bless him), until the dower is made up or the two spouses are separated. The two jurists said that the awliyā' do not have this right. The issue as stated is valid according to the view of Muḥammad (God bless him) where he withdrew his opinion in the case of nikāh without the permission of the wali. The issue as stated is sound, and is testimony to the retraction of the opinion. The two jurists argue that what is in excess of ten (dirhams) is her right, however, a person who forgoes his right is not criticised like one who does so after the mahr is named. According to Abū Ḥanīfah (God bless him), the awliyā' take pride in receiving a higher mahr and are criticised when it is deficient, thus, it is like equality of status. This is different from relinquishment after it has been named as in that case there will be no criticism.

If a father gives away his minor daughter in marriage and causes a deficiency in her mahr, or he arranges his son's marriage and pays more mahr for his wife, it is valid in both cases. This is not permitted to anyone other than the father and the grandfather. This is the position according to Abū Ḥanīfah (God bless him). The two jurists said that such decrease or increase is not permitted, except by an amount that people tend to overlook. The meaning of their statement is that the contract is not valid according to the two jurists. The basis is that wilāyah is qualified with the securing of interests, and when such interests are not secured the contract is void. The reason is that decreasing it to an amount less than reasonable dower is not the securing of interests, as in the case of bay' (trade by way of exchange), thus, no one other than the two (father and grandfather) owns this right. According to Abū Ḥanīfah (God bless him), the hukm revolves around the dalil evidence of serving of interests (welfare of the child) and that is found in the closest relationship. In nikāh, there are

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25 This appears to be true.
26 But do people really believe in this and act accordingly?
objectives that are built upon (the lessening of) mahār. As for the financial aspect, it is the objective in a financial transaction. The dalīl (of welfare), however, has been deemed absent in the case of persons other than these two.

If a person gives away in marriage his minor daughter to a slave or marries his minor son to a slave girl, it is permitted. He (the Author—God be pleased with him) said that this too is the view of Abū Ḥanīfah (God bless him), on the basis that avoidance of equality of status is for an interest that is much higher than it. The two jurists maintain that there is manifest injury in this and, therefore, it is not permitted. God knows best.

55.2 Agency (Wakālah) in Nikāh and Other Matters

It is permitted to the paternal uncle’s son to give his uncle’s daughter in marriage to himself. Zufr (God bless him) said that it is not permitted. If a woman grants permission to a man to marry her to himself, and if he concludes the contract in the presence of two witnesses, then, this is permitted. Zufr and al-Shāfi‘ī (God bless them) said that it is not permitted. They believe that a person cannot at the same time be one who transfers property from one end and acquires it from the other, as in the case of bay‘. Al-Shāfi‘ī, however, permits this in the case of the walī when there is a necessity to do so, because no one else can undertake this for him, but there is no such necessity in the case of the agent (wakil).

We maintain that an agent in nikāh is one communicating and mediating. What is negated here is the performance of the contract and not conveying the consent. In the case of nikāh, the huqūq (rights of performance of the contract) do not belong to the agent as distinguished from bay‘ (trade) where there is a direct participant so that the rights of performance belong to him. As he assumes authority for both sides, his statement “I have married” will include the statements from both sides; therefore, there is no need of acceptance (qabūl).

He said: The marriage of a male and female slave without the permission of their master is suspended subject to ratification (mawqūf). If the master ratifies it, the marriage is permitted, but if he refuses, the marriage becomes void. Likewise, if a man gives away a woman in marriage without her consent or a man without his consent. This is so in our view. Each form of the contract concluded by the fudūlī (unauthorised agent), when there is a counter-value permitting acceptance, will be concluded as suspended (mawqūf) subject to ratification. Al-Shāfi‘ī (God bless him) said that all the transactions of the unauthorised agent (fudūlī) are void, because the contract is concluded for giving rise to its legal effects, therefore, his action is superfluous. We maintain that the rukn (essential element) of the transaction has been issued by one who has legal capacity and this is associated with the subject-matter. As the conclusion of the contract causes no harm, it is concluded as mawqūf so that if there is a securable interest in it, the contract may be executed. The legal effects (hukm) of the contract can be delayed till after the conclusion of the contract.

If a person says, “Bear witness that I have wed such and such woman,” and when the report of this reaches her she ratifies it, the contract is void. If another person says, “Bear witness that I have wed such and such woman to him,” and when the report reaches her she ratifies it, the contract is valid. The same rule applies if it is a woman who says all this with respect to a man. This is so according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf (God bless him) says that if a woman marries herself to a person who is absent and he ratifies it on the report reaching him, the contract is valid. The net result of this is that a person cannot act as an unauthorised agent from both sides or a fudūlī from one side and a principal from the other, according to the two jurists, with Abū Yūsuf (God bless him) disagreeing. If a contract takes place between two fudūlīs or between one fudūlī and a principal, it is permitted on the basis of consensus (ijmā‘). He (Abū Yūsuf) argues that if he were ordered to do so from both sides, the contract would be valid, thus, when he acts as a fudūlī from both sides, the contract is suspended. In this form the contract is similar to khul‘ and divorce as well as manumission in return for wealth. The two jurists argue that what is present here is one-half of the contract and this is the half of the one present, while one-half is absent. Now a part of the contract cannot be suspended till after

The contract of agency (wakālah) in the case of commercial transactions distinguishes between the hukm (legal effects) of the contract and the huqūq of a contract. The huqūq belong to the agent and the hukm to the principal. The Author is saying that this distinction is not made by the contract of agency in the case of nikāh.
the session of the contract as in the case of bay', as distinguished from the person receiving an order from both sides as his statement is transferred to the two parties to the contract. What takes place between fudtilis from two sides is a complete contract and so also khul' and its sister cases as it is a unilateral oath (promise) on his part that is binding, therefore, the transaction is complete with it.

If a man orders another that he should wed him to a woman and he marries him to two women through a single contract, marriage with none of the two is binding on him. The reason is that there is no basis for the execution of the contract of both together due to violation of the order, nor is there a basis for execution of the contract of either without one of them being ascertained (the wife) due to the absence of a priority between the two, thus, what is ascertained is separation.

If a ruler orders a person that he should marry him to a woman and he does so with a slave girl belonging to another, the contract is valid, according to Abu Hanifah (God bless him) on the basis of the unqualified command and the absence of a suspicion of vested interest. Abu Yusuf and Muhammad (God bless them) said that it is not permitted unless he weds him to a woman of equal status. The reason is that the absolute command is diverted towards what is reasonable in practice and that is marriage with one of equal status. We would say that 'urf is equal here or it is one that pertains to practice, thus, it is not suitable as a qualifying factor. It is mentioned in the topic of wakalah that the acknowledgement of equal status here is based upon istiljas in the opinion of the two jurists, because no one is completely helpless in marrying any type of spouse, thus, where help is sought it is usually for marriage with one of equal status. God knows best.

Chapter 56

Mahr (Dower)

The contract of nikah is valid even if no mahr is named in it. ¹ The reason is that nikah is a contract of joining and union in its literal meaning and is, therefore, complete with two spouses. Thereafter, mahr is obligatory (wajib) according to the shari`ah² as an expression of the sanctity of the subject-matter. Consequently, there is no need of mentioning it for the validity of the nikah. The same rule applies³ if a man marries the woman with the stipulation that there is no mahr for her. This is based on our explanation. Malik (God bless him) disagrees with this.

The minimum mahr is ten dirhams. Al-Shafi`i (God bless him) said that an amount that can lawfully be a price in bay` can lawfully be the mahr for the woman. The reason is that it is her right and it is she who will determine its amount.⁴ We rely on the saying of the Prophet (God bless him and grant him peace), "There is no mahr that is less than ten."⁵ The reason is that it is the right of the shari`ah as an obligation and as an expression of the sanctity of the subject-matter, therefore, it has to

¹That is, it is not like other commutative or camapunistic contracts where a counter-value has to be paid from both sides.
²Al-`A`yni, quoting other jurists, says that there are seven names for mahr (nine according to some). In the Qur'an, however, there are four names for it. The first is iddir, the second is nash'ilah (4:4), the third is 'urf (4:45), the fourth is faridah (2:237), the fifth is mahr (tradition), the sixth is aligah, and the seventh is 'urf. Al-`A`yni, vol. 5, p. 30.
³That is, the contract of nikah is considered valid.
⁴An amount that can be the subject-matter of a gift according to Ibn Hazm.
⁵In other words, whatever amount is acceptable to the bride is valid as dowry.
⁶This is part of a tradition that has preceded in the case of equality of status. The tradition, however, is considered do`of Al-Zayla`i, vol. 3, 199, 196.
⁷That is, it is not the right of the woman as claimed by al-Shafi`i (God bless him), but is a right of the shari`ah in order to maintain the sanctity of the contract.

⁸That is, marriages are concluded both with freewomen and slaves.
be fixed at an amount that has significance, and such an amount is ten dirhams reasoning from the scale (nisāb) for sariqah (theft).

If an amount less than ten is named then she is entitled to ten, in our view. Zufar (God bless him) said that she is entitled to reasonable mahr (for a woman of her status), because naming an amount that is not suitable as mahr is the same as not mentioning it. We maintain that the error in such naming pertains to the right of the shari'ah and the shari'ah has required it to be ten. As for her own right, she has already agreed to what is less than ten so she agrees to ten as well. 8 Not naming the mahr is not a factor to be considered here, because she may agree to the passing of ownership without a counter-value sometimes out of respect, while at other times she may not give her consent for an amount that is substantial. If he divorces her prior to the consummation of marriage, the payment of five becomes obligatory according to our three jurists (God bless them), while according to Zufar (God bless him), the payment of mut'ah becomes obligatory just like the case where he did not mention an amount.

A person who names a mahr of ten or more dirhams, is under an obligation to pay what he mentioned if he consummates the marriage or dies (leaving her behind). The reason is that with consumption the delivery of the counter-value is established and it is for this that the counter-value was affirmed. With death the contract is terminated by reaching its end. A thing is established and affirmed by its termination with all its accompanying obligations.

If he divorces her prior to having intercourse with her or seclusion with her, she is entitled to one-half of the named mahr, due to the words of the Exalted, "And if you divorce them before consummation, but after the fixation of a dower for them, then half of the dower is due to them," unless they remit it or (the man's half) is remitted by him in whose hands is the marriage tie; and the remission of the man's half is the nearest to righteousness. And do not forget liberality between yourselves. For God sees well all that you do. 9 The analogies in this case are conflicting. The husband has extinguished the ownership for himself of his own choice, the subject-matter has been returned to the woman as a whole, therefore, after the right of the shari'ah is met, she can demand an additional of her own right.

If he marries her and does not name a mahr for her or he marries her on the condition that there is no mahr for her, she is entitled to dower that is reasonable (for a woman of her status) if he consummates the marriage or dies. Al-Shafi'i (God bless him) said that in case of death nothing is obligatory, while most of the Shafi'i jurists maintain that it is obligatory in the case of intercourse. He (al-Shafi'i) maintains that mahr is purely her right, 10 thus, if she is able to negate it at the beginning of the contract she can negate it at its end. We maintain that mahr is an obligation as the right of the shari'ah, as has preceded. Mahr becomes her right in the case of subsistence of the contract and in such a case she can relinquish it and not negate it.

If he divorces her prior to consumption, she is entitled to mut'ah, due to the words of the Exalted, "There is no blame on you if you divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gi)t, the wealthy according to his means, and the poor according to his means; a gift of a reasonable amount is due from those who wish to do the right thing." 11 Thereafter, this mut'ah is obligatory relying upon the command, 12 and on this point there is disagreement with Malik (God bless him).

Mut'ah is three dresses (that is, three parts of a dress) according to the apparel of a woman of her status. These are the shirt, head covering and the loin cloth. This estimate is reported from 'A'ishah and Ibn 'Abbas (God be pleased with both). Al-Zayla'i, Al-Bayhaqi from Ibn 'Abbas (God be pleased with him) ordered to囡 an as a candidate for reasonable mahr. The correct view is that acting upon the text, it is the husband's situation that is to be considered, and

8 Prior to consummation.
9 The distinction between what is her right and what is the right of the shari'ah, according to the Hanafi jurists, has preceded.
10 Qur'an 2:236
11 The command gives rise to an obligation, unless another evidence indicates otherwise.
12 It is recorded by al-Bayhaqi from Ibn 'Abbas (God be pleased with both). Al-Zayla'i,
the text is, "The wealthy according to his means." Thereafter, it is not to be in excess of one-half of the mahr that is reasonable for her, and it is not to be less than five dirhams. This is known through Kitāb al-Adl.

If he marries her without naming a mahr, but thereafter they agree about naming it, then, she is entitled to it if he consummates the marriage with her or dies. If he divorces her prior to consummation, she is entitled to mut'ah. According to the earlier view of Abū Yūsuf (God bless him), she is entitled to one-half of the sum named. This is also al-Shāfi‘ī’s view. The reason is that it is the amount due, therefore, it is to be halved on account of the text. We rely on the reasoning that this wajib has been ascertained after the contract, which is reasonable dower and that cannot be halved. Likewise whatever has acquired the same position. The meaning of the text that they recite is the obligation arising from the contract, because that is the obligation that is well known.

He said: If he increases for her the amount of the mahr after the conclusion of the contract, he is bound to pay the excess. Zufar (God bless him) disagrees with this. We shall discuss this under the topic of the increase in price and the priced commodity, God willing. When the increase is valid, it lapses with divorce prior to consummation. According to the first opinion of Abū Yūsuf (God bless him) it is to be halved with the original amount. The reason is that in their view halving is specific to the obligation arising out of the contract, but in his view the obligation arising later is similar to the obligation of the contract, as has already preceded.

If she reduces for him the amount of mahr, it is valid. The reason is that mahr represents the subsistence of her right and a reduction in it is compatible with it while it subsists. If a person is secluded with his wife, and there is no obstacle in the way of intercourse, but thereafter he divorces her, she is entitled to the complete mahr. Al-Shāfi‘ī (God bless him) said that she is entitled to one-half of the mahr, because the subject-matter of the contract becomes payable due to intercourse, thus, full mahr does not accrue without it. We maintain that she has submitted the counter-value by removing all obstacles and that is all she could do. Consequently, her right in the counter-value is established on the analogy of bay‘ (exchange). Seclusion is proper (valid) if either one of them is ill, fasting during Ramaḍān, or is in the state of ihram due to the obligatory or supererogatory ḥajj or due to ‘umrah, or the woman is in her menstrual period, so that if he divorces her she is entitled to one-half of the mahr. The reason is that all these things are obstacles. As for illness, the meaning is an illness that prevents intercourse and with this is linked injury through it. It is said that the illness of the male does not exclude contraction of the organ and being listless, whereas the above detail is about her illness. The fasting of Ramaḍān includes what is binding due to qada‘ and kaffarah, while ihram includes what will lead to dam, the vitiation of rites and qada‘ due to intercourse. Menstruation is an obstacle by nature as well as the law.

If one of them is fasting voluntarily, then she is entitled to the whole mahr. The reason is that it is permitted that it be broken without an excuse, according to the narration of al-Muntaqa‘. This view about mahr is sound. The fast of qada‘ and nadhr (vow) is like a voluntary fast, according to one narration, because there is no expiation in it. Salāt has the same status as sawm with the fard of one being like the fard of the other and nafl like the nafl.

If a man with amputated genitals is secluded with his wife and then divorces her, she is entitled to full mahr according to Abu Hanifah (God bless him). The two jurists say that he is liable for one-half mahr, because his inability is more severe than that of the sick person. This is distinguished from the case of the ‘innin (impotent person), because the rule depends upon the soundness of the organ. According to Abu Hanifah (God bless him), what is due from her is submission in favour of the one to whom it is due, and this she has brought about.

He said: She is liable for undergoing the waiting period (‘iddah) in all these issues, by way of precaution based upon istihsan due to the possibility of the womb being occupied. As ‘iddah is the right of the shar‘i‘ and
the child, therefore, the claim (of no intercourse) is not to be taken as true for negating the right of the third party (the child). This is distinguished from mahr, as that is wealth and does not require precaution for its imposition. Al-Qudūrī (God bless him) has mentioned in his commentary that the obstacle, where it is legal, gives rise to 'iddah due to the existence of the ability to undertake sex in reality, and where it is actual like minority and illness, it does not give rise to 'iddah due to the absence of actual ability of undertaking intercourse.

He said: Mut'ah is recommended for each divorced woman except for one, and she is the one whom the husband has divorced prior to intercourse when he had named a mahr for her. Al-Shafi`i (God bless him) said that it is obligatory for all divorced women, except for this woman (excluded). The reason is that mut'ah is obligatory to establish goodwill on the part of the husband, because he has cast her into the brutality of separation, except that in this particular case there is one-half of the mahr in the nature of mut'ah. The reason is that divorce is revocation in this situation, and mut'ah cannot recur. Our reasoning is that mut'ah is a substitute for mahr that is reasonable in the case of a woman who has been divorced prior to intercourse without naming the mahr, as in this case reasonable mahr is extinguished and mut'ah is made obligatory. As it is the contract that gives rise to compensation, therefore, it is treated as a substitute. A substitute cannot be combined with the original imposition nor even be a part of it, thus, mut'ah cannot be imposed along with a part of the mahr. Further, he has not committed an offence in subjecting her to this ordeal, therefore, a penalty cannot be associated with his act. Accordingly, mut'ah belongs to the category of equity.

If a man gives away his daughter in marriage to another on the condition that the other wed his daughter or his sister to him so that one contract be a counter-value (compensation) for the other contract, then the two contracts are valid, and each woman married is entitled to reasonable mahr (according to her status). Al-Shafi`i (God bless him) said that the two contracts are void, because he has deemed one-half of the goods as sadaq and the other half as the subject-matter of the contract of nikāh, but there can be no joint sharing in this relationship, thus, the imposition is void. We maintain that he has named as mahr what is not valid as mahr. Consequently, the contract is valid and reasonable mahr becomes obligatory. It is as if he had mentioned khams or khinzir. Further, joint sharing cannot be established without entitlements (of utilisation).

If a freeman marries a woman on the condition that she serve him for one year or on the condition of teaching him the Qur`ān, then, she is entitled to reasonable mahr. Muhammad (God bless him) said that she is entitled to the value of one year's service. If a slave marries a (slave) woman with the permission of her master that he will serve him for a year, then, the contract is valid and she is entitled to (the value of) his service. Al-Shafi`i (God bless him) said that she is entitled to (the value of) instruction of the Qur`ān and service in both cases. The reason is that in his view, where it is valid for something to have compensation, contingent upon a condition, it is suitable for being mahr, because it is through this that compensation is realised. It is as if he married her for serving another freeman with his consent or upon the condition of the husband tending her sheep. Our reasoning is that what is prescribed (in nikāh) is seeking them in return for wealth and instruction is not wealth. Likewise, all benefits (manafi`) according to our principle. Service by the slave is such seeking through wealth as it includes submission of his body. The case of the freeman is not the same. Further, service of the husband who is a freeman is not permitted as an entitlement through the contract of marriage insofar as there is a reversal of duties as distinguished from the service of another freeman with his consent as there is no contradiction in such a case. It is also distinguished from the case of service by the slave, because he serves his master, that is, where he serves her with his permission and his order. It is also distinguished from the case of tending sheep, because that amounts to the management of family matters, therefore, there is no contradiction. Further, it is forbidden according to one narration. Thereafter, according to the opinion of Muhammad (God bless him), the value of the service becomes obligatory, because the thing is important to note that Islamic law attaches great significance to the welfare of the child in this case, the right of the child is being recognized even before its birth and being associated with the right of the shari`ah, that is, it is protected as the claim of the shari`ah.

21That is, the commentary he wrote on Mukhtasar al-Karkhi.
22Like fasting and menstruation.
23That is, it is obligatory not recommended.
named is wealth, however, he is unable to deliver it due to conflict. Thus, it is like marrying on the condition of delivering another’s slave. According to the opinion of Abū Ḥanīfah and Abū Yūsuf (God bless them), reasonable dower becomes obligatory, because service is not wealth as there can be no entitlement to it under any circumstances. It, therefore, amounts to naming the mahār in terms of khāmūr and khīnzār. The reason is that their valuation through the contract is due to necessity. If its delivery cannot become obligatory through the contract, its value is not known. What remains is the original rule and that is the payment of reasonable dower.

He marries her on the condition of paying one thousand, and she takes possession of the thousand, but then makes a gift of them to him. Thereafter, if he divorces her prior to consummation, he has recourse to her for five hundred. The reason is that the substance of what became due to him on account of the gift has not reached him, because dirhams and dinārs are not ascertained in contracts and their revocation. The same applies if the mahār is stated in cubic measure or weight or something else that becomes a liability attached to the dhimmah when it is not ascertained.

If she did not take possession of the thousand until she made a gift of them to him, and he then divorces her prior to consummation, none of them is to have recourse to the other for anything, according to all three jurists. On the basis of analogy he has recourse to her for half of the sadaq (dower), and this is the opinion of Zufar (God bless him). The reason is that he delivered the mahār that belonged to him on the basis of relinquishment. Thus, the woman is not absolved of what he was entitled to due to divorce prior to consummation. The basis for istisnā is that he has received the very thing to which he was entitled to due to divorce prior to consummation, and that is the waiving of the liability for half of the mahār. The difference of cause is of no consequence when the objective is achieved.26

If she takes possession of five hundred and then makes a gift of the entire one thousand, the amount taken into possession and the remaining, or she makes a gift of the remaining amount, after which he divorces her prior to consummation, none of them is to have recourse to the other for anything, according to Abū Ḥanīfah (God bless him). The two jurists say that he has recourse to her for one-half of what she took into possession, giving the rule of the whole to the part. The reason is that the gift of a part is a reduction and is linked to the original amount in the contract. According to Abū Ḥanīfah (God bless him), the objective of the husband has been attained and that is the safety of one-half of the sadaq without a counter-value. This does not give rise to recourse upon divorce, and a reduction is not to be linked to the contract itself in the case of nikāh. Notice that the excess is not linked to the contract so that it is not halved. If she had made a gift of less than one-half and had taken possession of the rest, then in his view he would have had recourse to her for the complete one-half, while in their view the amount taken into possession would be halved.

If he marries her on the condition of giving her goods and she does or does not take possession of the goods, but then gifts them to him, after which he divorces her prior to the consummation of marriage, he is not to have recourse to her for anything. On the basis of analogy, which is the basis of Zufar’s opinion (God bless him), he is to have recourse to her for half the value of the goods. The reason is that the obligation is to return one-half of the corpus of the mahār, as has been established earlier. The basis of istisnā is that his right upon divorce pertains to the securing of one-half of the mahār taken into possession by her, and this one-half has reached him. Accordingly, she is under no obligation to pay anything in its place. This is distinguished from the case where the mahār is a debt (da’wah), and it is also distinguished from the case where she sells the goods to her husband, in which case the counter-value has reached him.

If he marries her for a mahār consisting of an animal or for goods attached to the dhimmah as a liability, then the response is the same. The reason is that what is taken into possession has been ascertained for return. This is due to the fact that uncertainty in the contract of nikāh when subjected to ascertainment is as if it is the amount that has been named.

If he marries her for a mahār of one thousand27 on the condition that he will not take her out of the city28 or on the condition that he will not

26That is, the waiving of liability for one-half.

27This means that the sum of one thousand is less than the dower that she is actually entitled to. If she imposes the payment of a huge amount instead, that too should be valid as a condition, especially when the condition is not linked to the mahār.

28That is, ask her to take up residence outside the city.
take another wife, then, if he abides by the condition she is entitled to the sum named. The reason is that the amount is suitable as *mahr* and her consent is complete with respect to it.

If he marries another woman or takes her out of the city, then, she is entitled to reasonable dower (according to her status). The reason is that he named things that are beneficial for her. When these are lost, her consent becomes non-existent with respect to one thousand. The reasonable dower will then be made up as in the case where respect and gifts are mentioned with the one thousand.

If he marries her for a thousand on the condition of keeping her in the city and for two thousand if he takes her out of there, then, if he keeps her there she is entitled to one thousand and to reasonable dower if he takes her out of there, but it is not to exceed two thousand and is not to be less than one thousand. This is so according to Abū Hanifah (God bless him). The two jurists have said that both conditions are valid, so that she will get one thousand if he lets her stay in the city and two thousand if he takes her out of the city. Zufar (God bless him) said that both conditions are void and the woman is entitled to reasonable dower that is not to be less than one thousand and is not to exceed two thousand. The basis for this rule pertains to the topic of *ijarah* (hire) in the context of the statement: If you stitch it today you have a dirham, but if you do it tomorrow you have half a dirham. We shall elaborate it, God willing.

If he marries her on the condition that he will give her this slave or that other slave when the first has a lesser value and the other a higher value, then, if the dower that is reasonable for her is less than the lesser of the two slaves, she is entitled to the slave with the lesser value, but if it is more than the slave with a higher value, she is entitled to the slave with the higher value. If the reasonable dower is in between the values of the two slaves, she is entitled to reasonable dower. This is the position according to Abū Hanifah (God bless him). The two jurists said that she is entitled to the slave with a lesser value in all these cases. If he divorces her prior to consummation of her marriage, she is entitled to one-half of the slave with the lesser value, in all these cases, on the basis of consensus (*ijma*). The two jurists maintain that recourse to reasonable dower is

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29 The cases discussed above and some that follow may be instructive for the kind of conditions that may be imposed by a woman in a pre-nuptial agreement. The cases show that any kind of condition may be imposed and if the husband accepts such conditions he will be bound by them. In case of violation, he will have to pay the compensation.

29 It is a bilateral contract, but not a commutative or synallagmatic contract.
a case there can be no average type due to a difference in species. The case is also distinguished from ḥay' (exchange) as that is based upon pressurising and haggling. As for nikāh, it is based upon mutual compassion. The option is given to the husband, because the average quality is not known except by value, and this serves as the basis for payment, whereas a slave serves as its own basis (as in the previous case). Accordingly, an option is granted (in this case).

If he marries her for a dress that is not described, the woman is entitled to reasonable dower. The meaning here is that he mentions a dress, but does not add to the description. The interpretation is that this amounts to uncertainty with respect to species, because dresses are of different types. If he mentions a type, for instance like a dress from Hira, such a term would be valid, while the husband will be given an option, as we elaborated. The same applies if he gives the description of a very high quality dress, according to the Zāhir al-Riwayāt, because such a dress cannot be considered a fungible commodity. Likewise when he names a thing subjected to cubic measure or weight where he mentions its species, but not its quality. In case he mentions its species as well as quality, he is not to be granted an option, because the described item covers both types (currency as well as fungible commodity) and is established as a liability in the correct form.

If a Muslim marries with khamr (wine) or khinzi (swine) as mahr, the nikāh is valid, but the woman is entitled to reasonable dower. The reason is that a condition for the acceptance of wine is a void condition. Accordingly, the nikāh is valid and the condition is rejected. This is distinguished from ḥay' (exchange), because it is rendered void due to fasīd conditions. As the naming of such a mahr is not valid, insofar as the named thing is not wealth with respect to a Muslim, reasonable dower becomes obligatory.

If he marries a woman on the condition of giving her “this jug of vinegar,” but it turns out to be wine, then she is entitled to reasonable dower, according to Abū Ḥanīfah (God bless him). The two jurists said that she is entitled to vinegar of the same weight. If he marries her for “this slave,” but it turns out to be a freeman, reasonable dower is payable according to Abū Ḥanīfah and Muhammad (God bless him), while Abū ʿUṣuf (God bless him) said that value is to be paid. Abū ʿUṣuf’s reasoning is that he offered her wealth and then became unable to deliver it, therefore, its value is due, or a similar item if it is a fungible commodity. It is just like a named slave dies prior to delivery. Abū ʿUṣuf (God bless him) said that in this case naming the item and pointing to it have been combined, therefore, the indication is to be taken into account as it is more expressive in identifying the objective, and that is its definition. It is as if he married by offering wine or a freeman. Muhammad (God bless him) said that the rule is that if the named thing is one that is of the same category as the thing pointed to, the contract is linked to the thing pointed out. The reason is that the thing named can be found to exist in the thing pointed to, and conforms to it in its essence and description. In case the thing pointed to is different from the named thing, the contract is linked to the thing named, because the thing named is like the thing pointed out but does not conform to it. Naming a thing is more expressive in defining a thing insofar as it identifies the form of a thing whereas an indication identifies its substance. Do you not see that if a person buys a gemstone on the condition that it is a ruby, but it turns out to be glass, the contract is concluded due to a difference in species. If he buys it on the condition that it is a red ruby, but it turns out to be green, the contract is concluded due to the unity of species. In our issue, the slave with the freeman are one species due to the lack of difference in benefits, while vinegar taken with khamr are two separate species due to a vast difference in purposes.

If he marries her for “these two slaves,” when one of them turns out to be a freeman, she is only entitled to what remains if his value is equivalent to ten dirhams, according to Abū Ḥanīfah (God bless him), because he is the one named. The payment of the thing named, even when it turns out to be less in value, prevents the payment of reasonable dower. Abū ʿUṣuf (God bless him) said that she is entitled to the slave and the value of the freeman had he been a slave. The reason is that he had offered her two slaves in sound condition. As he is unable to deliver one of them, he pays its value. Muhammad (God bless him) said, and it is also a narration from Abū Ḥanīfah (God bless him), that she is entitled to the slave remaining and the balance of her reasonable dower if her reasonable dower comes to more than the value of the remaining (slave). The reason is that if both were freemen, the entire reasonable dower would have been paid, in his view. Thus, when one of them is a slave, it is necessary to complete the reasonable dower.
If the qādī pronounces separation between the two spouses prior to sexual intercourse, there is no mahār for the woman, because mahār does not become obligatory by the contract alone. It becomes obligatory due to the acquisition of the benefits of physical contact. The same applies to seclusion and after, because seclusion does not establish the facilitating of contact, thus, it cannot be a substitute for intercourse.

If the man has intercourse with her, she is entitled to reasonable dower that is not to exceed the named dower, in our view. Zufar (God be pleased with him) disagrees as he considers it analogous to vitiated bay' (exchange). We maintain that what is acquired is not wealth; it is only assigned a value by being named. If it is in excess of reasonable dower, the excess is not due on account of the absence of valid naming, but if it is less than it, the excess over the named thing is not due to the absence of naming. This is distinguished from bay', because in that case it is marketable wealth in itself, therefore, its counter-value is estimated by its value. The woman has to undergo the waiting period ('iddah), by linking the suspicion of intercourse to the reality as a measure of precaution and in order to avoid the confusion in lineage. The commencement of the waiting period is reckoned from the time of separation, and not from the last time of physical contact. This is the sound view, because it is imposed on account of the semblance of nikāḥ and its extinction through separation. The lineage of her child is established. The reason is that caution is exercised in establishing the lineage for the welfare of the child. Thus, the proof is to be based upon what stands proved in some respects. The period for purposes of lineage is to be reckoned from the time of intercourse, according to Muhammad (God bless him), and it is this view that is chosen for fatwā (today), because a vitiated nikāḥ does not lead to it, when the decision is based upon it.

He said: The reasonable dower of the woman is to be estimated in the light of the dower of her sisters, paternal aunts and the daughters of paternal uncles, due to the saying of Ibn Mas'ud (God be pleased with him) that "she is entitled to the dower paid to the women of her family without increase or decrease, and these are women related to the father." Further, a person belongs to the race of his father, and the value of a

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\[9\] In conformity with the rule that the contract of nikāḥ is not a commutative contract.

\[10\] It is recorded by the compilers of the four Sunan. The version in al-Tirmidhi is usually referred to. Al-Zayla`i, vol. 3, 201.

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The reason is known by looking at the value of its genus. Her mahār is not to be estimated in the light of the mahār paid to her mother and maternal aunts, if they do not belong to her tribe, on the basis of our explanation. If the mother belongs to the tribe of her father, like being the daughter of his paternal uncle, then, in such a case her mahār is worked out on the basis of her mahār, insofar as she belongs to her father's family. In case of reasonable dower it will be considered whether two women are equal in age, beauty, wealth, intellect, religion, land and time period. The reason is that reasonable dower differs on the basis of these attributes. It also differs on the basis of a difference of territory and time. The jurists said that equivalence in terms of virginity or otherwise is also to be taken into account.

If the wali guarantees the payment of dower, his guarantee is valid. The reason is that he is one of those persons who are eligible to be bound, and he has added this to something that accepts guarantee, therefore, it is valid.

Thereafter, the woman has an option to demand it either from her husband or her wali, in accordance with the terms of other types of kafalah (surety). The wali when he pays it has recourse to the husband, if he had ordered him to provide surety, as is the procedure in kafalah. Likewise, this guarantee is valid even when the wife is a minor. This is distinguished from the case where the father sells the property of the minor and guarantees the price. The reason is that the wali is an advocate and the means of expression in nikāḥ, whereas he is the one who is undertaking the contract and directly undertaking the dealings, so that the dealings and performance of the contract revert to him so much so that the waiving of claims by him is also valid, according to Abū Ḥanīfah and Muhammad (God bless them). He also possesses the authority to take possession of the price, after the attaining of majority by the minor. If this guarantee is valid (for bay' ) it is provided on his own account. The authority (wilāyah) of taking delivery of the mahār belongs to the father by virtue of his being the father, and not because he has undertaken the contract. Do you not see that he does not possess the authority to take delivery of the mahār after she has attained majority. Accordingly, he is not a guarantor on his account.

\[10\] That is, the huquq of the contract belong to the agent.
He said: The woman has a right to deny access to herself until she has taken her *mahr*, and she can prevent him from taking her out of the house, that is, from travelling with her. She can do this to ascertain her right in the counter-value, just as the right of the husband has been ascertained in the other counter-value. In this case, the contract is like *bay'*. The husband does not have the right to prevent her from travelling and going out from his house in order to visit her family until he pays her the entire *mahr*, that is, the part to be paid promptly by him, because the right of confinement is for claiming what is due to him, but he does not have this right to what is due prior to payment. If the entire *mahr* is deferred, she does not have the right to deny access to herself, as she has relinquished her right due to deferment, as in the case of *bay'* (exchange). Abū Yūsuf (God bless him) disagrees with this.

The response is the same where he has had intercourse with her, according to Abū Ḥanīfah (God bless him). The two jurists said that in such a case she does not have the right to refuse access to herself. The disagreement turns on whether the intercourse was with her consent. Consequently, if she is coerced, is a minor or is insane, she does not lose this right against restriction on the basis of unanimous agreement. The same disagreement applies to seclusion with her consent. On these issues depends the right of maintenance as well. The two jurists reason that the subject-matter of the contract has been delivered to him completely through consensual intercourse once and through seclusion. It is through this that the entire *malāk* stands established (for claim), and she no longer has the right to refuse access, just like the seller where he has delivered the sold commodity. The Imām (God bless him) argues that she has refused access to what amounts to a counter-value. The reason is that each intercourse is a transaction in protected subject-matter and it will not be left devoid of counter-value due to its significance for protection. The affirmation of the *mahr* after a single intercourse is due to the uncertainty of what is beyond it, therefore, the known counter-value cannot be adjusted against an unknown return. Thereafter, when another intercourse occurs it becomes known and stands adjusted. The *mahr* in this way becomes a counter-value for the whole. This is similar to the case of a slave who has committed an offence. The whole slave will be delivered in lieu of the offence. Thereafter, if he commits another offence and another, he is delivered in lieu of all these offences.

When he has paid her *mahr* he may move her to where he likes, due to the words of the Exalted, “Let the women live (in `iddah) in the same style as you live, according to your means: annoy them not, so as to restrict them.” It is said that he is not to move her to a land that is not her land, because being a stranger is painful. Such estrangement does not occur in villages close to the city.

He said: If a person marries a woman and thereafter they differ about the *mahr*, the legally admissible statement is that of the woman up to the extent of her reasonable dower. The legally admissible statement is that of the husband with respect to what is in excess of the reasonable dower. If he divorces her prior to intercourse with her, then the statement acknowledged is his with respect to one-half of the dower. This is the position according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf (God bless him) said that it is his statement that is accepted after divorce and before it, unless he mentions an insignificant amount, by which he means something that is not known to be *mahr* for such a woman, and this is the correct view. Abū Yūsuf (God bless him) argues that the woman claims an excess and the husband denies it. The acceptable statement is that of one who denies along with his oath, unless he mentions something that prima facie shows him to be a liar. The reason is that estimation of the benefits of physical access is essential, therefore, if something out of the claim can be awarded it will be without recourse to the named amount. The two jurists argue that the acceptable statement in claims is the statement of the person whose claim is supported by the prima facie position; and it is supported here for the person claiming reasonable dower, because that is the primary obligation in a contract of *nikāḥ*. It resembles the case of the dyer disagreeing with the owner of the dress with respect to the wages of dyeing, in which the value of the dyeing is awarded.

Thereafter, he mentioned here that after divorce prior to intercourse, the acceptable statement is his with respect to one-half of the dower. This is the narration of al-Ḥāmi' al-Ṣaghīr and Kitāb al-Ālī. It is mentioned in al-Ḥāmi' al-Kabīr that reasonable *mut'ah* is to be awarded, and this is

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34 This in no case can be interpreted to mean confinement at all times.
35 Qur'an 65:6
36 A basic rule of procedure.
Based on analogy constructed upon the view of the two jurists. The reason is that mut'ah is due after divorce just like reasonable dower before it. Therefore, it is awarded like the mahr. The reasoning for reconciling between the two (the narration of Kitāb al-Aṣl and al-Jāmi’ al-Kabīr) is that Muhammad (God bless him) staled the issue in Kitāb al-Aṣl for amounts of one thousand and two thousand when mut'ah, in practice, does not reach such an amount; therefore, awarding it on this basis will not be useful. He stated the issue in al-Jāmi’ al-Kabīr with respect to ten and one hundred, where reasonable mut'ah was twenty. This is beneficial for a ruling. In al-Jāmi’ al-Ṣaghib, he remained silent about the amount, and it is construed to mean what is stated in al-Aṣl. The elaboration of the opinion of the two jurists, then, where the parties differ, while the contract of nikāḥ still exists, with the husband claiming the amount to be one thousand and the wife claiming it to be two thousand: (1) if her reasonable dower is one thousand or less, the acceptable statement is his; (2) if it is two thousand or more, the acceptable statement is hers; (3) if anyone of them adduces evidence in both situations that evidence is to be accepted; (4) if both adduce evidence in the first situation, her evidence is to be accepted as she is proving an excess; in the second situation, it is his evidence that is to be accepted as he is establishing a lesser amount; and if her reasonable dower is one thousand and five hundred, both are required to take the oath—when they do take the oath, one thousand and five hundred are to be paid. This is the takḥrij of Abū Bakr al-Jassās al-Rāzī (God bless him). Al-Karkhi (God bless him) said that they are to be administered the oath in all three cases, and thereafter reasonable dower is to be awarded.

If the disagreement is about the naming of the amount itself, reasonable dower is due on the basis of consensus (ijmā‘), as that is the primary amount according to the two jurists, and in his (Abū Yūsuf’s) view, it has become difficult to give a decision according to the amount named, therefore, it is to be based on this.

If the dispute arises after the death of one of the spouses, the response is the same as the response during their lifetime, because the consideration of reasonable dower is not relinquished due to death of one spouse. If the dispute arises about the amount after the death of both spouses, the acceptable statement is that of the heirs of the husband, according to Abū Ḥanīfah (God bless him), and even the claim of an insignificant amount is not ignored. According to Abū Yūsuf (God bless him), the acceptable statement is that of those heirs, unless they mention a trivial amount. According to Muhammad (God bless him), the response is the same as that given for a dispute during their lifetime.

If the dispute pertains to the naming of the mahr itself, then, according to Abū Ḥanīfah (God bless him), the acceptable statement is that of one who denies. The result is that a decision is not to be given on the basis of reasonable dower after their death, according to Abū Ḥanīfah (God bless him), as we will elaborate later, God willing.

If the spouses have died, and a mahr had been named for the wife, then, her heirs have a right to recover the amount from the husband’s estate. If no mahr had been named for her, then, according to Abū Ḥanīfah (God bless him) there is nothing for her heirs. The two jurists said that the heirs are entitled to mahr in both cases. The meaning here is the named mahr in the first case, and reasonable dower in the second case. As for the first, the reason is that the named mahr is a debt liability. It has been established with death and is to be recovered from his estate. If it is known that she died first, his share out of this lapses. As for the second, the reasoning underlying the statement of the two jurists is that the reasonable dower has become a debt liability for him just like the named dower. Accordingly, it cannot be waived due to death, and is like the case where one of them has died. According to Abū Ḥanīfah (God bless him), their death indicates the termination of the relationship, then, according to whose dower will the qādi estimate the reasonable dower?

If a person had sent something for his wife, and she claims that it was a gift, while the husband claims that it was mahr, then, the acceptable statement is his. The reason is that it is he who is passing the ownership and he knows best what type of ownership has been passed. How can it be otherwise for it is obvious that he is trying to meet an obligation.

He said: The exception is food that is consumed in the house, in which case it will be her opinion that is accepted. The meaning here is food that has been prepared for consumption, because it is identified as a gift. As for wheat and barley, the accepted statement is his as we have elaborated. It is said that what is obligatory on the husband like a head covering, shirt and so on should not be included in his reckoning of the mahr, because the prima facie position negates his claim. God knows best.
If a Christian man marries a Christian woman in exchange for carrion or something other than the *mahr*, when this is valid in their religion, then has intercourse with her or divorces her prior to consummation or dies leaving her behind, she is not entitled to *mahr*. Likewise two enemies (marrying) in the *dār al-ḥarb* (enemy territory). This is the position according to Abū Ḥanīfah (God bless him), and it is the view of the two jurists about the two enemies. As for the dhimmī woman, she has reasonable dower if the husband dies or has intercourse with her, and in case he divorces her prior to intercourse with her, she is entitled to *mu`āth*. Zufar (God bless him) said that the woman in the case of two enemies in the *dār al-ḥarb* is also entitled to reasonable dower. He argues that the *ṣharī`ah* has not prescribed the desire for *nikāh*, except in lieu of wealth, and this *ṣharī`ah* is applied generally (as public law), therefore, the rule is to be applied to all. The two jurists argue that the residents of the enemy territory are not obliged to follow the *ahkām* of Islam, and the authority of imposing the obligation is cut off due to the difference for the *dār*. This is distinguished from the case of the Ahl al-Dhimmah, because they have agreed to abide by our laws with respect to matters of *mu`āmalāt* like *zinā* and *ribā*. Further, the authority imposing obligations is established due to the unity of the *dār*. According to Abū Ḥanīfah (God bless him), the Ahl al-Dhimmah have not undertaken the obligation to follow our purely religious laws and those of the *mu`āmalāt* about which their belief is different nor do they fall under the authority established through our purely religious laws and those of the *drūsah* (God bless him), the Ahl al-Dhimmah have not undertaken the obligation to follow our laws.

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does not become obligatory in the case of *khinzir*, because it is a non-fungible thing and taking its value amounts to taking its corpus. This is not the case with *khamr* as it is a fungible commodity. If he divorces her prior to consummation, then those who impose reasonable *mahr* also impose *mut'a*, while those who impose the payment of value impose one-half of it. God knows best.

**Chapter 57**

**Marriages of Slaves**

The *nikāh* of a male and female slave is not permitted without the permission of their masters. Mālik (God bless him) said that it is permitted for the male slave. The reason is that he possesses the right of divorce, therefore, he owns the right to contract *nikāh* as well. We rely on the saying of the Prophet (God bless him and grant him peace), “Any slave who marries without the permission of his master is a fornicator.” The reason is that in the implementation of their *nikāh* is an admission of defects in the slaves, because being married is a defect in both the male and female slave. Consequently, they do not possess this right without the permission of their master.

The same applies to the *mukātab* slave. The reason is that *kitābah* leads to release from interdiction with respect to earning, and such interdiction remains with respect to *nikāh* governed by the rule of slavery. It is for this reason that the *mukātab* does not possess the right of permitting the marriage of his own slave. He does, however, possess the right to permit his female slave’s marriage as that belongs to the category of earning (receiving her *mahr* and so on). Likewise a female *mukātabah*

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1. The tradition is reported from Jābir and Ibn 'Umar (God be pleased with them). The different versions are recorded by al-Tirmidhī, Abū Dawūd and Ibn Mājah. Al-Zāya‘ī, vol. 3, 203–204.
2. It is a defect from the perspective of the sale of the slave. A married slave, male or female, is likely to fetch a lower price, because of which marriage is deemed a defect.
3. A *mukātab* slave is one who has entered into agreement of *kitābah* with his master by virtue of which he buys his freedom from his master by paying in installments out of his earnings.
4. The earnings of the *mukātab* belongs to the slave and is used for paying off the master.
does not possess the right of her own marriage without the permission of her master. She does, however, possess the right to permit the marriage of her own female slave, as we have explained. The same applies to the mudabbar\(^5\) and the umm al-walad,\(^6\) because ownership in them subsists.

If a slave marries with the permission of his master, the \(mahr\) is a debt attached to his corpus, and he can be sold for its recovery. The reason is that this debt is attached to the slave's body due to the bringing about of its cause by one who is eligible to do so. The right works against the master due to the issuance of permission from his side, therefore, it is linked to the corpus of the slave to ward off injury to the creditors (owners of debts) as in the case of trade.\(^7\)

The mudabbar and the mukātab are to work for paying off the \(mahr\) and are not to be sold to meet it. The reason is that ownership in them cannot be transferred from one person to another due to the subsistence of kitābah and tadbir.\(^8\) Consequently, the \(mahr\) is to be paid from their earnings and not from their persons.

If the slave marries without the permission of his master, and the master asks him to divorce her or to separate from her, then, this does not amount to ratification of the marriage. The reason is that this directive carries the probable meaning of rejection, because the rejection and relinquishment of this contract are called divorce and separation. Construing it in this way is suitable in response to the situation of a disobedient slave or it is the preliminary meaning (divorce coming later), therefore, it is preferable to follow their construction. If he says, “Give her a divorce that retains the right of retraction,” then this amounts to ratification. The reason is that retraction after divorce is possible only after a valid nikābah, thus, it affirms ratification.

If a person says to his slave, “Marry this slave girl,” and he marries her through a contract that is vitiated (fāsid), thereafter, if he has intercourse with her, he is to be sold for paying off the \(mahr\), according to

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\(^{5}\) A mudabbar slave is one who is emancipated upon the death of his master.

\(^{6}\) A female slave who has borne her master a child.

\(^{7}\) In other words, the slave is treated as an encumbered asset. The idea cannot be used to say that the slave is now like a corporation with legal personality. Such reasoning is flawed. Some scholars have tried to float the idea to justify legal personality in order to promote Islamic banking.

\(^{8}\) The right of the master to sell them stands restricted due to kitābah and tadbir.

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Abū Ḥanīfah (God bless him). The two jurists said that it will be recovered from him if he is emancipated. The rule according to Abū Ḥanīfah (God bless him) is that the permission of marriage covers both vitiated and valid contracts, in his view. Thus, this \(mahr\) is established against the right of the master. The two jurists maintain that permission applies only to valid contracts and not other types, therefore, the claim of \(mahr\) is not established against the interests of the master. It is to be recovered from the slave after his manumission. The two jurists also argue that the objective of the contract of nikābah is to enable chastity and protection in the future and this is only possible through a valid contract. Thus, if he were to take an oath that he will not marry, it will be construed to mean through a valid contract, as distinguished from the contract of bay' (exchange), because some purposes are attainable in it through ownership of the right of transactions. Abū Ḥanīfah (God bless him) argues that the term is used in an unqualified sense and is, therefore, to be applied in this sense as in the case of bay'. Further, some of the objectives of nikābah are attainable even through a vitiated contract of nikābah, like lineage, the obligation of \(mahr\), and the waiting period in case of intercourse. In addition to this, the issue of the oath is not applicable in such a way.

If a person gets his ma'dhān slave (authorised to trade on his behalf), who is under debt, married to a woman, it is valid. The woman will be a claimant for her \(mahr\) at par with other creditors.\(^9\) The meaning here is that the nikābah has been concluded for reasonable dower. The underlying reasoning is that the basis for the authority of the master is his ownership of the corpus of the slave, as we will mention. Nikābah does not conflict with the right of the creditors with the aim of annulling their claims, however, when such a nikābah is valid, the debt becomes obligatory due to a reason that cannot be rejected. The debt here resembles consumption by the debtor and the case becomes similar to that of a debtor in terminal illness who marries a woman for reasonable dower and the woman becomes a claimant at par with other creditors.

A person who gives away his slave girl in marriage does not have to let her reside in his husband's house, rather she is to serve her master. The directive for the husband is: whenever you get a chance you can cohabit with her. The reason is that the right of the master in her service remains and residence annuls this right. If he does permit her

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\(^{9}\) Here again, the slave is like an encumbered asset; not a corporation.
to reside with him at his house, then she has the right to maintenance and residence, otherwise not, because maintenance is in lieu of restriction to the house.\(^{10}\) If he does permit her to stay at the husband’s house, but then it appears to him that he needs her services, he has a right to claim them. The reason is that this right remains due to the subsistence of ownership. Thus, it is not extinguished through residence, just as it is not extinguished due to her marriage.

The Author (God be pleased with him) said: He mentions marriage permitted by the master for his male and female slave, but he does not mention their consent. This is to be referred to the opinion of our school that the master has the right to compel them to marry. According to al-Shāfi’i (God bless him), the slave is not to be compelled. This is also one narration from Abū Ḥanīfah (God bless him). The reason is that nikāh is a personal right of a human being, while the slave is part of the master’s property insofar as he is wealth, thus, the master does not possess the right to undertake his marriage. This is different from the case of the slave girl as he is the owner of her physical benefits, thus, he possesses the right to transfer such ownership. Our reasoning is that nikāh is permitted for the improvement of his property insofar as it provides protection against zinā, which is the cause of loss or deficiency, thus, he possesses this right on the analogy of the female slave girl. This is different from the case of the mukātāb and the mukātābah as they have come to be associated with free persons for purposes of transactions in them, therefore, their consent is stipulated.

He said: If a person gives away his slave girl in marriage and then kills her, before her husband has had intercourse with her, there is no mahr for her, according to Abū Ḥanīfah (God bless him). The two jurists said that the husband is liable for her mahr to be paid to her master on the analogy of her death due to natural causes. The reason is that the woman killed has died within her (predestined) period and is treated as if she has been killed by a stranger. The Imām (God bless him) argues that he has prevented the counter-value from reaching, prior to the time of its delivery, therefore, he is to be given the recompense by preventing the counter-value due to him, and it is as if a free woman had turned apostate. Homicide in terms of the rules of the temporal world has been deemed destruction so that it gives rise to retaliation and blood money. The same applies to mahr (it is destruction for this too).

If a freewoman kills herself before her husband has had intercourse with her, she is entitled to mahr with Zufar (God bless him) disagreeing. We rely on the rule that the offence of a person against his own self is not acknowledged for the āhkām of this world (falls outside their ambit), thus, it is similar to her death due to natural causes.\(^{11}\) The case is distinguished from the killing of the slave girl by her master, as that falls within the jurisdiction of the āhkām of this world so that expiation is imposed in it.

If a person marries a slave girl, then, permission for ‘azl (ejaculating outside the vagina) belongs to the master, according to Abū Ḥanīfah (God bless him). According to Abū Yūsuf and Muhammad (God bless them), the right to permit ‘azl belongs to her, because intercourse is her right so that the authority to demand it belongs to her. In ‘azl there is a diminution of her right, therefore, her consent is stipulated just as it is stipulated for a freewoman. This is distinguished from the case of a slave girl owned by another, as she does not have the right to demand it, thus, her consent is not taken into account. The reasoning underlying the Zahir al-Riwayah is that ‘azl disturbs the goal of reproduction, and that is the right of the master. Accordingly, it is his consent that is acknowledged. It is due to this that her case differs from that of a freewoman.\(^{14}\)

If a slave girl is married with the permission of her master and is then emancipated, she has an option irrespective of her husband being a freeman or a slave, due to the words of the Prophet (God bless him)

\(^{10}\) A wife is entitled to maintenance if she stays in her husband’s house. Is this a general rule?

\(^{11}\) That is al-Qudūrī (God bless him).
and grant him peace) to Barirah when she was manumitted, “You have come to own your body; so choose.” The ‘illah (underlying cause) of owning her body has been stated in an unqualified sense, therefore, it includes both cases. Al-Shâfi‘i (God bless him) disagrees with us where her husband is a freeman, and the proof against him is what we have related. Further, he adds to the ownership of the husband over her upon emancipation as the husband comes to own three repudiations after it. Accordingly, he is made to own the removal of the contract itself for safeguarding against this excess.

The same applies to the mukātabah slave, that is, when she marries and is set free later. Zufar (God bless him) said that she has no option, because the contract of marriage was executed with her consent. Further, she also has the right to mahr. Accordingly, granting her the option has no meaning. This is distinguished from the case of the slave girl whose consent is not taken into account for her nikāh. Our reasoning is that the underlying cause is the increase in ownership, and we have seen its operation in the case of the mukātabah, because her waiting time is two periods and there are two repudiations for her divorce.

If the slave girl marries without the permission of her master and is then set free, her nikāh is valid. The reason is that she now has legal capacity for issuing legally admissible statements. The prevention of execution of the contract was the right of the master and this has now lapsed. There is, however, no option for her, because the execution of the contract took place after emancipation, therefore, additional ownership is not realised. It is as if she married herself after being set free.

If she marries without his permission for one thousand, when her reasonable dower is one hundred, after which her husband has intercourse with her, and she is then set free by her master, the mahr belongs to her master, because the husband acquired benefits that belonged to the master. If he does not have intercourse with her until the master sets

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9Does a woman own her body, especially a married woman? The issue needs to be explored and can have legal consequences.

10It is recorded by al-Dār qūfī from ‘A‘ishah (God be pleased with her). Al-Zayla’s, vol. 3, 204.

11In other words, her emancipation is a kind of ratification by the master of her marriage. She does not have the right to choose now as the marriage was undertaken with her consent.

12This line of reasoning creates problems. We believe that what we have said in the previous note offers a better solution.

13That is, in this case ownership follows childbirth and does not precede it.
kind of ownership for the father even if it was there. All this indicates the absence of his ownership, except that the hadd is waived on account of shubhah.\textsuperscript{20} Thus, if his nikah is valid, his progeny is secure. As milk yamin is not established, the woman does not become his umm al-walad, and he is not liable for paying any value for her or for her child, because he does not own them. He is liable for mahm arising from his undertaking the obligations of nikah. His child is free as he would come to be owned by his brothers, therefore, he is to be considered emancipated on the basis of kinship.

He said: If a freewoman is married to a slave and she says to his master, "Set him free for me for one thousand." If he does so, the nikah stands vitiated. Zufar (God bless him) said that it is not vitiated. The rule, in our view, is that the manumission has taken place on account of the person who ordered it so that the wala' belongs to him. If the owner had intended an expiation that was obligatory on him, then, the manumission would move out of her order. According to Zufar (God bless him) the manumission takes effect on account of the person ordered, because he demanded that the owner set free his slave for him, and this is impossible as there is no manumission in a case where a human being does not have ownership. Accordingly, the demand is not valid and the manumission takes effect on account of the person ordered. We maintain that its validity is possible by offering ownership by way of necessity, because ownership is a condition for manumission on account of the orderer. Thus, her statement, "Set him free," is a demand for the acquisition of ownership from him for a thousand and thereafter her demand that he set free the slave of the orderer on her account. His response, "I have set him free," is a transfer of ownership by him and then manumission on her account. When ownership is established for the orderer, the nikah becomes vitiated due to a contradiction between two types of ownership.

If she said, "Set him free for me," and does not mention a sum, the nikah is not vitiated, and the wala' belongs to the emancipator. This is the view according to Abu Hanifah and Muhammad (God bless them). Abu Yusuf (God bless him) said that this case and the previous case are the same, because here he offers ownership without a counter-value in order to validate his act. Possession is not taken into account, and the case is like one where a person under the obligation of kaffarah for zihar orders another to feed people on his account. The two jurists maintain that a condition of hibah (gift) is possession on the basis of a text, therefore, it is not possible to relinquish it. Possession is not established this way as a necessity, because it is a physical act as distinguished from bay' as that is a legal act (that can be established orally). In that issue (of expiation), the poor man represents the orderer for purposes of possession. As for the slave, nothing is being delivered to him so that he may be considered to act on the part of the orderer.

\textsuperscript{20}When intercourse is without a valid legal relationship.
Chapter 58

Marriages of the Polytheists

If an unbeliever marries without witnesses or within the waiting period of the unbeliever, which is permitted in their religion (if any), and thereafter both spouses become Muslim, their nikāh is acknowledged. This is the view according to Abu Ḥanifah (God bless him). Zufar (God bless him) said that the nikāh is vitiated in both situations, except that their act is not objected to prior to Islam or prior to litigation in the courts. Abū Yūsuf and Muhammad (God bless them) had the same opinion as Abu Ḥanifah (God bless him) for the first situation, while they held the same opinion as Zufar (God bless him) for the second situation. He maintains that the khitāb (communication) is addressed to all, as stated earlier, therefore, it is binding on them. Their act is not objected to, however, due to their compact of dhimmah, but as an exemption, not by way of acknowledgement. Thus, when they convert to Islam or come as litigants, it is necessary to decree separation, because the prohibition persists. The two jurists argue that the prohibition of the marriage of a woman in her waiting period is agreed upon by all, therefore, they have to abide by it. The prohibition of nikāh without witnesses, on the other hand, is disputed, and they are not bound to follow all our laws where they disagree.

1 Al-Zaylaʾi says that there are traditions about the validity of the nikāh of the unbelievers, Al-Zaylaʾi, vol. 3, 208.
2 Due to the contract of dhimmah in the case of residents of a Muslim country, and due to the lack of jurisdiction in the case of non-citizens. God knows best.
3 That is, Zufar (God bless him).
4 This is the second situation about which they agree with Zufar (God bless him). Apparently, they agree with the Imam (God bless him) that the unbelievers are not addressed in the khijah, that is, they are bound to obey the personal laws of the Muslims.
with theirs. Abū Hanifah (God bless him) maintains that the prohibition cannot be established against them as the right of the shari'ah, as they have not been addressed by the khfitab with respect to its rights. There is no reason for imposing the obligation of the waiting period on the husband, because he does not believe in it, as distinguished from the case where she was married to a Muslim as he believes in it. When the nikāh is valid, it is valid for the cases of conversion to Islam or litigation, as the validity remains. Witnessing is not a condition for such a contract nor does the waiting period negate it, like a woman who is married and has intercourse under shubhah.

If a Magian marries his mother or his daughter and then both convert to Islam, they are to be separated. The reason is that nikāh among prohibited categories carries the ḥukm of nullity insofar as it applies to them, according to the two jurists, as we have mentioned in the case of the waiting period. As an objection is raised due to Islam, therefore, they are to be separated. According to the Imam (God bless him), the nikāh is assigned the rule of validity, according to the sound view, except that the prohibited categories negate the continuation of nikāh as valid, thus, they are to be separated. This is distinguished from the case of the waiting period as that does not negate continuity. Thereafter, where one of them converts to Islam, they are to be separated. In case one of them takes the matter to court, they are not to be separated in his view, but the two jurists disagree. The difference is that the entitlement of one is not annulled due to a claim by the companion, because his belief is not altered due to it. As for the belief of one who persists in his unbelief, it does not overcome the Islam of a Muslim, because Islam is dominant and is not dominated (principle). If both become litigants, they are to be separated on the basis of consensus (ijma'), because such litigation amounts to their consent to arbitration.

It is not permitted to an apostate that he wed a Muslim woman, an unbelieving woman, nor an apostate woman, because he is eligible for execution. The period of postponement provided is for the necessity of pondering over his act. Nikāh will distract him from such contemplation, therefore, it is not lawful for him. Likewise an apostate woman, neither a Muslim nor an unbeliever is to marry her, because she is confined for reflection and the service of her husband will distract her from contemplating her act. Further, such a marriage will not be intended for securing their interests, and nikāh has not been prescribed for itself, but for the securing of mutual interests.

If one of the two spouses is a Muslim, the child will follow the religion of the Muslim. Likewise if one of them converts to Islam and he (or she) has a minor child, the child will become a Muslim due to the Islam of such a spouse, because deceiving the religion of the child dependent on such parent is for the welfare of the child. If one of the parents is a Kitābi (following a Book), while the other is a Magian, the child will be a Kitābi, as in this there is welfare of the child, of a sort, because Magianism is evil. Al-Shafi’i (God bless him) opposes us due to conflict resulting in the law, and we have already elaborated the basis of preference. If a woman converts to Islam, while her husband is still an unbeliever, the qādī is to make him an offer of converting to Islam. If he accepts, she remains his wife, but if he refuses he is to separate them. This will amount to divorce according to Abū Hanifah and Muḥammad (God bless them). If the husband converts to Islam when he is married to a Kitābi woman, she is to be made an offer of conversion to Islam. If she accepts, she remains his wife, but if she refuses the qādī is to separate them, however, the separation between them does not amount to divorce. Abū Yūsuf (God bless him) said that the separation does not amount to divorce in both cases. As for offering of Islam, it is our view. Al-Shafi’i (God bless him) said that Islam is not to be offered to them as that amounts to inducing them to do so, and we have guaranteed to them through the contract of dhimmah that we will not pressurise them to accept it. The ownership arising out of nikāh, however, is not confirmed prior to consummation, therefore, it will be cut off by the mere act of accepting Islam, but after consummation it stands confirmed for which reason it is delayed till three periods of menstruation as in the case of ṣulq. We rely on the reasoning that the objectives to be attained through nikāh are now lost, therefore, a cause is to be ascertained on which the separation is to be based. Islam is an act of obedience and is not suitable for being a cause for it, therefore, Islam is offered to the other spouse so that the objectives of nikāh can be secured again through the acceptance of Islam, otherwise separation will be established through refusal. The reasoning given by Abū Yūsuf (God bless him) is that separation is due to a cause that is common between the two spouses, therefore, it is
not like separation that is due to ownership. The two jurists argue that by refusal the husband rejected the adoption of what is good when he has the ability to do so through Islam. Consequently, the qādī represents him in the doing of good, as he will in the case of a person with a cut off penis or one who is impotent. As for the woman, she does not have the legal capacity to pronounce divorce, therefore, the qādī cannot take over this function for her upon her refusal.

Thereafter, if the qādī pronounces separation between them upon her refusal, she is entitled to mahr if the husband had consummated the marriage with her, because the marriage was confirmed due to intercourse. If he did not consummate the marriage with her, there is no mahr for her. The reason is that separation is from her side and mahr has not been established. It, therefore, resembles the case of apostasy and that of a woman submitting to the husband's son.

If a woman converts to Islam in the dār al-harb, while her husband is an unbeliever, or if a resident of dār al-harb converts to Islam and is married to a Magian woman, she is not separated from him until she has menstruated in three periods and then separated from her husband. The reason for this is that Islam is not the cause of separation, and offering conversion to Islam (to the other spouse) is not possible due to lack of jurisdiction, however, separation is essential to repel conflict. We, therefore, imposed its condition, which is the passage of menstrual periods in place of the cause, as in the case of a person who digs a pit. There is no distinction here between the woman whose marriage stands consummated and one whose marriage is not consummated. Al-Shafi (God bless him) does make the distinction, as he did in the case of dār al-īslām. When separation occurs and the woman is a resident of the dār al-harb (as a non-Muslim) there is no obligation of 'iddah on her. If the woman is a Muslim, the rule is the same for her according to Abū Ḥanīfah (God bless him), but the two jurists disagree. This discussion will come up before you, God willing.

If the husband of a Kitābī woman converts to Islam, their nikāh continues to be valid. The reason is that the nikāh between them was valid initially, therefore, it should be valid in this changed situation.

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6 The 'ilah in this case is “falling into the pit,” but compensation cannot be associated with it, therefore, it is attributed to the person who dug the pit.
Thus, if legal right of intercourse is effective in the right of paternity, it is effective in preventing nikāh by way of precaution.

If one of the spouses turns away from Islam (becomes apostate), a separation ending marriage occurs without divorce. This is the view according to Abū Hanifah and Abū Yūṣūf (God bless them). Muhammad (God bless him) said that if the apostasy occurs on the part of the husband, then, it is separation through ṭalāq, which is analogy upon refusal to accept Islam. The factor that reconciles the two has already been explained by us. Abū Yūṣūf (God bless him) relies on the basis we have stated for him in the case of refusal. Abū Hanifah (God bless him) distinguished between the two situations. The reasoning for the distinction is that apostasy negates nikāh, because it negates protection by the law. Ṭalāq, on the other hand, removes the contract of nikāh, therefore, it is difficult to deem it ṭalāq. This is distinguished from the case of refusal as the person relinquishes the adoption of what is good. Accordingly, the doing of good (by the qādī) becomes obligatory, as has preceded. It is for this reason that separation ending in marriage due to refusal depends upon a judicial decree, but it does not in the case of apostasy.

Thereafter, if it is the husband who is the apostate, she is entitled to the entire mahr if he has had intercourse with her, and one-half mahr if he has not. If she was the apostate, then, she is entitled to the entire mahr if he has had intercourse with her. If he has not had intercourse with her, she is not entitled to mahr or maintenance, because the separation is due to her.

He said: If the two become apostate together, they maintain the validity of their nikāh, on the basis of istiḥsān. Zufar (God bless him) said that their nikāh stands nullified, because the apostasy of one negate it, and the apostasy of both includes the apostasy of one. We rely on the report that the Banū Hunayfah turned apostate and then converted back to Islam. The Companions (God be pleased with them) did not ask any of them to renew their nikāh contracts. Apostasy on their part was collective, due to uncertainty about exact dates. If one of them converted to Islam after their collective apostasy, the nikāh would become vitiated, due to the insistence of the other upon apostasy, because it negate nikāh as it does in the case of apostasy of one at the beginning.
indicate this. Further, the lawfulness of the slave is less than the lawfulness of a freewoman, thus, it must be reflected in their rights. The mukātabah, mudabbarah, and the umm al-walad have the same status as that of the slave girl, because the element of slavery still subsists in them.

He said: They do not have a right of distribution in the state of journey, and the husband has the right to travel with any of his wives he likes. It is, however, preferable that he draw lots between them so that he travels with one whose name turns up. Al-Shāfi‘ī (God bless him) said that the drawing of lots is what is due, because “the Prophet (God bless him and grant him peace) used to draw lots between his wives when he intended to travel.” We maintain, however, that the drawing of lots is for the satisfaction of the wives, therefore, it belongs to the category of recommendation. The reason for this is that a wife does not possess the right to travel with the husband. Do you not see that at times none of them accompanies him. Likewise, it is his right to travel with one of them and this period is not taken into account in the reckoning of distribution.

If one of the wives gives her consent to relinquish her share of the distribution in favour of another wife, it is permitted. The basis is that Sawdah bint Zam‘ah (God be pleased with her) asked the Prophet (God bless him and grant him peace) to retract in her case and to assign the day of her turn to ‘Ā’ishah (God be pleased with her). She has the right to withdraw such consent, because she relinquished something that has not occurred as yet, thus, it cannot really be extinguished. God knows best.

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4 It is reported by most of the sound compilations from ‘Ā’ishah (God be pleased with her). Al-Zayla‘i, vol. 3, 216.
5 Al-Bukhārī and Muslim have reported this case, but without referring to the retraction. The reason in their record appears to be old age. Al-Zayla‘i, vol. 3, 216.
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Chapter 60

The Meaning of Raḍāʾ

He said: The minimum and maximum periods of suckling (breastfeeding) are legally the same if it occurs in the period of breastfeeding, and, to this the prohibition becomes linked. Al-Shāfiʿi (God bless him) said that prohibition is not established except by feeding up to five times, due to the words of the Prophet (God bless him and grant him peace), “One or two sucks or feeding once or twice does not result in prohibition.”1 We rely on the words of the Exalted, “Foster-mothers who gave you suck,”2 and on the words of the Prophet (God bless him and grant him peace), “Prohibited by suckling is what is prohibited by lineage,”3 without providing details. Further, although the prohibition is based on the suspicion that milk becomes part of the child adding to growth in bones and muscles, but this is a matter that is internal (not known), therefore, the rule has been attached to the act of suckling. What he4 has related is rejected by the Qurʾān or is abrogated by it. It is necessary that such feeding be during the period of suckling, as we have explained.

Thereafter, the period of suckling is thirty months, according to Abū Ḥanīfah (God bless him). The two jurists said that it is two years, which is also al-Shāfiʿi’s opinion (God bless him). Zufar (God bless him) said that it is three years, because the term ḥawl (year) also conveys the meaning of transferring from one state into another. It is necessary that it be

1It is recorded by Muslim in two separate traditions. One tradition is from ʾĀʾishah (God be pleased with her). Al-Zaylaʿi, vol. 3, 217.
2Qurʾān 4:23
3It is recorded by al-Bukhārī and Muslim from Ibn ʿAbbās and ʾĀʿishah (God be pleased with them). It has preceded in the first chapter of nikāḥ. Al-Zaylaʿi, vol. 3, 218.
4That is, al-Shāfiʿi (God bless him).
more than two hawls, as we will explain, therefore, it should be limited by three. The two jurists rely on the words of the Exalted, "The carrying of the (child) to his weaning is (a period of) thirty months." The minimum gestation period is six months and that leaves two years for weaning. The Prophet (God bless him and grant him peace) said, "There is no suckling after two years." The Imam (God bless him) relies on the above verse. His reasoning is that God, the Exalted, has mentioned two things and determined the period for them, therefore, each of the two things will have the complete period (of thirty months) mentioned, like the period determined for two debts, except that He has given a reduction in one of these periods, but it remains as stated for the other. Further, it is necessary to alter the food (of the infant) so that growth dependent on milk should come to an end and this occurs by extending the period in which the infant gets used to the other diet. Accordingly, it has been limited to the minimum period of pregnancy as it changes. The food of the foetus alters the diet of the infant, just as it alters the diet of the weaning child. The tradition is to be construed to indicate the period of entitlement (for expenses), and it is in this sense that the text of the Qur'an restricting it to two years is to be construed.

He said: When the period of suckling is over, the prohibition cannot be related to suckling, due to the words of the Prophet (God bless him and grant him peace), "There is no rada' after weaning." The reason is that the prohibition is based on growth and this takes place in the period of suckling, because a grown person cannot be fed on it. Weaning is not acknowledged prior to the period, except in a narration from Abü Hanifah (God bless him), for he is no longer dependent on it. The basis for the termination of growth is the change of diet. Is suckling permitted after the prescribed period? It is said that it is not permitted as permitting it is harmful, for it is part of a human being.

Chapter 61

The Legal Effect of Rada'

He said: Rada' (suckling) prohibits what is prohibited by lineage, on the basis of the tradition that we related, except the mother of his foster sister, because it is not permitted to him to marry her. It is not permitted to him to marry the mother of his sister on the basis of lineage, because she is his mother or is one who has cohabited with his father.

It is not permitted to him to marry the sister of his foster son, when this is not permitted on the basis of lineage. The reason is that when he cohabits with her mother she becomes prohibited for him, but this meaning is not to be found in rada'.

It is not permitted to him to marry his foster father's wife or his foster son's wife, just as it is not permitted to do so on the basis of lineage, due to what we have related. The aslāb have been mentioned in the text to exclude the consideration of the mutabannā as we have elaborated.

The prohibition is related to the laban al-fahl, which is that a woman nurses a girl infant and this infant becomes prohibited for the husband of the woman (who nursed her) as well as for his fathers and his sons. The husband due to whom the woman had milk in her breasts becomes the foster father of the infant girl suckled. In one opinion from al-Shafi'i (God bless him), laban al-fahl does not give rise to prohibition, because the prohibition is due to the suspicion of becoming part of him. We rely on what we have related. Further, the prohibition due to lineage operates on both sides and so also due to rada'. The Prophet (God bless him and

5 Qur'ān 46:15
6 It is recorded by al-Dār'utnī in his Sunan, Al-Zayla'i, vol. 3, 218.
7 That there is no suckling after two years.
8 It is recorded by al-Tabarānī and 'Abd al-Razzāq, Al-Zayla'i, vol. 3, 219.
9 The milk.

10 The first tradition in the previous chapter.
11 When they have been nursed by a third woman.
12 That is, rada' prohibits what is prohibited by lineage.
13 The same tradition as above.
grant him peace) said to 'Ā'ishah (God be pleased with her), “You can appear before Aflāh, because he is your foster-uncle due to rada'ah.”

The reason is that he (the husband) was a cause of the appearance of milk in her, therefore, the prohibition is extended to him by way of precaution.

It is permitted to a man to marry his foster brother's (step) sister. The reason is that it is permitted to a person to marry his brother's sister on the basis of lineage. This occurs in the case of his brother from the father's side when this brother has a sister from his mother's side. In such a case, it is permitted to his brother from the father's side to marry her.

In the case of two infants (girl or boy), who have gathered on the breast of one woman, it is not permitted to one of them to marry the other. This is the rule, because their mother is one and they are brother and sister.

A girl is not to marry any (male) child of the woman who suckled her, because he is her brother. She is also not to marry a child (son) of her child, because he would be the child of her brother. A foster son is not to wed the sister of his foster mother's husband, because she is his foster aunt.

When milk is mixed with water, with the milk being predominant, the prohibition is linked to it. If the water is predominant, it is not linked to the prohibition. Al-Shāfi`ī (God bless him) disagrees saying that it is present in it in reality. We maintain that something that has been overwhelmed is legally non-existent so that does not manifest itself in comparison to the predominant ingredient as is the rule in oaths.

If it is mixed with food (wheat), the prohibition is not related to it, even if the milk is predominant, according to Abū Ḥanīfah (God bless him). The two jurists said that if the milk is predominant, the prohibition is linked to it. The Author (God be pleased with him) said that the view of the two jurists pertains to the mixture that is not touched by fire. If it is cooked, the prohibition does not apply to it by agreement. The two jurists maintain that what is taken into account is predominance, as in the case of water, when its state is not altered. Abū Ḥanīfah (God bless him) maintains that the basic thing is food (wheat) and milk is subservient to it with reference to the purpose of mixing. Thus, it is like a substance dominated. The drops of milk (that may be visible) are not taken into account in this view. This is correct, because eating wheat is the basis.

If the milk is mixed with a medicine when the milk is predominant, the prohibition applies to it. The reason is that milk remains the main purpose of the diet, because the medicine is for strengthening it to achieve its purpose.

If the milk is mixed with goat milk, and it is predominant, the prohibition applies to it. If the goat milk is predominant, the prohibition does not apply, in consideration of the predominant ingredient as is the case with water.

If the milk of two women is mixed, the prohibition applies to the predominant milk, according to Abu Yusuf (God bless him). The reason is that the whole becomes the same thing, therefore, the lesser in quantity is deemed subservient to what is greater, for the purpose of basing the rule on it. Muhammad (God bless him), as well as Zufar (God bless him), said that the prohibition applies to both, because one specie cannot dominate an identical specie. A thing is not deemed destroyed when it is mixed with its own specie, due to the unity of purpose. There are two narrations about this from Abū Ḥanīfah (God bless him), and the basis of the issue lies in the Book of Oaths (Aymān).

If a virgin has milk in her breasts and she feeds an infant, the prohibition is established, due to the unqualified meaning of the text. Further, it is the cause of growth, thus, the contribution to the constituent parts of the infant is established.

If the milk of a woman is extracted after her death and fed drop by drop to the infant, the prohibition is established. Al-Shāfi`ī (God bless him) disagrees. He maintains that the basis for the proof of the prohibition is the woman, and it extends to others through her. By her death she no longer remains the subject-matter of prohibition. It is for this reason that intercourse with a dead woman does not lead to the prohibition of marital relations. We maintain that the cause is the suspicion of consuming it to development and growth; such a meaning is associated with milk. The burial and supplication (as to who is legally permitted to do this). As for reproduction, it is due to the existence of a means for distinguishing, and that is gone due to death. The two cases are, therefore, identical.

\[\text{It is recorded by the six Imams of the sound compilations. Al-Zayla`i, vol. 3, 220.}\]
If an infant is given an anema with milk, the prohibition is not established. According to Muḥammad (God bless him), the prohibition is established through it just as a fast is broken with it. The distinction, however, is obvious. The factor invalidating a fast is to provide a cure for the body and this meaning is found in medicine. As for the prohibiting factor in ṭaḍā', it is growth, and such a meaning is not found in anema, because what serves as food is fed through the top (mouth).

If a man has milk in his breasts, and he feeds an infant, the prohibition is not established, because this is not milk as verified, thus, growth and development are not associated with it. The reason is that the emergence of milk can be conceived in the case of one who can give birth.

If two infants (boy and girl) drink of the milk of the same goat, the prohibition is not established, because there is no relation of constituent parts between a human being and an animal whereas the prohibition is due to this.

If a man marries a grown woman and an infant, and the grown woman gives suck to the infant, both are prohibited for the husband, because he would be combining a mother and a daughter in marriage, and this is prohibited like combining the two on the basis of lineage. Thereafter, if he has not had intercourse with the grown woman, there is no mahr for her, because the separation has occurred due to her act prior to consummation of her marriage. The minor girl is entitled to one-half of the mahr, because the separation has not occurred due to her act. Although suckling is her act, but her act is not admissible for the extinction of her right, just as though she had killed the person from whom she was to inherit. The husband is to have recourse to the grown woman (for the mahr paid to the minor) in case she intentionally rendered the marriage vitiated. If she did not intend it, there is no claim against her, even when she knew that the minor was married to him. According to Muḥammad (God bless him), he is to have recourse to her in both cases. The correct view, however, is that of the Zāhir al-Riwayāt. The reason is that she has confirmed a claim that was likely to be extinguished, which is one-half of the mahr, and the case becomes similar to the destruction of wealth. She is, however, the cause of it, either because suckling is not the basis for the vitiation of the contract as prescribed, and is established merely as a coincidence, or that one-half mahr is imposed by way of mut'ah as is known, but the condition for it is the nullification of marriage. If she is the cause, a wrong is stipulated as in the case of digging a pit. Thereafter, she has committed a wrong if she is aware of the marriage and has intended vitiation through ṭaḍā'. If, however, she is not aware of the marriage or she is aware of the marriage, but intends to drive away hunger and death from the infant, and not vitiation, even then she has not transgressed. This from our side is the acknowledgement of ignorance (as an excuse in law) for the elimination of the hukm (operation of the law).

The testimony of one woman alone is not admissible in ṭaḍā'. It is established by the testimony of two men or one man and two women. Malik (God bless him) said that it is proved with the testimony of a single woman if she is known to possess moral probity. The reason is that the prohibition is due to a right that belongs to the rights of the shari'ah, therefore, it can be established through the testimony of a single person, and is like one buying meat when a person informs him that it was slaughtered by a Magian. We maintain that prohibition cannot be proved separate from the loss of ownership in the category of nikāh, and the nullification of ownership cannot be proved except through the testimony of two men or a man and two women. This is distinguished from meat, because the prohibition of consumption is distinguished from the loss of ownership, therefore, it is considered a matter of ritual. God knows best.
Al-Hidāyah
THE GUIDANCE
## Al-Hidāyah

### BOOK EIGHT

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Chapter 66

Divorce by Person Suffering From Terminal Illness

In the Name of God, Most Merciful and Compassionate, and (with) prayers and blessings on Muhammad and his family.

If a man divorces his wife, during his terminal illness, through an irrevocable (bā‘īn)\(^1\) repudiation and then dies while she is still in her waiting period, she will inherit from him. If he dies after the termination of the waiting period, she is not entitled to inheritance. Al-Shafi‘i (God bless him) said that she will not inherit in either case,\(^2\) because the state of being married has been annulled due to this obstacle\(^3\) where marriage was the basis (of inheritance), therefore, even he will not inherit from her if she dies.

\(^1\)For the meaning of bā‘īn divorce and its legal effects, see fn 4 on page 569 in Volume 1 of this translation; see also section 671 (What Makes a Divorced Wife Lawful) in this volume on p. 14.

\(^2\)According to al-‘Ayni this means before the waiting period and after the waiting period. Al-‘Ayni, vol. 5, 440. The text indicates, however, that it means if he dies during her ‘iddah or after such waiting period.

\(^3\)The obstacle of irrevocable repudiation
Chapter 62

Ṭalāq al-Sunnah (Divorce Conforming to the Sunnah)

He said: Ṭalāq (divorce) is of three types: ḥasan (proper), aḥsan (more appropriate) and bidʿī (innovative, not conforming to the Sunnah). The aḥsan form of divorce is that a man divorce a woman with a single repudiation pronounced during her period of purity from menstruation (ṭuhr) during which he has not had intercourse with her. He then leaves her alone (does not cohabit with her) until she completes her waiting period (ʿiddah). The reason is that the Companions (God be pleased with them) used to prefer not increasing the number of repudiations over one till the passing of the waiting period.¹ This form had greater merit in their view than a man divorcing his wife by pronouncing three repudiations, one in each period of purity. The reason is that the aḥsan form is the farthest from remorse (leaving a possibility of retraction) and less injurious for (the feelings) of women. There is no dispute about the (absence of) disapproval for this form.

The ḥasan form, which is also called ṭalāq al-sunnah, is that a woman whose marriage has been consummated be divorced with three repudiations pronounced in three periods of purity (one in each). Mālik (God bless him) said that it is bidʿah (innovation against the Sunnah) and only a single repudiation is permitted. The reason is that the governing presumption with respect to ṭalāq is that it is prohibited and permissibility

¹It is recorded by Ibn Abi Shaybah from Ibrāhīm al-Nakhaʿī (God bless him). Al-Zaylaʿī, vol. 3, 220.
is granted due to the need of separation.⁵ Such a need is met through a
single repudiation. We rely on the saying of the Prophet (God bless him
and grant him peace) in a tradition from Ibn ‘Umar (God be pleased with
both), “It is a sunnah to await a period of purity and then to divorce her
pronouncing one repudiation in each period.”³ Further, the rule revolves
around the evidence of need, which is the pronouncing of divorce in a
period of time in which desire is renewed, and this is a period of purity in
which intercourse has not taken place. The need, therefore, recurs in view
of its evidence. Thereafter, it is said that he should delay the pronounce-
ment till the end of the period of ḥrika in order to avoid prolonging the
waiting period. It is, however, the stronger view that he is to pronounce
the repudiation as soon as she attains purity, because he may have inter-
course with her. This will place the person who pronounces divorce after
intercourse in a state of trial.⁴

Talaq al-bid`ah (innovation conflicting with the Sunnah) is that he
divorce her with three repudiations pronounced in a single statement
or three repudiations in a single period of purity. If he does this, the
divorce takes effect, but he has sinned. Al-Shafi‘i (God bless him) said
that each form of divorce is mubah (permissible) as it is a legally valid
act so that it leads to its legal effects. Legal validity does not exist side
by side with prohibition, as distinguished from a divorce pronounced
during menstruation. The prohibited element is the prolongation of the
waiting period for the woman and not divorce. We maintain that
the governing rule in divorce is prohibition¹ insofar as it leads to its legal
effects. Legal validity does not exist side by side with prohibition, as
distinguished from a divorce pronounced during menstruation. The
prohibited element is the prolongation of the waiting period for the
woman and not divorce. We maintain that the
governing rule in divorce is prohibition¹ insofar as it leads to its legal
effects. Legal validity does not exist side by side with prohibition, as
distinguished from a divorce pronounced during menstruation. The
prohibited element is the prolongation of the waiting period for the
woman and not divorce. We maintain that

²This statement is to be understood in the light of the presumption preferred. The
presumption is al-aslu fi al-ṣayā‘a al-bid`ah. The opposite of this is al-aslu fi al-ṣayā‘a al-
tahririm. In this case, the second presumption operates in the case of divorce, that is, it is
an act that is prohibited. The basis for permitting it is the need for separation. This is
met through a single repudiation; there is no need for three.
³It is recorded by al-Dār al-qumis in his Sunan. Al-Zayla’s, vol. 3, 220.
⁴This repudiation will not conform to the Sunnah as he will be pronouncing divorce
in a period of purity in which he has had intercourse.
⁵The presumption of prohibition has been discussed.

⁶Be’thārah.
the Exalted, has said, “Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have any doubts, is three months, and for those who have no courses (it is the same); for those who are pregnant, their period is until they deliver their burden.” Substitution with the month is specific to menstruation, so the vacation of the womb is also reckoned through months in the case of such a woman, when this is usually assessed through the menstrual period and not with the period of purity. Thereafter, if the divorce was pronounced in the beginning of the month, the reckoning of the months will be based on the moon. If it is pronounced in the middle of the month, the reckoning will be on the basis of days for the distribution of repudiations. The calculation of the ‘iddah will be made in the same manner according to Abü Ḥanifah (God bless him). According to the two jurists, the first month is completed by its end, while the months in between on the basis of the moon. The issue is similar to cases in hiring.

It is permitted to him to divorce her without any separation based on time between intercourse and divorce. Zufar (God bless him) said that he is to separate them with a period of one month, as the month acts as a substitute for menstruation. The reason is that with intercourse desire goes away and is renewed with time, and this time is one month. We maintain that there is no likelihood of conceiving in the case of such women, while the disapproval in the case of those who menstruate was on this basis. The reason is that by delay, the period of ‘iddah will become vague. Desire, even though it goes away in the manner stated (by Zufar), yet increases due to another reason, because a man desires to have intercourse with a woman who is not likely to become pregnant, and this is for avoiding the burden of a child. Thus, the period in this case will be the period of desire, therefore, it will be like the period for the woman who is pregnant.

Divorce in the case of a pregnant woman is permitted immediately after intercourse. The reason is that it does not lead to any confusion in working out the ‘iddah. The period of pregnancy is a period of desire for intercourse as the possibility of becoming pregnant during ‘iddah and

1. Qur'ān 65:4
2. Where the calculations are based upon the moon or the number of days.
3. That is, a woman who does not menstruate due to old age or minority.
4. See next issue.

causing remorse is not relevant or the person desires her as she is bearing his child. Accordingly, desire is not reduced due to intercourse.

He is to divorce her (the pregnant woman) thrice in the period prescribed by the Sunnah, by separating every two repudiations with a month, according to Abü Ḥanifah and Abū Yūsuf (God bless them). Mohammad and Zufar (God bless them), said that he is to pronounce only one single repudiation according to the (method of the) Sunnah. The reason is that the presumption about divorce is that it is prohibited (unless permitted due to need), and the sharī‘ah has prescribed a separation of the period (‘iddah), whereas a month is not the period prescribed for the pregnant woman for she will become like a woman whose period of purity has become extended (so that the next repudiation cannot be pronounced). The two jurists argue that the permissibility (of divorce) is due to the ‘illah (reason) of need. The month is evidence of this need as in the case of the woman in the menopause or one who is a minor (or they too have an extended period of purity). The reason for this is that the period of one month renews desire in conformity with normal instinct, therefore, a month is suitable for identifying the need and serves as evidence for it. This is to be distinguished from the case of the woman whose period of purity is extended, because the identification of the need in her case is the (renewed) period of purity (often menses) for she does menstruate, and such purity is desired in all periods, but it is not so in pregnancy (as renewal of purity is only after pregnancy).

If a man divorces his wife during a period of menstruation, the divorce does take effect. The reason is that the prohibition of doing so is for a reason other than the issue of validity of divorce, and this we have already stated. Accordingly, the validity of divorce is not negated. It is, however, recommended that he make a retraction in her case, due to the words of the Prophet (God bless him and grant him peace) addressed to ‘Umar (God be pleased with him), “Order your son to take back his wife,” when he (the son) had divorced her during her menstrual period. This statement conveys the validity of divorce in such a case and then some of our jurists (Masha‘ikh), but the correct view is that it is obligatory for undoing the offence to the extent possible, by removing its legal effect

5. It is recorded by all the six Imams of the sound compilations. Al-Zayla‘i, vol. 3, 221.

...
and that is the ‘iddah, and so also the injury caused by the prolongation of the ‘iddah.\textsuperscript{12}

He said: When she has attained purity and then received her monthly course followed by the next period of purity, if he likes he may divorce her or if he likes he may hold on to her. He (the Author, God be pleased with him) said: This is how it has been stated in al-Asl, while al-Ṭāhāwi (God bless him) has stated that he may divorce her in the period of purity following her first monthly course. Abu al-Ḥasan al-Karkhi (God bless him) said that what al-Ṭāhāwi has stated is the view of Abu Hanifah, while the view of al-Asl is that of the two jurists. The reasoning underlying the view in al-Asl is that the Sunnah employs menstruation for effecting a separation between two repudiations, and the separation here is through part of the monthly course, which is to be completed through a second course. As it cannot be split into parts, it has to be completed. When the second monthly course is complete, the period of purity following it is the period conforming to the Sunnah, therefore, divorcing her in conformity with the Sunnah is possible. The reasoning for the other view is that the legal effect of the divorce has become non-existent due to retraction. The situation now is like one where no divorce has been pronounced during menstruation. Thus, divorcing her in the period of purity following it will be in conformity with the Sunnah.

If a man says to his wife, who menstruates and with whom he has consummated marriage, “You are divorced thrice according to the Sunnah,” when he had no particular niyyah associated with his statement, she is divorced with one repudiation taking effect in each period of purity. The reason is that the character ḥam (in li’sunnah) conveys time and the time of the Sunnah form is a period of purity in which no intercourse takes place. If he had formed the intention that all three should take effect that very moment or one repudiation at the beginning of each month, then, they will take effect as he intended. This is so whether they become effective during the state of menstruation or the state of purity. Zufar (God bless him) said that the niyyah of all repudiations operating at once is not valid as it amounts to bid'ah (innovation), which opposes the Sunnah.\textsuperscript{13} We maintain that his niyyah includes as a probable meaning of the legal validity of the occurrence of divorce, insofar as the legal validity of all three acting at once also arises from the Sunnah and excludes the occurrence in the form prescribed by the Sunnah. Accordingly, his unqualified statement does not include the form conforming to the Sunnah, and it is his intention that will be operative.

If the woman is one who no longer menstruates or is one in whose case months are taken into account (not menses), one repudiation will take effect at once, another the next month, and another the following month. The reason is that the evidence of need in her case is the month, like the period of purity for those who have periods, as we have explained.

If he had formed the niyyah that all three were to take effect at once, they do so, with Zufar (God bless him) disagreeing, as we elaborated. This is contrary to the case where he says, “You are divorced according to the Sunnah,” but he does not mention the word “thrice,” because the niyyah of three operating at once is not valid for such a statement. The reason is that the niyyah of all three acting at once is valid for such a case where the character ḥam (in li’sunnah) is for the timing. As this statement applies to timing in a general way, therefore, it necessarily implies that the occurrence of the repudiations be taken in a general way. Thus, when he intends the operation of all three at once, the generality with respect to timing stands nullified. Consequently, the intention of three is not valid.

6.1 Legal Capacity for Pronouncing Divorce

The divorce pronounced by any husband is valid if he is sane and major. The divorce pronounced by a minor, an insane person and one doing so in sleep is not valid, due to the words of the Prophet (God bless him and grant him peace), “Each divorce is permitted, except the divorce of a minor and an insane person.”\textsuperscript{14} The reason is that legal capacity depends on the rational faculty (‘aql)\textsuperscript{15} with which one can discriminate, and these two lack this faculty. The person asleep cannot exercise a choice.

\textsuperscript{12}In other words, undoing an injury is obligatory, and an act without which it cannot be undone is also obligatory.

\textsuperscript{13}This is an interesting idea.
The divorce of the person coerced takes effect. Al-Shafi'i (God bless him) disagrees. He says that coercion cannot exist side by side with volition (ikhtiyar), and it is through this that acts are legally acknowledged. This is distinguished from the case of one joking, because he has a choice in (not) using the words of talâq. Our argument is that he has intended the occurrence of divorce with respect to his legally married wife while he was in possession of his legal capacity. These attributes are not lost due to his situation and for the repelling of his predicament on the analogy of the obedient person. The basis for this is that he knows the two evils and he has chosen the least of these. Such a choice is a sign of intention and volition, except that he is not happy with the legal effects of his act. This does not alter his situation, just like that of one doing so in jest.

The divorce pronounced by an intoxicated person takes effect. The view preferred by al-Karkhi and al-Ţahawi (God bless them) is that it does not take effect. This is also one of the two opinions of al-Shafi'i (God bless him). The reason is that intention is valid due to the rational faculty and he has lost this faculty. It is like the loss of the faculty through bhang (bhang in Urdu; henbane) and medication. We maintain that his reasoning faculty is lost due to a cause that is an offence. The legal effects have thus been deemed retained as a deterrence for him. If he drinks liquor and then develops a headache so that he loses his mind due to the headache, we would say that the divorce pronounced in such a state does not take effect.16

Divorce by a dumb person through gestures takes effect, because his gestures are known and are taken to stand in place of expressions, on the basis of need. The reasoning will be presented at the end of this book, God, the Exalted, willing.

The divorce of a slave girl consists of two repudiations irrespective of her husband being a freeman or a slave. The divorce of a freewoman consists of three repudiations irrespective of her husband being a freeman or a slave. Al-Shafi'i (God bless him) said that the number of repudiations depends on the status of men, due to the words of the Prophet (God bless him and grant him peace), "Divorce depends on the status of men, while 'iddah depends on the status of women." Further, being described as an owner is an honour and human beings have been perfected in a freeman, therefore, his ownership is wider and greater. We rely on the words of the Prophet (God bless him and grant him peace), "The repudiations for the slave girl are two and her waiting period consists of two menstrual periods." The reason is that the permissibility of permitting marriage with a woman is a blessing as far as she is concerned. Slavery has the effect of halving these blessings, except that a repudiation cannot be halved, therefore, two complete repudiations are assigned. The interpretation of what he has related is that divorce is pronounced by men.18

If a slave marries a woman with the permission of his master and then divorces her, the divorce takes effect. A divorce pronounced by the master does not take effect against the slave's wife. The reason is that ownership in nikâh belongs to the slave. Its relinquishment, therefore, belongs to him and not his master.19

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16 In this case, the cause of losing the rational faculty is not an offence.
17 It is a gharib tradition that is recorded by Ibn 'Abi Shaybah. Al-Zayla'i, vol. 3, 225.
18 Other versions are recorded by Abû Dâwîd, al-Tirmidhi, Ibn Mâjah and others. Al-Zayla'i, vol. 3, 226.
19 That is, the tradition relied upon by al-Shafi'i (God bless him).


Pronouncing Divorce

\(\text{Talāq} \text{ (divorce)}\) is pronounced in two ways: direct expression (\textit{sarih}) and indirect expression (\textit{kināyah}; allusion). Direct expression includes a man's statement, "You are divorced," "You are a divorced woman (\textit{mutallaqah})," and "I have divorced you." \(\text{Talāq}\) takes effect with these expressions and is of the retractable (revocable) form (\textit{raj'i}). The reason is that such expressions are employed for pronouncing divorce and

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1. That is, repudiation.
2. Words that convey their meaning explicitly.
3. A statement is essential. \(\text{Talāq}\) does not become effective by mere inner resolve and intention. An opinion attributed to al-Zuhri is that it does become effective.
4. \textit{The Legal Effects of Irrevocable (Bā'īn) Divorce}.—The legal effects (\textit{hukm}) of revocable divorce have been explained by the Author, however, the irrevocable forms need some elaboration. Irrevocable divorce is classified into two types: (1) three repudiations and (2) one or two repudiations. The rules for each type vary according to the freedom or slavery of the spouse. Here we focus on free persons. When the repudiations are less than three, that is, one or two, the result is that the husband cannot have intercourse with the woman without a new contract of marriage, his pronouncements of \\(\text{ilā}\\) and \\(\text{zihār}\\) are ineffective, there can be no \\(\text{li'an}\\) (imprecation) between the spouses, and there is no mutual inheritance between them. The resulting prohibition is light, however. The meaning is that he can marry his wife without her marriage to another man and subsequent divorce. The explanation is that an irrevocable divorce, with less than three repudiations, results in loss of ownership, but not in the prohibition of the subject-matter (the woman). As compared to this, three irrevocable repudiations result in the loss of ownership as well as prohibition of the subject-matter. The woman can become permissible only if she marries another man and is then divorced.
5. In practice.
are not used for other matters. They are, thus, direct expressions. Such expressions are followed by retraction on the basis of the text.

These expressions do not depend upon niyyah (intention). The reason is that such expressions are direct for this purpose due to their common use. Likewise, where he has intended irrevocability. The reason is that he has intended direct execution of a matter that the shar'i'ah has made contingent upon the termination of the waiting period (`iddah). Accordingly, such an intention reverts to him.

If he intends a release from the compact by his pronouncement of talaq, it is not admissible for a judicial decree, as it contradicts the apparent meaning, but it will be admissible for what is between him and God, as He is the Exalted, because he has intended what can be included in the probable meaning of the statement (and God knows the inner intentions). If he intended thereby release from labour, it is neither admissible for a judicial decree nor for what is between him and God, as He is the Exalted.

The reason is that the word talaq is intended for release from a bond and the woman is not in bondage for labour. It is narrated from Abu l-`uanifah (God bless him) that it is admissible for what is between him and God as He has employed it for release. If he says, “You are a mutlaqah (instead of mutallaqaqah),” it does not amount to a pronouncement of divorce except through his intention. The reason is that this word is not used in practice, therefore, it cannot be treated as a direct expression.

He said: By the use of such an expression (direct) only a single repudiation takes effect even if he intended more than this. Al-Shafi’i (God bless him) said that what he intends takes effect, because his statement probably implies this. The mentioning of one who divorces implies the mentioning of divorce in the literal meaning, just like mentioning of a scholar implies scholarship. It is for this reason that it is valid if a number is associated with the statement so that it becomes an indication of specification. We maintain that an attribute conveys meaning, as made contingent upon the termination of the waiting period of divorce, as at al-talaq. The dual is eliminated from these. If he says, “You are al-talaq (divorce),” or “You are the taliqun al-talaq,” or “You are al-talaqan,” and if he does not have a particular niyyah, or he intends a single repudiation, or two, then a single retractable repudiation will take effect, but if he intends three, three repudiations will take effect. The occurrence of divorce through the second and third statements is obvious. The reason is that if he has merely mentioned the attribute, divorce would have occurred. Thus, when he mentions the attribute and mentions the verbal noun with it, when such noun strengthens it, the divorce occurs a priori. As for its occurrence through the first statement, the reason is that the verbal noun is sometimes mentioned when the nominal term is intended, like saying a man who is `adl, that is, `adil (just). This amounts to saying, “You are a taliqun.” In the same manner, if he says, “You are al-talaq,” the divorce occurs with this too and no niyyah is needed. This will be deemed a non-retractable repudiation, as we have explained, for it is a direct pronouncement of divorce due to its widespread use. The niyyah of three divorces will be valid, because the verbal noun implies generality of meaning and multiplicity, because it is a generic noun, thus, it will be treated like all generic nouns. Consequently, it implies the least with the probability of including the whole. The intention of two repudiations in this statement is not valid, with Zufar (God bless him) disagreeing. He maintains that the dual is part of three, thus, when the intention of three is valid that it is valid as well as a matter of necessity. We say that the niyyah of three is valid as it is a genus, so that when the woman is a slave, the niyyah of two repudiations is valid in her case taking into account the dual. As for two in the case of the freewoman, it is a number and the statement does not imply number. The reason is that the meaning of a single instance or a single genus. The dual is eliminated from these. If he says, “You are al-talaq al-talaq,” and maintains that he intended one repudiation by the word taliq and another repudiation by the word al-talaq, he is to be deemed truthful. The reason is that each word taken separately is suitable for the occurrence of divorce. It is as if he had said,

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*These expressions are explicit for purposes of talaq.

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*The text is Qur'an 2:228.

*That is, direct expressions.

*In other words, even if he intends irrevocability, the rule imposed by the shar'i'ah with respect to retraction operates.

*In other words, an indirect expression depends upon the accompanying niyyah.
"You are repudiated, repudiated." With such a statement two retractable repudiations take effect when he has consummated his marriage with her.

If he attributes divorce to the woman as whole or to what is taken to be the whole, divorce takes effect, because he has attributed it to the object of divorce. This is like saying, "You are repudiated." The reason is that the character tā' (in antithesis) is a pronoun for the woman. And so also if he says, "Your rāqabah (neck) is divorced, or 'unūq (neck) is divorced, or "Your head is divorced," or "Your soul," or "body" or "corpus" or "vagina" or "face." The reason is that these words refer to the entire body. As for the words "corpus" and "body" it is obvious, and so also the other words. God, the Exalted, has said, "The freeing of a nikāh (saddles)." It is said, "So and so is the suraj (saddles)." It is said, "They would bend their necks in humility." The Prophet (God bless him and grant him peace) has said, "God has cursed the ra's (head) of the people, 'O face of the Arabs,' and "His soul expired," meaning his self. In the same sense, the word dam (blood) is used, "His blood is permissible." Among these words is also nafs (self), which is obvious.

The same applies if he divorces an inseparable part of her, like saying, "One-half of you or one-third is divorced." The reason is that the inseparable part is the subject-matter of all transactions like sale and others. In the same way it is the subject-matter of divorce, except that it cannot be separated with reference to divorce, therefore, the whole is intended by way of necessity.

If he says, "Your hand (arm) is divorced" or "Your foot is divorced," the divorce does not take effect. Zufar and al-Shafi'i (God bless them) said that it does take effect. The same disagreement applies to each specified part, as it does not express the meaning of the entire body. The two jurists (Zufar and al-Shafi'i) argue that it is a part that is benefited from by virtue of the contract of nikāh, and something that has this status becomes the subject-matter of the contract of nikāh. Consequently, it becomes the subject-matter of talaq as well. The rule is, therefore, established for utilisation by attributing it to talaq and thereafter it spreads to the whole as in the case of the inseparable part. This is distinguished from the case where it is attributed to nikāh, because extending the meaning is prohibited. The reason is that the prohibition of the remaining parts dominates permissibility of this part. In the case of divorce, the matter is reversed. We maintain that he attributed divorce to something that is not its subject-matter, therefore, it becomes redundant. It is as if he had attributed it to her saliva or nails. The reason is that the subject-matter is that in which there is a restriction, because divorce is based upon the removal of such restriction, and in the hand there is no such restriction. It is for this reason that it is not valid to attribute the contract of nikāh to it, as distinguished from an inseparable part, as that is the subject-matter of nikāh and attributing it to the contract of nikāh is valid. Likewise it is the subject-matter of talaq. The jurists disagreed about the woman's back and her stomach. The correct view is that a talaq in this case is not valid as an expression naming these parts does not refer to the entire body.

If he divorces her by pronouncing one-half of a repudiation or one-third of it, he has divorced her with one repudiation. The reason is that divorce cannot be fragmented and the mentioning of a fractional part amounts to the pronouncement of the whole. The same response is given for any part that he may mention, due to the explanation we have provided.

If he says to her, "You are divorced with three-halves of two repudiations," then she is divorced with three repudiations. The reason is that one-half of two repudiations is one repudiation, thus, when three such halves are combined they amount to three repudiations by logical necessity. If he says, "You are divorced with three-halves of one repudiation," it is said that this amounts to two repudiations. The reason is that the total comes to one and one-half repudiations and this has to be completed (into a round figure). It is also said that this amounts to three repudiations as each half is completed in itself, and this comes to three repudiations.

If he says to her, "You are divorced from one up to two or up to what is between one and two," then it amounts to one repudiation. If he says, "From one to three or what is between one and three," then it amounts to two. This is the view according to Abu Ḥanifah (God bless him). The two jurists said in the first case that they amount to two, and in the second case they amount to three. Zufar (God bless him) said that in the first

11Qur'ān 4:92
12Qur'ān 26:4
13Al-Zayla'i says that this tradition is ghārib in the absolute sense. Al-Zayla'i, vol. 3.
228. He adds that it may be supported somewhat by a tradition reported by Ibn 'Ādī.
case nothing takes effect, while in the second case it amounts to one repudiation. This is based on analogy. The reason is that a thing determined does not include the limits mentioned, just like one saying, "I have sold to you from this wall to that wall." The underlying reasoning of the two jurists, which is based on istihsân, is that such a statement made in the customary way is intended to mean the whole, as when you would say to another, "Take from my wealth from one dirham up to one hundred dirhams." According to Abû Hanîfah (God bless him) what is intended is what is more than the minimum mentioned and what is less than the maximum mentioned. Thus, people say, "My age is from sixty to seventy." They mean thereby "when you fall ill," whereas "when you enter..." means thereby "when you fall ill," meaning that when it occurs legally, as distinguished from sale, as the limit is present in it prior to the sale. If he intends one then morally it is taken into account, but not legally. The reason is that his statement probably includes this meaning, but it is contrary to the apparent meaning.

If he says, "You are divorced one in (to) two," and he intends multiplication and calculation thereby, or he does not have any intention, then it amounts to one repudiation. Zufar (God bless him) said that two repudiations take effect according to the practice in arithmetic (1\times2=2). This is also the opinion of Hasan ibn Ziyad (God bless him). We maintain that the effect of the proposition is to increase the multiplicands and not the result of multiplication. Increasing the components of a repudiation does not lead to an increase in its number.

If he intended thereby "one and two," then they amount to three repudiations, because this is the meaning probably implied. The character "wâw" is for conjunction and enveloping and it combines the things.

If he says, "You are divorced from here up to Syria," it amounts to one repudiation, and he possesses the right to retract. Zufar (God bless him) said that it is one irrevocable repudiation, because he attributed extended length to it. We maintain that in fact he made it short, because when it takes effect, it will take effect in all locations.

If he says, "You are divorced at Makkah or in Makkah," then she is divorced at once at all locations in all lands. Likewise, if he were to say, "You are divorced in the dar," the reason is that divorce is not specific to one location to the exclusion of another. If he means thereby "when she reaches Makkah," he will be considered truthful morally, but not judicially, because he intended a concealed meaning that goes against the apparent meaning. Likewise, when he says, "You are divorced and you are ill," if he intends thereby "when you fall ill," he is not to be deemed truthful judicially.

If he says, "You are divorced when you enter Makkah," she will not be deemed divorced till she enters Makkah. The reason is that he made it contingent upon her entry. If he says, "You are divorced during your entry into the dar," the divorce is linked to the act of entry due to the close association between the condition and the duration, therefore, it is linked with entry due to the difficulty of associating it with the duration.

\[\text{Qur'an}\ 89:29\]

\[\text{For one into two.}\]
63.1 Associating تَلَاقَ with Time

If he says, “You are divorced tomorrow,” then the repudiation will be effective against her with the rising of dawn. The reason is that he associated the entire next day with divorce, and the repudiation takes effect in its first part. If he had intended by this the end of the day, he will be deemed truthful morally, but not for a judicial decree. The reason is that he has intended the restriction of a general meaning, where this is probable, but it conflicts with the apparent meaning.

If he says, “You are divorced today tomorrow,” or “tomorrow today,” then he will be held bound to the time uttered first. Accordingly, it will take effect “today” in the first statement, and “tomorrow” in the second statement. The reason is that when he says “today,” he intends immediate execution, and what is immediate does not admit association. When he says “tomorrow,” it amounts to association and what is associated cannot be immediate insofar as that amounts to nullifying the association. In both cases, the second word becomes redundant.

If he says, “You are divorced during tomorrow, and he then says that he intended the end of the day, his statement is admissible in law according to Abu Ḥanifah (God bless him). The two jurists said that it is not admissible in law exclusively (morally it is). The reason is that he associated the entire day with divorce and it becomes like his statement “tomorrow,” as we have already elaborated. Consequently, it takes effect in the first part of the day in the absence of intention. The reason is that he omitted the word “fi,” and inserting it has the same effect as it is a duration in both cases. According to Abū Ḥanifah (God bless him), he intended the actual meaning of his statement, because the word "fi" is for duration and duration does not require that it be covered entirely. The determination of the first part as the time of legal effect is due to the absence of a contrary implication. If he determines it to be the end of the day, then the intended determination has greater priority as compared to the necessary. This is distinguished from his statement “tomorrow,” as that implies the entire duration insofar as he has associated it with this attribute in association with the entire day. A parallel for this is when he says, “By God I will fast for my lifetime,” while the parallel for the former is, “By God I will fast during my lifetime.” The same applies to saying “dahr” and “fi al-dahr.”

If he says, “You are divorced yesterday,” when he married her today, there is no effect. The reason is that he associated with a time that has already passed and which negates the right of ownership of تَلَاقَ. It is, therefore, deemed redundant and is like saying, “You are divorced prior to the time of my creation.” Further, the statement can sound if it conveys the information that there was no نِكَاحِ or that the woman was divorced through the pronouncement of another (earlier) husband. If he had married her prior to yesterday, the divorce takes effect at that moment, because he did not associate it with a negating situation. Further, the statement cannot be deemed sound as a report either. It is, therefore, a new act and a new act that is associated with the past takes effect at the present moment.

If he says, “You stand divorced prior to my marriage to you,” the statement has no legal effect, because he has associated it with a negating situation. It, therefore, amounts to saying, “I divorced you when I was a minor,” or “when I was asleep,” or it may be taken as a report, as we have mentioned.

If he says, “You are divorced as long as I do not divorce you,” or "till I do not divorce you," or "till such time that I do not divorce you,” and then remains silent, the woman stands divorced. The reason is that he associated divorce with a time that is devoid of repudiation, and this happens when he remains silent. Further, the words “till” and “until” are explicit with respect to time as they represent durations of time. Likewise, the word “مَا” (as long as) is for time. God, the Exalted, said, “As long as I live,” that is, during your life.

If he says, “You are divorced if I do not divorce you,” she is not divorced till his death. The reason is that non-existence is not realised except by the absence of hope of life, and that is the condition, as in the statement, “If I do not reach Baṣrah.” In this, her death has the same effect as his death, which is the correct view.

If he says, “You are divorced when I do not divorce you,” or “till the time that I do not divorce you,” she is not divorced till he dies, according to Abū Ḥanifah (God bless him). The two jurists said that she is divorced when he remains silent. The reason is that the word idhā (when) is meant

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to express time. God, the Exalted, has said, "When the sun (with its spacious light) is folded up." It, therefore, conveys the same meaning as matā (until) and matā mà (till the time). It is for this reason that when he says to his wife, "You are divorced when you like," the matter stays in her control even after leaving the session, as in his statement, "until you like." According to Abū Hānīfah (God bless him), the word idhā is used to introduce a condition as well. If he intended a condition thereby, she is not divorced at once. If he intended a particular time, she can be divorced, but not with the associated doubt and probability. This is distinguished from the case of leaving it at her pleasure on the analogy of time, where the matter does not move out of her control. It is assumed that it has been used for a condition, the matter moves out of her control. As the matter had been delegated to her, however, it will not move out with doubt and probability. This disagreement pertains to the situation where he has no niyyah. If he intends a time thereby, the divorce takes effect immediately. If he had intended it as a condition, the divorce will take effect at the end of life (of either), because the term probably implies both time and condition.

If he says, "You are divorced as long as I do not divorce you, you are divorced," then she stands divorced with this repudiation. The meaning is that he said this linked to the prior words. Analogy dictates that this is association (not linked), therefore, two repudiations take effect if the woman's marriage stands consummated. This is the opinion of Zufar (God bless him). The reasoning is that a period of time is found (between the two statements) in which he did not divorce her, however brief the moment. This is the time in which he pronounced the words "You are divorced" prior to being free of the entire statement. The basis for istihāān is that the time for pronouncing the oath is exempted from the oath due to the situation itself. The reason is that taking the oath is the aim and it is not possible to take the oath unless this duration is exempted. The basis of the rule pertains to the case where one makes a vow not to reside in a specific house and becomes occupied with moving out at once. The same applies to sister cases as will be brought up in the Book of Oaths, God, the Exalted, willing.

If he says to a woman, "The day I marry you, you are divorced," and he marries her at night, she stands divorced. The reason is that the word

**63.2 Miscellaneous Forms**

If a person says to his wife, "I am divorced from you," then it does not have any legal effect, even if he had intended divorce. If he says, "I am irrevocably separated from you," or "I am prohibited for you," and he intended divorce thereby, then, she stands divorced. Al-Shāfi‘ī (God bless him) said that divorce occurs in the first case as well, if he had intended divorce. The reason is that ownership of nikāh is common between the two spouses so that she can demand sexual intercourse just as he has the right to demand access. Likewise, the lawful right to benefit from the subject-matter of nikāh is common between them. Talaq has been prescribed to eliminate these two rights, therefore, it is valid to associate divorce with the man just as it is valid to associate it with her, as in the case of irrevocable separation and prohibition. We maintain that divorce is prescribed for the removal of the restrictions of marriage. These restrictions apply to her and not to the husband. Do you not see that it is she who is prevented from marrying another husband. If moving out of nikāh is for the elimination of ownership, then it works against her, because it is she who is owned, while the husband is the owner. It is for this reason that she is referred to as one in a state of nikāh. This is distinguished from irrevocable separation as it refers to the bond that is common between

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22 Qur'an 8:1

23 Qur'an 8:16
If he says, “You are divorced with one or you are not,” then the statement has no legal effect. He (the Author—God be pleased with him) said that this is how it has been stated in *al-jami' al-Saghir* without any opposing view. It is the view of Abu Hanifah (God bless him) and the second opinion of Abū Yusuf (God bless him). According to the opinion of Muhammad (God bless him), which is also the first view of Abū Yusuf (God bless him), a single retractable repudiation takes effect. He mentions in the *Book of Tāliq* with respect to where he says to his wife, “You are divorced with one or it is nothing,” that there is no difference between the two issues. If what is mentioned there was the opinion of all, then from Muhammad there are two narrations. He argues that doubt has crept in about one repudiation by the insertion of the word “or” between it and its negation. Consequently, the consideration of a single repudiation is relinquished and what remains is the statement “You are divorced.” This is to be distinguished from his statement “You are divorced or you are not,” because this creates a doubt about the occurrence of divorce itself, therefore, it does not take effect. The two jurists argue that when the attribute is associated with a number, the occurrence takes place by mentioning the number. Do you not see that if he said to a woman whose marriage has not been consummated “You are divorced thrice,” she will be divorced thrice. If the divorce had to occur through the attribute alone, the mentioning of the number three would be redundant. This is so as in reality what takes effect is the characteristic described but not mentioned. The statement means “You are divorced with one repudiation,” as has preceded. Thus, if what occurs is the substantive for which number is a qualifier, doubt creeps into the very occurrence of the divorce, therefore, nothing takes effect.

If he says, “You are divorced upon my death” or “upon your death,” then nothing takes effect. The reason is that he has associated divorce with something that negates it. Further, his death negates legal capacity, while her death negates the subject-matter, and it is necessary that both be present.

If the husband comes to own his wife in whole or in part, or the wife comes to own her husband in whole or in part, a separation occurs, due to a conflict between the two types of ownership. As for the wife’s owning her husband, it leads to the combining of owning or being owned. As for his coming to own her, the reason is that ownership through marriage is established due to necessity, and there is no such necessity with the presence of milk yamin (lawful ownership of a slave), therefore, nikāh is negated.

If he buys her and then divorces her, nothing takes effect, because divorce requires the pre-existence of nikāh, and it does not remain with a negating factor either in the form of 'iddah or any other way. Likewise, when she comes to own him as a whole or in part, the divorce will not take effect due to what we have said about negation. It is narrated from Muhammad (God bless him) that it does take effect. The reason is that 'iddah is obligatory here as compared to the first case, because there is no 'iddah in that case as it is permitted to him to have intercourse with her.

If he says to her, when she is another person’s slave, “You are divorced twice with freedom granted to you by your master,” and then if the master grants her freedom, the husband possesses the right of retraction. The reason is that he has made repudiation contingent upon manumission or freedom, because the term 'ītq covers both. A condition is one that is non-existent with the likelihood of its coming into existence. The rule is linked to the condition and the condition mentioned is of this nature. What is dependent upon the condition is repudiation (not divorce), because in conditions such a transaction will become a repudiation upon the condition occurring, in our view. When the repudiation is dependent upon manumission or freedom, it comes into being after the condition. Thereafter, divorce is found after repudiation, therefore, divorce will be delayed till after freedom. It will operate on the woman when she is free, but for now she cannot become finally prohibited with two repudiations. One thing remains and that is that the word *ma'a* (with) conveys the meaning of accompanying. To this we would say that it is sometimes mentioned for subsequent happenings, as in the words of the Exalted, “Verily with every difficulty there is relief.”

Accordingly, it is to be construed in this sense on the evidence of what we have said about conditions.

If he says, “When tomorrow comes, you are divorced twice,” and the master says, “When tomorrow comes, you are free,” then when the next day arrives she is not lawful for him until she marries another husband.24

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24Qur'an 9:45
Her 'iddah is of three menstrual periods. This is the view according to Abu Ḥanīfah and Abū Yūsuf (God bless them). Muhammad (God bless him) said that her husband possesses the right of retraction, with respect to her. The reason is that the husband has associated the occurrence of divorce with manumission by the master insofar as he has made it contingent upon the condition that the husband has employed for manumission. What has been made contingent (repudiation) becomes the cause (of the occurrence of divorce) on the happening of the condition, while manumission accompanies freedom as it is its underlying cause, for which the basis is the existence of ability along with the act to be done (both come together). Thus, repudiation accompanies manumission by way of necessity. She is, therefore, repudiated after manumission and the issue becomes like the first issue. It is for this reason that her 'iddah is determined to be three menstrual periods (like those for a free woman). The two jurists maintain that he made divorce contingent upon the thing on which the master made manumission contingent. Thereafter, manumission operates on her when she is a slave and so also divorce (that is, at the same time). Two repudiations prohibit the slave girl finally as distinguished from the first issue, as in that case he made repudiation contingent upon freedom by the master, therefore, divorce occurred after freedom, as we established. It also differs from the waiting period, because in that case precaution is adopted and for final prohibition also precaution is adopted. There is no basis for what he (Muhammad) said. The reason is that if manumission is associated with freedom, because it is its 'illah (cause), then divorce is to be associated with repudiation (in the same way) as that is the 'illah too, therefore, they should be deemed equal.

63.3 Divorce by Simile (Tashbih)

A person who says to his wife, "You are divorced like this," and he snaps his thumb, index and middle finger, then this amounts to three repudiations. The reason is that an indication with the fingers conveys an information about the number according to the usual practice so that it becomes associated with a number that is vague. The Prophet (God bless him and grant him peace) said, "The month is like this and this..." If he raises one finger, then it is a single repudiation, and if he indicates with two, it amounts to two repudiations, on the basis of what we said. The indication acknowledged is that with fingers that are spread. It is said that if the indication is made with the back of the fingers, then, this amounts to a closed fist. If the indication takes effect with fingers that are spread (with the inner side facing) then, the intention with closed fingers will be accepted morally, but not for the purpose of a judicial decree. If the intention is manifested with the palm (with fingers open but together), then in the first situation (closed fist) two repudiations will be acknowledged morally, but in the second (with an open palm) it will morally amount to one. The reason is that it can bear his intention, but it will be contrary to the obvious meaning. If it is not accepted this way, then it will amount to one repudiation as it is not associated with any vague number, for in this case what is left is his statement, "You are divorced."

If he qualifies divorce with a sort of excess or intensity it amounts to an irrevocable divorce, like saying, "You are divorced irrevocably or finally." Al-Shafi‘i (God bless him) said that a revocable divorce will take effect if it is after consummation. The reason is that divorce has been prescribed in a manner that it is followed by retraction, therefore, qualifying it with irrevocability goes against the intent of the law. Thus, it becomes redundant, like his saying, "You are divorced with the condition that there is no retraction for me with respect to you." We maintain that he has qualified it with a meaning that the term can bear. Do you not see irrevocability is attained through the pronouncement if the marriage has not been consummated or after the waiting period. Thus, the qualification is for ascertaining one of the two probable meanings. The issue of retraction is not acceptable, therefore, one irrevocable repudiation will take effect if he did not have an intention or he intended two repudiations, but if he intended three, then three take effect, due to what has preceded earlier. If he intended with his statement, "You are divorced," one repudiation, and with his words "irrevocable" or "final" another, then two irrevocable repudiations occur. The reason is that this qualification is suitable for its legal effect ab initio.

\[\text{References:}\]  
\[\text{582}\] Al-Hidayah

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Likewise, if he says, “You are divorced with the extreme form of divorce.” The reason is that it has been qualified with this word in view of its legal effect. It has the effect of immediate irrevocability, and is the same as his statement “irrevocable.” Likewise, if he says, “the most vicious form of divorce,” or “the worst form of divorce,” on the basis of what we have mentioned.

The same applies if he says, “The divorce of Satan,” or “The divorce of bid’ah (innovation).” The reason is that retractable divorce is talaq al-sunnah, therefore, his words “bid’ah” and “Satan’s divorce” result in an irrevocable divorce. It is narrated from Abu Yûsuf (God bless him) about the words “You are divorced with the divorce of bid’ah (innovation),” that it does not amount to an irrevocable (bâ’in) divorce without a niyyah. The reason is that the bid’ah form applies to one pronounced during the menstrual period, therefore, niyyah is essential. It is narrated from Muhammad (God bless him) that if the person says, “You are divorced with the bid’ah form,” or “Satan’s divorce,” it amounts to a revocable (rajî) divorce. The reason is that this legal effect is realised in divorce during the situation of menstruation. Thus, irrevocability is not established through doubt.

The same applies if he says, “Like the mountain.” The reason is that a simile referring to the mountain inevitably leads to excess, and this is due to the assertion of an excess in the attribute (divorce). The same applies if he says, “On the analogy of a mountain,” on the basis of what we said. Abû Yûsuf (God bless him) said that it amounts to a revocable divorce, because the mountain is a single thing, therefore, a simile referring to it conveys unity.

If he says to her, “You are divorced with the most intense form of divorce,” or “Like a thousand,” or “A roomful,” then it is a single irrevocable (bâ’in) repudiation, unless he intended three repudiations. As for the first, the reason is that he qualified it with intensity and that means irrevocable as it does not admit of decrease or rejection. The rajî (retractable) divorce does admit such meanings. The intention of three is valid as he has mentioned the verbal noun. With respect to the second, on occasions this simile conveys strength, while at others it conveys number. It is said, “He is like a thousand men,” where the intention is to convey strength, therefore, a niyyah of both things is valid. When the niyyah is absent the least number is affirmed. According to Muhammad (God bless him), three repudiations take effect in the absence of intention, because it is a number and the apparent meaning of the simile is to convey a number. Thus, his statement is like, “You are divorced with the number one thousand.” As for the third, a thing may sometimes fill a room due to its own size, while at others it may fill it due to the multiplicity of numbers, therefore, whatever he intends makes the niyyah valid. In the absence of niyyah, the minimum number is established. Thereafter, the rule according to Abû Hanîfah (God bless him) is that when a simile is used for divorce an irrevocable divorce takes effect, whatever the simile used, irrespective of the person using magnitude, and this is due to the earlier explanation that a simile implies an increase in the attribute. According to Abû Hanîfah (God bless him), irrevocability results through the mention of magnitude, but not otherwise, whatever the simile used, because a simile may sometimes be purely for unity, however, magnitude is always for excess. According to Zufar (God bless him) if the subject-matter of the simile is something that accepts magnitude according to the people it will amount to an irrevocable divorce otherwise it is retractable. It is said that Muhammad (God bless him) sided with Abû Hanîfah (God bless him) on this issue and it is said that he sided with Abû Yûsuf (God bless him). The elaboration of this is in his statement “The eye of a needle,” that is, “like the size of the eye of the needle” or “like the mountain,” that is, “like the size of a mountain” (where Muhammad is with the Imam).

If he says, “You are divorced through an aggravated repudiation,” “broad,” or “lengthy,” then a single irrevocable repudiation takes effect. The reason is that what cannot be revoked becomes aggravated and that is the irrevocable divorce. Likewise a thing that is difficult to undo. It is said that such and such thing has a length and breadth. According to Abû Yûsuf (God bless him) with such a statement a revocable repudiation takes effect, because such a qualification is not compatible with a repudiation, therefore, it is redundant. If he intends three repudiations in these cases, the intention is valid, because irrevocability is multifaceted, as has preceded, and what takes effect is irrevocable.

63.4 Divorce Prior to Consummation

If a man divorces his wife “thrice” prior to consummating his marriage with her, the repudiations will be effective against her. The reason is that
what takes effect is an implied noun. The meaning is “divorce thrice,” as we have elaborated. His statement, “You are divorced,” will not be taken as the occurrence of a single repudiation at a time, thus, they will all take effect at once.

If he separates the repudiations, the first is irrevocable, and the second and third will not take effect. This is the case where he says, “You are divorced, divorced, divorced.” The reason is that each one of them takes effect independently when he does not say something at the end of his statement that will alter the earlier meaning so that it can be relied upon. Thus, the first takes effect immediately and the second will come up to meet it as that is irrevocable.

Likewise, if he says to her, “You are divorced once and once”; one will take effect, on the basis of our statement that she became irrevocably divorced with the first.

If he says to her, “You are divorced once,” and she dies before his pronouncing the word “once,” the pronouncement is nullified. The reason is that he has associated the attribute with a number, it is the number that will take effect. If she dies before the number is mentioned, the subject-matter of divorce has expired before the divorce could take effect. Accordingly, it stands nullified.

Likewise, if he says, “You are divorced twice,” or “thrice,” on the basis of our elaboration. This belongs to the same category as the issue preceding it in terms of meaning.

If he says, “You are divorced with one along with one,” then a single repudiation takes effect. The basis is that when he mentions two things and inserts the word of duration between them, then if a figurative meaning is associated with it, it becomes a qualification for another thing that is mentioned. It is like the statement, “Zayd came to me, before him ‘Amr.” If he does not associate a figurative meaning with it, it becomes a qualification for the first thing mentioned. It is like the statement, “Zayd came to me before ‘Amr.” The occurrence of divorce in the past is its occurrence in the present, because undoing the prohibition of the past is not within his power. Thus, the precedence in his statement “You are divorced with one along with one” becomes a qualification for the first. As the woman is irrevocably divorced with the first, the second does not take effect. The relegation in his statement “After which is one” becomes a qualification for the last mentioned repudiation, therefore, irrevocability is attained through the first.

If he says, “You are divorced with one before which is one,” two repudiations take place, because precedence is a qualification for the second due to its link with the figurative meaning. This implies its occurrence in the past and the occurrence of the first in the present, however, occurrence in the past amounts to occurrence in the present as well. The two are, therefore, linked and take effect.

The same applies if he says “You are divorced with one after which is one,” and two repudiations will take effect. The reason is that relegation is a qualification of the first. This requires the occurrence of one in the present and the occurrence of the other prior to it, and the two are linked.

If he says, “You are divorced with one along with one” or “along with one with it,” two repudiations take effect. The reason is that the word “with (ma’a)” is for linking the two. It is narrated from Abū Yūsuf (God bless him) about the words “along with it one” that a single repudiation takes effect, because a figurative meaning inevitably requires the prior mentioning of its object.

In the case of the woman whose marriage is consummated, two repudiations take effect in all the above cases, due to the existence of the subject-matter (woman not yet divorced) after the occurrence of the first.

If he says to her, “If you enter the house, you are divorced with one and one.” Thereafter, when she enters a single repudiation takes effect against her according to Abū Ḥanīfah (God bless him). The two jurists said that two repudiations take effect. If he says to her, “You are divorced with one and one, if you enter the house,” then when she does enter she is divorced with two repudiations, by agreement. The two jurists maintain that the character waaw is for absolute addition, therefore, both take effect together just as if he had mentioned two in his statement or had delayed the condition. In his (Abū Ḥanīfah’s) view, absolute addition implies association and a sequence, thus, taking the first (association) into account, two repudiations take effect and in the second (sequence) only one. For example, when he made this word “one” have immediate effect then an addition over one will not take effect due to doubt. This case is distinguished from one where the condition is relegated, as that alters the earlier statement so that the earlier part depends on it, thus, both take effect together. There is no alteration if the condition is stated first, as the remaining statement is not dependent on it. If the two are

22The condition is delayed in this statement as compared to the first.
linked with the character *fa’*, then, the disagreement is the same according to what has been mentioned by al-Karkhi (God bless him). The faqih Abū al-Layth has stated that only one takes effect by agreement, because the character *fa’* is for pursuit, and this is the correct view.

### 63.5 Divorce Through Indirect Expressions

The second category of statements are those in which divorce does not occur with figurative meanings unless there is an accompanying intention (*niyyah*) or circumstantial evidence. The reason is that such meanings are not applied for pronouncing divorce, rather they probably imply such meanings as well as others. Accordingly, there is a need to ascertain the real meaning or the implication of the word.

He said: Divorce on the basis of *kināyah* is of two types: retractable and irrevocable. Among these are three statements which with retractable divorce occurs, however, only one repudiation takes effect. These words are: “Complete your waiting period,” “Vacate your womb,” and “You are alone.” As for the first, the reason is that the statement probably means counting the (remaining) days of *nikāh* and it probably means counting the blessings of God, the Exalted. If he intends the first meaning, the meaning is ascertained through his intention. In such a case, it implies prior repudiation, and this is followed by retraction. As for the second statement, it is probably used for the waiting period as it is an expression for the objective of the waiting period, therefore, it will apply to the waiting period. The meaning is probably vacation of the womb so that he can divorce her. As for the third, it is probably used as an adjective for an implied noun, which means a single repudiation, thus, if he has the intention of divorcing her he will be deemed to have implied this, and such a divorce is followed by retraction. It probably implies another meaning, which is that she is alone with him or with his people. Insomuch as these statements imply divorce and other meanings, they are in need of intention (*niyyah*). Further, only a single repudiation takes effect, because in his statement, the words, “You are divorced” are implied or concealed. If the meaning of such words had been manifest, only a single repudiation would have taken effect, thus, when the meaning is concealed this legal effect is more likely. In his statement “one,” the noun has been mentioned, but expressing the word “one” negates the intention of three repudiations. The syntactical position of the word “one” is of no consequence according to most jurists, and that is the sound view, because people in general do not distinguish between the grammatical forms.

He said: The remaining figurative expressions when intended for pronouncing divorce result in a single irrevocable repudiation. If three are intended, three take effect, and if he intends two, a single irrevocable divorce takes effect. This is similar to the statements, “You are separated irrevocably,” “separated decisively,” “severed,” “prohibited,” “your rope is on your neck,” “join your relatives,” “devoid of blessings,” “absolved,” “I have made a gift of you to your relatives,” “dismissed,” “I have separated from you,” “your affair is in your hands,” “choose yourself,” “you are a free woman,” “you are veiled,” “wear a veil,” “go behind a curtain,” “become a stranger,” “go out,” “go away,” “stand up,” and “search for your companion.” The reason is that these words probably imply divorce as well as other meanings.

He said: If, however, these words are spoken in the context of divorce, divorce will take effect in a court of law, but it does not occur for purposes of what is between him and God, unless he intended divorce. The Author (God be pleased with him) said: He (al-Quḍārī) deemed these words equivalent. The Author said: These words are not interpreted as true in the context of divorce, unless they are those that are not suitable for a response, according to what the jurists said. The conclusion for this is that there are three situations: an absolute situation, and this is the situation of normal conversation; a situation in which divorce is discussed; and a situation of anger. Indirect expressions are of three types: those that are suitable as a response and a rejection; those that are suitable as a response but not rejection; and those that are suitable as a response, an abuse and insult. In a situation of congenial conversation none of these statements will result in divorce without a *niyyah*, and the statement of divorce would have been manifest, only a single repudiation.

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26The chapter began with two kinds of expressions used for divorce: direct and indirect. All that has preceded was a discussion of direct expressions. The Author now deals with indirect expressions. The section heading has been inserted here by us and is not
means divorce upon being asked about divorce. He is deemed truthful in those statements that are suitable as responses and rejections, like his statements “Go away,” “Go out,” “stand up,” “veil yourself,” “wear a veil,” as well as whatever follows this course, because these statements probably imply rejection and that is the minimum construction placed on them. In a situation of anger he is to be deemed truthful in all these statements as they probably bear the meaning of rejection and abuse, except those that are suitable for divorce but not as a rejection or insult, like his statements “count,” “choose,” “your affair is in your hands,” for he is not deemed truthful in these as anger indicates the resolve to pronounce divorce. It is narrated from Abū Yūsuf (God bless him) about the statements, “I have no ownership over you,” “I have no claim over you,” “I have removed obstacles from your path,” and “I have separated from you,” that he is to be deemed truthful when the statements are made in a state of anger, insofar as there is the probability of abuse in this. Thereafter, the occurrence of an irrevocable divorce with those that are besides the first three (count, vacate your womb, you are alone) is the opinion of our school. Al-Shafi‘ī (God bless him) said that a retractable divorce occurs through the statements. The reason is that what occurs through them is divorce, because these are indirect expressions of divorce. It is for this reason that the existence of niyyah is stipulated and the number is reduced due to these statements. Thereafter, divorce is followed by retraction. We maintain that an act of irrevocability has issued forth from one who possesses legal capacity by associating the act with the subject-matter according to the legal authority granted by the sharī‘ah. There is no ambiguity about legal capacity and subject-matter, while the evidence about legal authority is that there is an intense need to establish it so that the door to this solution is not closed for him and that he does not have to take her back during her period without intention. Further, these statements are not indirect expressions in reality as they act in their true meanings. The condition is to ascertain one of the two types of baynūnāh (irrevocability) and not divorce. The reduction in number is for establishing divorce on the basis of the removal of the bond. The intention of three is valid in such statements due to the division of irrevocability into enhanced and light; when the intention is missing, the lesser of the two is established.

The niyyah of two repudiations is not valid in our view, but Zufar (God bless him) disagrees. The reason is that it is a number, and we have elaborated this earlier.

If he says to her, “Complete your waiting period, complete your waiting period,” and he claims that he meant divorce by the first statement and menstrual periods by the remaining, he is to be deemed truthful in a court of law. The reason is that he has formed the intention in conformity with the real meaning of his statement. Further, he ordered his wife to observe the waiting period according to the usual practice of doing so after divorce. Thus, the obvious meaning supports him.

If he says that he did not form any intention about the remaining statements, then, three repudiations take effect. The reason is that when he formed the intention of divorce with respect to the first, the situation turned into one about the discussion of divorce. The meaning of the remaining two statements came to be ascertained for divorce on the basis of this state. Accordingly, he will not be deemed truthful regarding the negation of intention. This is distinguished from the situation where he claims that he did not intend divorce through any of the three statements in which case no repudiation will take effect, because there is no apparent evidence that demolishes his claim. The case is also different from one where he says that he intended divorce by the third statement and not through the first two in which case only one repudiation will take effect, because the state at the time of the first two was not one about the discussion of divorce. On each occasion where the husband is deemed truthful about the negation of the existence of intention, he is accepted as truthful through an oath. The reason is that he is the trustee for conveying the information concealed within him, and the acceptable statement is that of the trustee along with his oath.
Chapter 64

Tafwīd (Delegation)

64.1 Choosing (Ikhtiyār)

If he says to his wife, “Choose yourself,” and he intends divorce thereby, or he says to her, “Divorce yourself,” then, she has the right to divorce herself as long as she is in this session. If she gets up from this session or begins some other act, the matter moves out of her hands. The basis is that the woman granted a choice (of divorce) has the right of the session on the basis of ījmaʿ (consensus) of the Companions (God be pleased with them all), because it is the passing of ownership in the act to her and passing of ownership requires a response within the session of the transaction as in the case of bayʿ (exchange). The reason is that all the moments of the session are considered a single moment, except that the session is sometimes altered by departing from it and sometimes by occupation with another act. This is so as the session of eating is different from the session of discourse (munāẓarah), while the session of fighting (qītāl) is different from these.

Her right of choice is annulled by her merely getting up from the session. The reason is that it is an evidence of turning away from the transaction as distinguished from the transactions of ṣarf (currency exchange) and salam (advance payment), as the vitiating factor there is parting without taking possession. Thereafter, it is essential that there be

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1Views are reported from ‘Umar, ‘Uthmān, Ibn Mas‘ūd, Jābir and ‘Abd Allāh ibn Amr ibn al-‘Āṣ (God be pleased with them all). The views are recorded by ‘Abd al-Razzāq and Ibn Abī Shaybah. Al-Zayla’i, vol. 3, 229.
2Without walking away.
niyyah behind the husband’s statement, “choose,” because the word probably implies giving an option to the wife with respect to herself and it also implies giving her a choice with respect to another different matter.

If she chooses herself (divorce) in response to the words “choose,” a single irrevocable repudiation takes effect. Analogy implies that no repudiation should occur with this even if the husband intends divorce through it. The reason is that he does not possess the right to pronounce divorce by using this word, therefore, he does not possess the right to delegate it to another. We based our view on *istisihan*, however, relying on the consensus of the Companions (God bless them all). Further, by way of having the right to retain her in marriage or to separate her, he possesses the right to make her stand in his own place for the purposes of this rule. Therefore, the repudiation taking effect due to this is irrevocable, because she chooses herself due to the exclusive right to do so, and this occurs in the case of the irrevocable repudiation.

The number of repudiations is not three even if the husband intended this. The reason is that a choice cannot be broken down into types as distinguished from irrevocability as that is divided into types. He said: It is essential to mention her own person in his statement or in her statement so that if he says to her, “Choose,” and she says, “I have chosen,” then this is void. The reason is that this form has become known through consensus, and such consensus is an elaboration by one party, because one vague term cannot serve as an elaboration for another vague term, and ascertainment is not made through vagueness.

If he says to her, “Choose yourself,” and she says, “I have chosen,” then, one irrevocable repudiation takes place. The basis is that his statement is clear and her statement contains a response to it, therefore, it amounts to repeating it.

Likewise, if he says, “Choose to make a choice,” and she says, “I have chosen.” The reason is that the character of ha’ in *ikhtiyarah* conveys the meaning of unity and individuality, and her choosing herself signifies unity (herself) from one aspect and multiplicity (divorce) from another, therefore, it stands elaborated from his side.

3For its legal effect see note at the beginning of the previous chapter.
4Mentioned above.
5Light and enhanced.
6Or what can serve as a substitute for it.
If he says to her, "Your affair is in your hands today and the day after tomorrow," then, this does not include the night. If she refuses to exercise the choice on the first day, the right is extinguished for that day, and her affair remains in her hands for the day after tomorrow. The reason is that he has explicitly mentioned two timings with a third timing in between these two, but which is not covered by the command. The mentioning of the day with a separate statement does not cover the night. The two are separate affairs. Rejecting one of them does not amount to the rejection of the other. Zufar (God bless him) said that the two are the same having the same legal meaning as in the statement, "You are divorced today and the day after tomorrow." We say that divorce does not accept the limitation of time whereas delegation of the "affair" does accept it. Consequently, the "affair" is limited with the first statement, while the second is a fresh "affair."

If he says, "Your affair is in your hands today and tomorrow," then these amount to choosing herself when the waiting period is over. The reason is that he gave her the choice, but with one repudiation, and such a repudiation is followed by retraction according to the text.

64.2 Her Affair in Her Hands

If he says to her, "Your affair is in your hands," and forms the niyyah of three repudiations, to which she replies, "I have chosen myself with one," then, three repudiations take effect. The reason is that the choice is suitable as a response to the directive placing the affair in her hands as it is the passing of ownership, just like takhyir (the granting of choice). A single repudiation is a qualification for the choice. It is, therefore, like her saying, "I have taken one turn to exercise this choice." With this meaning, three repudiations take effect.

If she responds saying, "I have divorced myself with one," or "I have chosen myself with one repudiation," then, one irrevocable repudiation takes effect. The reason is that one is an adjective for the implied noun, which in the first case is "choice," and in the second it is "repudiation." unless it is irrevocable, because taqwiid in irrevocable repudiations necessarily passes off her affair to her. Her statement has been made as a reply to him, therefore, the qualification mentioned in the statement of taqwiid comes to be mentioned in the statement of pronouncement (by her). The niyyah of three repudiations is valid for his statement, "Your affair is in your hands," as it contains the probable general as well as particular meanings, and the intention of three is one of generality, as distinguished from his statement, "Choose" as that does not convey a general meaning. This we have elaborated earlier.
of the daylight, and we have established this earlier, thus, it is limited by daylight. Therefore, it is terminated with the ending of its time.

If he delegates her affair to her hands or grants her a choice, and she stays there for a day without getting up, then, the affair remains in her hands until she does not begin another (unrelated) act. The reason is that this is the passing of ownership in the repudiation to her. The owner is one who can act of his own free will, and the woman has this qualification. Ownership, however, is restricted to the session, and we elaborated this earlier.

Thereafter, if she is listening (to what he says) her session will be where she is, but if she is not (present and) listening, then her session will be where she comes to know of it and where the report reaches her. The reason is that this is the passing of ownership bearing a condition that depends upon what is beyond his session, and his session is not taken into account. The assumption of a condition is binding upon him, as distinguished from the contract of bay', because that is mere passing of ownership that is not affected by a condition. If such is her session, then the session is altered at times by her moving away from it or by occupation with another task, according to our explanation in the topic of granting a choice. The "affair" moves out of her hand by her mere getting up for that is evidence of turning away from it, because getting up signifies a different view as compared to her sitting in the same place for a day without getting up or without occupation with another task. The reason is sometimes lengthy and at other times it is short, therefore, it continues till an event occurs that cuts it off or what indicates turning away from the affair. His (Imám Muhammad’s) statement “remains for a day” does not indicate the limiting of the duration with such a time. His statement “till she does not occupy herself with another act” means an act by which it is known that the session is terminated and it is not a task in the absolute sense.

If she was standing and she sits down, she continues to possess her option. The reason is that this is evidence of focusing on the matter, because sitting down is better for concentration leading to a considered opinion.

Likewise if she was sitting and reclines or was reclining and sits up. The reason is that this amounts to transferring from one sitting posture to another, therefore, it does not amount to turning away from the matter, just as if she was sitting resting on her knees and moves to the squatting posture. The Author (God be pleased with him) said: This is a narration of al-Ṭāmain al-Ṣaghīr, however, it is stated in other sources that if she was sitting and reclines, there is no option for her any longer, because reclining is an expression of not caring about the matter of choice, thus, it amounts to turning away. The first view, however, is more authentic.

If she says, “I will call my father to consult him,” or “call witnesses so I can take them as witnesses,” then she retains her choice. The reason is that consultation is for arriving at a sound opinion, and witnesses are required to avoid denial, thus, these acts will not be construed as turning away from the matter.

If she is travelling on a riding animal or in a litter and she comes to a stop, then she retains her choice, but if she (then) travels her choice is nullified. The reason is that the moving and stopping of the riding animal is associated with her.

A ship has the same status as a room, because its movement is not associated with that of the passenger. Do you not see that the person travelling in a ship is not able to bring it to a halt, whereas one riding an animal is able to do so.

64.3 DIVORCE AT ONE'S DISCRETION (MASHĪ'AH)

If a person says to his wife, “You may divorce yourself,” when he has not formed any intention or he forms the intention of a single repudiation, and the woman says, “I have divorced myself,” then one revocable repudiation takes effect. If she divorces herself with three repudiations, and the husband had intended this, three repudiations will occur. This is so because the intention of three operates on it and applies to one when such intention is absent. The single repudiation is revocable, because what is delegated to her explicitly is divorce. If he forms the intention of two, it is not valid, because it is an intention of number. It is for this reason that the intention of three operates on it and applies to one when such intention is absent. The single repudiation is revocable, because what is delegated to her explicitly is divorce. If he forms the intention of two, it is not valid, because it is an intention of number.

If he says to her, “Divorce yourself,” and she says, “I have irrevoca-
ably separated myself,” then she is divorced. If she says, “I have chosen
If he says to a man, “Divorce my wife,” then he has the right to divorce her within the session and thereafter. The husband has the right to withdraw such authority, as it is an agency. It is a kind of assistance, therefore, it is not binding nor is it confined to the session. This is distinguished from his saying to his wife, “Divorce yourself,” because she is acting for herself, therefore, it is the passing of ownership and not agency.

If he says to a man, “Divorce her if you like,” then he has the right to divorce her within the session alone, however, the husband does not have the right to withdraw his statement. Zufar (God bless him) said that this case and the previous are equivalent. The reason is that expressly mentioning discretion (mash'ah) is like its non-existence, because he acts at the husband's discretion, therefore, he is like an agent for sale (bay') to whom it is said, “Sell it if you like.” Our reasoning is that it is the passing of ownership, because he made it dependent upon his discretion, and the owner is one who acts at his own discretion. Divorce bears conditional pronouncement as distinguished from sale that cannot be contingent.

If he says to her, “Divorce yourself with three,” and she divorces herself, therefore, it is the passing of ownership and not agency.

If he says to her, “Divorce yourself with three,” and she divorces herself with three, no repudiation takes effect according to Abu Hanifah (God bless him). The two jurists said that one repudiation takes effect. The reason is that she brought about what she owned and an excess over it. This becomes like the case where the husband divorces her with a thousand repudiations. The reasoning for Abu Hanifah (God bless him) is that she brought about something that was not delegated to her, therefore, she has become an innovator. This is so as the husband has granted the ownership of one, and three are not one, because three is a term for a numeric noun for a compound number whereas one is an individual number that has no compounding. Accordingly, there is a difference between them that amounts to a contradiction. This is distinguished from the case of the husband who acts in accordance with the rule of ownership. The same applies to the first case where she owned three. As she does not own three, and what she has brought about was not delegated to her, therefore, it is rejected.

If he orders her to pronounce divorce that grants the right of retraction and she pronounces a divorce that is irrevocable or he orders her...
to pronounce an irrevocable divorce, but she pronounces a retractable divorce, then what the husband had ordered takes effect. The meaning of the first case is that the husband says to her, “Divorce yourself with one repudiation so that I possess the right of retraction,” and she says, “I have divorced myself with one irrevocable repudiation,” then one retractable divorce takes effect. The reason is that she brought about the essential part of divorce and an additional attribute, as we have already stated, therefore, the additional attribute is rejected and the essential part remains. The meaning of the second case is that he says to her, “Divorce yourself with one irrevocable repudiation,” and she says, “I have divorced myself with one retractable repudiation,” then one irrevocable repudiation will take effect. The reason is that her statement “one retractable repudiation” is rejected for her, because the husband by specifying the description of what was delegated to her determined her requirement of pronouncing the essential part of divorce without ascertaining the additional attribute. It will be as if she has restricted herself to the essential part of divorce, therefore, it will occur in the form that has been specified by the husband whether irrevocable or retractable.

If he says to her, “Divorce yourself with three if you like,” and she divorces herself with one, then no repudiation will take effect. The meaning was “three if you like,” and by pronouncing one she did not prefer three, therefore, the condition is not met.

If he says to her, “Divorce yourself with one if you like,” and she divorces herself with three, then the same decision (as in the previous case) applies according to Abū Ḥanifah (God, the Exalted, bless him). The reason is that discretion of three is not the discretion of one, just like their pronouncement. The two jurists said that one repudiation takes effect, because the discretion of three is the discretion of one, just as the pronouncement of three becomes the pronouncement of one, therefore, the condition is present.

If he says to her, “You are divorced if you wish,” and she replies, “I wish it if you wish it.” The husband then says, “I wish it,” and he forms the intention of divorce. The matter stands nullified. The reason is that he made divorce contingent upon a general wish (without a condition) and she brought about a contingent statement, but the condition was not found. This amounts to being occupied with what does not concern him, therefore, the matter moved out of her hands. Divorce does not take place with his statement “I wish it” even if he intends divorce thereby, because

There is nothing in the statement of the woman that refers to divorce so that the husband can wish for her divorce. Niyyah (intention) does not come into operation without something being mentioned. Thus, if he come into operation with a wish “I wish your divorce,” it will occur if he intends it. The reason is that this is pronouncement ab initio and wish requires the pre-existence of a thing as distinguished from his statement, “I intended your divorce,” as nothing has come into existence.

Likewise, if she says, “I wish it if my father wishes it” or “I wish it if such and such happens,” when it has not happened as yet, on the basis of what we said. What has been brought about is a conditional wish, therefore, no divorce occurs and the affair stands nullified. If she says, “I would wish it if such a thing happens,” and the thing has happened, she stands divorced. The reason is that stipulating a condition that has come to pass requires immediate execution.

If he says to her, “You are divorced when (idha) you like” or “whenever (idhāmā) you like,” or “when (matā) you like,” or “whenever (matā mā) you like,” and she rejects the “affair,” it does not amount to a rejection nor is the matter dependent upon the session (majlis). As for the words matā and matā mā, they denote time and are generally for all times, and it is as if he said, “At any time you like.” This is not confined to the session on the basis of consensus (ijma‘). If she rejects the “affair” it does not amount to rejection, because he made her owner of divorce at a time of her liking. The ownership does not pass prior to the wish so as to be rejected by rejection. She divorces herself with one repudiation alone, because matā is general for all times, but not acts (several repudiations), therefore, she possesses one repudiation for all times. She does not possess a repudiation after a repudiation (multiple acts). As for the words idhā and idhā mā, they are equivalent to matā according to the two jurists. According to Abū Ḥanifah (God, the Exalted, bless him), it is used for a condition just as it is used for time, however, the “affair” rests in her hands and it cannot move out of her hands on the basis of doubt. This discussion has preceded.

If he says to her, “You are divorced whenever (kullama) you like,” then she has the right to divorce herself with one repudiation if another until she has divorced herself thrice. The reason is that the word kullama leads to the repetition of acts, except that the condition applies to her husband, and divorces herself. no repudiation will take effect, because
now it is renewed ownership. She does not have the right to divorce herself in one statement. The reason is that *kullamā* implies generality of separate acts not the generality of collective acts. Accordingly, she does not own the pronouncement of divorce in one statement or collectively.

If he says to her, “You are divorced wherever (*haythu*) you like,” or “where (*ayna*) you like,” she is not divorced until she expresses the wish. If she gets up from her session, she does not possess the wish anymore. The reason is that the words “*haythu*” and “*ayna*” are terms for location, while divorce has nothing to do with location, therefore, they are rejected and an unqualified “wish” remains. Accordingly, it is confined to the session as distinguished from time, because that is related to divorce so that it can occur at one time or the other, thus, it leads to its consideration for the general and the specific.

If he says to her, “You are divorced howsoever (*kayfa*) you like,” she is divorced through a single repudiation after which the husband possesses the right of retraction. This means prior to the expression of the “wish.” If she says, “I wished a single irrevocable repudiation” or “thrice,” it can occur at one time or the other, thus, it leads to its consideration for the general and the specific.

If he says to her, “You are divorced howsoever (*kayfa*) you like,” she is divorced through a single repudiation after which the husband possesses the right of retraction. This means prior to the expression of the “wish.” If she says, “I wished a single irrevocable repudiation” or “thrice,” it can occur at one time or the other, thus, it leads to its consideration for the general and the specific.

He (the Author—God be pleased with him) said: He says in *Kitāb al-Aṣl,* this is the opinion of Abū Ḥanīfah (God bless him), while in the view of the two jurists nothing occurs unless the woman pronounces it, and she may wish a retractable repudiation, an irrevocable repudiation or three repudiations. The same disagreement applies to manumission. The two jurists argue that the husband delegated repudiation to her in whatever form she liked, therefore, it is essential to make divorce itself dependent on her wish so that she can have a wish under all circumstances, I mean, before consummation and after it. Abū Ḥanīfah’s reasoning is that the word *kayfa* is used for questioning the nature of a thing, thus, it is said, “How did you fare in the morning?” Delegation by its description requires divorce itself and divorce exists due to its occurrence.
Chapter 65

Oaths Pertaining to Divorce

If he links divorce with marriage, it takes effect subsequent to *nikāh*, like the husband’s saying to his (would-be) wife, “If I marry you, you are divorced,” or “any woman I marry is divorced.” Al-Shāfī‘ī (God bless him) said that it does not take effect due to the saying of the Prophet (God bless him and grant him peace), “There is no divorce prior to marriage.”

We maintain that this is an act of oath taking due to the existence of the condition and consequences, therefore, the existence of ownership is not stipulated for its validity. The reason is that its occurrence takes place on the existence of the condition and ownership is certain when the condition is met. Prior to this the effect is prevention and that works against the person undertaking the transaction. The tradition is construed to mean the denial of immediate execution. Such a construction is reported from the ancestors, like al-Sha‘bī and al-Zuhrī as well as others.¹

If he links it to a condition, the divorce will occur subsequent to the condition, like his saying to his wife, “If you enter the house, you are divorced.” This applies by unanimous agreement, because ownership exists at present, and it will apparently do so till the time of the coming into existence of the condition. Accordingly, it is valid as an oath or as a pronouncement.

The linking of divorce (to another event) is not valid unless the person taking the oath is the owner or he links it to his ownership. The reason is that consequences must be likely so that he can deter the action. Thus, the meaning of oath is realised. This takes place through a threat

²This shows that traditions are construed in a manner that ensures analytical consistency of principles.
and it becomes manifest through one of the two (ownership or being linked with ownership). Linking a thing to the cause of ownership is like linking to ownership itself, as the consequence emerges from its cause.

If he says to a stranger, “If you enter the house, you are divorced,” and thereafter he marries her and she enters the house, she is not divorced. The reason is that the person taking the oath is not an owner nor has he associated it with ownership or its cause, and doing so with one of these is essential.

The words used for conditions are: in, idhā, idhā mà, kul, kullamā, matā and matā mà. The meaning of shart (condition) is derivated from the meaning of sign, and these words are followed by verbs (that constitute condition), therefore, the verbs are signs of violation. Thereafter, the word in is used for condition, because it does not contain within it the meaning of time, and what lies beyond the word in is linked with it. The word kul is not used for conditions in its actual application, as what follows it is a noun. A condition is something with which a consequence is associated, and consequences are related to verbs, except that they are associated with conditions due to the relationship of the verb with the noun that follows a noun. The example is the statement, “Each slave that I buy is a freeman.”

In these words if a condition is found, the oath is undone and terminated (for future cases). The reason is that these words do not require generality and repetition in their literal meanings. Thus, by the existence of the act once the condition is complete and the oath cannot survive without it, except in the case of kullamā (whenever) as that requires generality in acts. God, the Exalted, has said, “Whenever their skins are roasted through, We shall change them for fresh skins, that they may taste the penalty,” and generality requires repetition of the act.4

He said: If he marries her thereafter, that is, after she marries another husband, and the condition is repeated, no divorce occurs. The reason is that by the acquisition of three owned repudiations in the first nikāh, the consequence no longer remains. The continuity of the oath is due to the consequence and the condition. Zufar (God bless him) disagrees with this, and we shall repeat this discussion later, God, the Exalted, willing.

3Qu'ran 4:56
4Multiple and one time operation

If the word (kullamā) is applied to marriage itself, like saying, “Whenever I marry a woman, she stands divorced,” he violates the oath, because the condition is not found, therefore, it survives. He said: The extinction of ownership after the oath does not annul the oath, because the condition is not found, therefore, it survives. The consequence remains due to the subsistence of the subject-matter (three repudiations), thus, the oath survives.

He said: Thereafter, if the condition is found (by entering the house) within his ownership (marrying a second time), the oath is undone, and the divorce takes effect. The reason is that the condition is found and the subject-matter (woman) is suitable for the consequence, thus, the consequence arises and the oath does not remain, on the basis of what we said. If the condition occurs outside of ownership, the oath is undone, due to the existence of the condition, and no divorce occurs, because of the absence of the subject-matter.

If the two disagree about the existence of the condition, then the acceptable statement is that of the husband, unless the woman adduces evidence, because he is asserting the original position, which is the non-existence of the condition, and also because he is denying the occurrence of divorce and the extinction of ownership whereas the woman is claiming these.

If the existence of the condition cannot be known except through her, then the acceptable statement is hers with respect to her position. For example, where he says, “If you receive your menstrual period you and so and so are divorced.” If she replies, “I have commenced my periods,” she is divorced, but not the other woman. The occurrence of divorce is based upon istihšā. Analogy dictates that she is not divorced, because it is a condition for which she is not to be deemed truthful as in the case of consummation. The reasoning underlying istihšā is that she is truthful with respect to herself, as this cannot be known except through her. Her statement is, therefore, accepted as it is accepted in the case of wife, in fact she is under suspicion, therefore, her statement will not be accepted with respect to the other woman.

Likewise, if he says, “If you like that God should torment you in the fire of hell, then you are divorced and my slave is free,” and she replies
that she does like this, or he says, "If you love me then you are divorced and so is this other wife with you," and she replies that she does love him, then she stands divorced, but the slave does not become free nor is her companion divorced, on the basis of our explanation. There is no certainty about the woman being a liar, because she desires to be free of right that the hukm be based on her information even if she is a liar. With respect to the rights of the others, the hukm will be based on the original rule, and that is love.

If he says to her, "If you have your period, you are divorced," after which she sees blood, the divorce does not occur until the blood continues for three days, because what is less than that is not considered ḥayd. When three days are completed, we give the ruling of divorce effective from the time her period commenced. Due to the extended bleeding it became known that the blood was from the womb, thus, it was menstruation from the start.

If he says to her, "If you have menstruated for a period, you are divorced," then she will not be divorced until she reaches purification after the menstrual period. The reason is that the word ḥaydah with the ending ḥa' indicates a complete period. It is for this reason that it has been construed as such in the tradition of the vacation of the womb. The completion of the period is through its termination, which is attained through purity.

If he says to her, "If you are divorced if you fast for a day," then she stands divorced with the setting of the sun on the day that she keeps the fast. The reason is that word al-yawm, when it is associated with an act that is extended, means daylight. This is distinguished from the case when he says to her, "If you fast," as he has not fixed it through a standard of measure, and the fast exists with the existence of its rukn and condition.

A man says to his wife, "If you give birth to a boy, you are divorced with one repudiation, and if you give birth to a girl, you are divorced with two repudiations." She then gives birth to a boy and a girl and does not know which one of them was born first. For purposes of law, one repudiation becomes binding on him, but to avoid moral prohibition two are binding on him. Her waiting period is complete with the delivery of the child. The reason is that if she had given birth to the boy first, one repudiation would have taken effect, and her waiting period would have been over with the birth of the girl. Thereafter, another repudiation would not have taken effect, because she would be in her waiting period.

If, on the other hand, she had given birth to the girl first, two repudiations would have taken effect, and the waiting period would be over with the delivery of the boy. Thereafter, no further repudiation would take effect, due to what we have mentioned, that is, she is in a state of passing her waiting period. Thus, in one state one repudiation will take effect and in another state two will take effect. It is preferable, however, to adopt two as binding to avoid moral prohibition and also by way of precaution. The waiting period is over with a certainty, as we have elaborated.

If he says to her, "If you talk to Abū 'Amr and Abū Yūsuf, you are divorced thrice." Thereafter, if he divorces her with one repudiation, this will be irrevocable. She then completes her waiting period and talks to Abū 'Amr. After this he marries her, and she then talks to Abū Yūsuf. Zufar (God bless him) said that the divorce does not take effect. This issue has several interpretations. First, if two conditions are found in ownership, the divorce will take effect. This is obvious. Second, if the two conditions are found without ownership, no divorce occurs. Third, if one condition is found in the state of ownership (state of marriage), while the second is found outside of ownership, then the divorce does not occur, because the consequences do not materialise outside of ownership. Fourth, the first condition is found outside of ownership, while the second is found within ownership, and this is the disputed issue of the Book. Zufar (God bless him) treats the first issue on the analogy of the second, therefore, both are identical issues for the purpose of the rule of divorce. Our reasoning is that the validity of statements depends on the legal capacity of the speaker, except that ownership is stipulated for purposes of contingent statements so that the existence of the consequences becomes likely due to the presumption of continuity, therefore, the oath is deemed valid. When the condition is complete, the consequences materialise, but they do not do so without ownership. The state in between ownership is the continuity of the oath, therefore, the existence of matter, and that is the dhimmah (liability).

A man says to his wife, "If you enter the house, you are divorced thrice." He then pronounces two repudiations for divorcing her, and she marries a second husband consummating the marriage. Thereafter, she reverts to the first husband and enters the house. She is divorced
thrice according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muhammad (God bless him) said that she is divorced to the extent of what remains of the repudiations. This is also the view of Zufar (God bless him). The basis according to the two jurists is that the second husband demolishes what is less than three, therefore, he reverts back to him with the (original) three. According to Muhammad and Zufar (God bless them) he does not demolish what is less than three, and she reverts back to him with what is left. We will elaborate this issue in what follows, God, the Exalted, willing.

If he says to her, “If you enter the house, you are divorced thrice.” He then says to her, “You are divorced thrice.” Thereafter, she marries another husband, consummates marriage with him and subsequently reverts to the first husband. When she enters the house, no repudiation takes effect. Zufar (God bless him) said that three repudiations come into effect, because the consequence is three absolutely due to the unqualified meaning of the word. As the probability of their occurrence remains, the oath also survives. Our reasoning is that the consequence are the repudiations of this ownership and it is these that are an obstacle to the occurrence of the condition and the prima facie position is the absence of such condition. An oath is undertaken to prevent the commission of an act or to urge its commission, therefore, if the consequence is as we have mentioned, and this is lost due to the pronouncement of three immediate repudiations, which also nullify ownership through marriage, the oath cannot survive. This is distinguished from the case where he pronounced an irrevocable repudiation; as in such a case the consequence remains due to the subsistence of the subject-matter.

A man says to his wife, “If I have intercourse with you, you are divorced thrice.” He then has intercourse with her. When the genitals meet (penetration) she is divorced thrice. If he stays inside for a moment, he is not liable for mahra (‘uqr), but if he moves out and then penetrates again, he is liable for mahra (‘uqr). Likewise, if he says to his slave girl, “If I have intercourse with you, you are a freewoman.” It is narrated from Abū Yūsuf (God bless him) that he invokes the liability of mahra in the first case as well due to the continuation of coitus, except that he is not liable to be punished with hadd due to the unity of the session (both lawful and unlawful). The reasoning for the Zahir al-Riwayah is that intercourse is the penetration of the vagina by the penis, and penetration is only once and is not continued. This is distinguished from the

65.1 Exceptions (Istithnā’)

If a person says to his wife, “You are divorced, God, the Exalted, willing” and if this is one connected sentence, divorce does not take place, due to the saying of the Prophet (God bless him and grant him peace), “If one takes an oath for divorcing or manumission, and says, ‘God, the Exalted, willing’ as a statement connected to the previous, then he will not be violating the oath (by omission of the acts).” Further, he has brought about the pronouncement in the form of a condition alone, therefore, it is a contingent statement from this aspect. The reason is that the latter statement conveys non-existence prior to the meeting of the condition, and the condition cannot be identified here, therefore, it conveys non-existence of the consequence for the first statement as well. It is for this purpose that it is stipulated that the statements be connected like all other conditions. If he remains silent, the legal effects of the first statement come into operation, thus, the exception (proviso) or the mentioning of the condition after this will amount to retraction of the first statement.

He said: Likewise, if she dies before he says, “God, the Exalted, willing” (that is, the divorce does not occur because he does say it). The reason is that by the use of the exception, the statement no longer imposes an obligation. Death negate the obligating statement and not what annuls it (the exception). This is different from the case where the husband dies before it, as in this case the link with the exception is not established.

In these words the tradition is gharib. The compilers of the four Sunan have recorded traditions that convey a similar meaning. Al-Zayla'i, vol. 3, 234.
If he says, “You are divorced thrice, except once,” she is divorced with two repudiations. If he says, “You are divorced thrice, except two,” a single repudiation takes effect. The rule is that exception (istithnā’) is speech conveying the remainder of the message left over after the exception, and this is correct. The reason is that he has made a statement that stands exempted, because there is no difference between the statement of a person to another, “I owe a dirham,” and the statement, “I owe ten dirhams except nine.” It is valid to exclude by exception part of a sentence leaving behind the other part as the speech after the exception. It is not valid to exclude by exception the entire sentence, as that leaves nothing behind, so that the speaker may be said to have spoken something by directing words towards the other person. Istithnā’ is valid if it is linked to the preceding statement, as we mentioned earlier. If this stands established, then in the first case the repudiations after the exception are two, and these take effect, whereas in the second it is one, and one repudiation takes effect. If the man says, “Except three,” all three will take effect, because this amounts to exclusion of the whole by exception, and such an exception is not valid. God knows best.

The first volume of al-Hidāyah ends here, praise be to God. The second volume follows this and begins with the section on “Divorce by the Person who is Terminally Ill.”
Chapter 66

Divorce by Person Suffering From Terminal Illness

In the Name of God, Most Merciful and Compassionate, and (with) prayers and blessings on Muhammad and his family.

If a man divorces his wife, during his terminal illness, through an irrevocable (bā‘in) repudiation and then dies while she is still in her waiting period, she will inherit from him. If he dies after the termination of the waiting period, she is not entitled to inheritance. Al-Shafī‘ī (God bless him) said that she will not inherit in either case, because the state of being married has been annulled due to this obstacle where marriage was the basis (of inheritance), therefore, even he will not inherit from her if she dies.

1For the meaning of bā‘in divorce and its legal effects, see fn. 4 on page 569 in Volume I of this translation; see also section 67.1 (What Makes a Divorced Wife Lawful) in this volume on p. 14.
2According to al-‘Aynī this means before the waiting period and after the waiting period. Al-‘Aynī, vol. 5, 440. The text indicates, however, that it means if he dies during her ‘iddah or after such waiting period.
3The obstacle of irrevocable repudiation.
Our argument is that the state of marriage is the cause of her inheritance during his terminal illness, and the husband intended its annulment, therefore, his intention is restrained by delaying the operation of the divorce up to the time of the termination of the waiting period in order to avert injury to the wife, which is possible. The reason is that during the waiting period some of the legal effects of nikāh remain. Consequently, it is permissible that they remain with respect to her inheritance from him. This is distinguished from the situation after the termination of the waiting period when there is no possibility (of delaying the operation of divorce). The state of marriage in this situation is not the basis of his inheriting from her, therefore, inheritance is annulled in his case, especially due to his consenting to it.

If he divorces her thrice upon her request or he says to her, “choose,” and she chooses herself or obtains khul’ (redemption) from him, and then he dies, while she is in her waiting period, she will not inherit from him. The reason is that she consented to the annulment of her right and the extinction of the delayed operation of her claim. If she says, “Divorce me through a revocable repudiation,” but he divorces her thrice, she will inherit from him, because a revocable repudiation does not eliminate marriage. In this case, she does not consent to the annulment of her right.

If he says to her during his terminal illness, “I had divorced you thrice during my period of health and now you have completed your waiting period” and she verifies it, following which the husband acknowledges a debt that he owes her or makes a bequest in her favour, then, according to Abu Ḥanīfah (God bless him) she is entitled to the lesser of this amount or inheritance. Abu Yūsuf and Muhammad (God bless them) said: His acknowledgement and bequest are valid. If he divorces her thrice during his illness upon her request and then acknowledges a debt or makes a bequest in her favour, she will have the lesser of this amount or inheritance according to the view of all three jurists. According to Zufar (God bless him) she will have the entire bequest amount

and what has been acknowledged, because inheritance has been annulled upon her request and this has removed the obstacle in the way of the validity of acknowledgement and bequest.

The reasoning of the two jurists in the first issue is that when both (husband and wife) mutually verified the occurrence of divorce and the termination of the waiting period, she became like a stranger for him so much so that it is permitted to him to marry her sister, thus, any suspicion (of the persistence of the relationship) that there was is eliminated. Do you not see that his testimony in her support will be admissible, and payment of zakāt to her will be valid. This is different from the second issue where the waiting period subsists and is a cause for the suspicion (of the continuing relationship). The rule turns on the evidence of such suspicion and invokes the implications of nikāh and close relationship. In the first issue, the waiting period does not exist.

Abū Ḥanīfah’s reasoning is that in both issues the suspicion still exists, because the woman may have chosen to pave the way for acknowledgement and bequest in her favour so that her share increases. The spouses sometimes mutually agree to acknowledge separation and termination of the waiting period so that the husband may grant her his wealth in excess of her inheritance. This suspicion operates upon excess, therefore, we have rejected it in this case. There is no suspicion in the case of the amount of inheritance, therefore, we deem it valid. There is normally no mutual compact in the case of the right to zakāt, (another) marriage, and testimony. Consequently, there is no suspicion in the case of these rules.

He said: If a person is under siege or is participating in battle and divorces his wife thrice, she will not inherit from him. If he has a duel with some person or is brought forth for execution on account of qīṣās (retaliation) or for rajm (stoning to death), she will inherit if he dies in this way or is killed. The source of this rule is what we have elaborated, that is, the wife of a person evading the rules of inheritance (fārā) will inherit on the basis of istihsān. The rule of the evader is established when the right of the wife is linked to his wealth. This linkage is established through illness in which there is usually an apprehension of death, like his being bed-ridden in a state where he cannot take care of his basic needs as does one in sound health. The rule for the evader is sometimes

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4 That is, the annulment of her inheritance.
5 In order to avoid injury to her.
6 By declaring his intention to terminate the contract of marriage irrevocably through the repudiation.
7 Like her saying during his illness, "Divorce me thrice."
8 Chooses divorce.
9 Till the end of her iddah.
10 Where he cannot marry her sister, for example.
11 The testimony of one close relative for another is not admissible.
established through situations that acquire the meaning of death-illness with respect to the likelihood of the occurrence of death. Situations in which the usual result is survival do not lead to the application of the rule of the evader. Thus, for a person under siege and one participating in battle the usual result is survival, because a fort is meant to repel enemy attacks, and likewise, defense in battle, thus, the rule of the evader is not established. The person who takes part in a duel or is brought forth for execution will most likely die, therefore, the rule of the evader is established. There are other cases similar to these that can be classified under this rule. His statement (in the matn), “If he dies in this way or is killed” is evidence of the fact that it makes no difference if he dies as a result of this cause or dies through another cause, just like the person suffering from terminal illness if he is killed.

A man says to his wife, when he is in sound health, “When the next month commences” or “When you enter the house” or “When so and so offers the zuhr prayer” or “When so and so enters the house,” “then you stand divorced.” If these occurrences take place when the husband is terminally ill, she will not inherit. If the statements were issued in a state of marād (illness), she will inherit, except in the case of the statement “When you enter the house.” This case has many forms. Divorce is either made contingent upon the arrival of a time or upon the act of a stranger or his own act or the act of the wife. Each of these variations has two further forms: (1) divorce is made contingent during sound health when the condition occurs during illness; and (2) both things take place during illness.

As for the first two forms in which the condition is associated with the arrival of time, where he says, “When the next month commences, you stand divorced,” or it is associated with the act of a stranger, where he says, “When so and so enters the house,” or “When so and so offers the zuhr prayer”; if the association and the occurrence take place during illness, she is entitled to inheritance. The reason is that the intention to evade inheritance stands verified by his pronouncing a contingent divorce in a state when her right stands linked to his wealth. If the stipulation takes place in health and the occurrence stipulated takes place during illness, she is not entitled to inheritance. The reason is that the intention to evade inheritance is nullified. In the case of Zufar (God bless him), she will inherit, because she was compelled to undertake an act to ward off the fear of perishing either in this world or the next, and there is no consent in a state of duress.

If, however, the stipulation is made in health and the occurrence is during illness, then, if the act is one in which there is a way out for her, like speaking to Zayd and so on, she will not inherit as she has consented to the divorce. If the act is one in which there is no way out for her, like the eating of food, the afternoon prayer, speaking to parents, she will inherit, because she was under a compulsion to undertake an act to avoid injury to her.

As for the fourth form in which he makes divorce contingent upon her act, if the stipulation and occurrence are during illness and the act is one in which there is a way out for her, like speaking to Zayd and so on, she will not inherit as she has consented to the divorce. If the act is one in which there is no way out for her, like the eating of food, the afternoon prayer, speaking to parents, she will inherit, because she was under a compulsion to undertake an act to ward off the fear of perishing either in this world of the next, and there is no consent in a state of duress.

He said: If he divorces her thrice when he is ill and thereafter recovers and then dies, she will not inherit. Zufar (God bless him) said that she will inherit, because he intended evasion of inheritance insofar as he pronounced it during illness, and he died thereafter while she was in her 'iddah (waiting period). We say that when illness is followed by recovery it acquires the status of sound health, because terminal illness becomes non-existent due to recovery. This makes it evident that no right of hers became linked to his wealth. Accordingly, the husband did not become entitled to inheritance.
an evader. If he had divorced her and then she became an apostate, God forbid, and then converted back to Islam after which the husband died due to his illness, while she was in her waiting period, she would not have inherited. If she does not become an apostate, but submits for sexual intercourse to her husband's son, she will inherit. The reason for the distinction is that by apostasy she nullified her legal capacity to inherit, as the apostate does not inherit from anyone, and inheritance is not possible without legal capacity. By submitting (for sex) she did not annul her legal capacity, because entering the prohibited category for marriage does not negate inheritance, which remains. This is different from submitting for sex during the validity of marriage, because it gives rise to separation, therefore, she consents to the nullification of the cause (of inheritance). After the three repudiations, the prohibition is not established through submission to sex as the three divorces were prior in time to the submission, therefore, the two cases are distinguished.

If a person commits qadhf (false accusation of unlawful sexual intercourse) against his wife when he is healthy, but then subjects her to the ḥan (imprecation) procedure when he is ill, she will inherit. Muḥammad (God bless him) said that she will not inherit. If the accusation is during illness, she will inherit according to the unanimous view of all three jurists. This is related to divorce being contingent upon an act in which there is no way out for her as she is constrained to have recourse to legal disputation to ward off the shame of zinā from herself.

If he makes a vow of continence (ḥa') to stay away from her when he is in sound health, and then she is separated irrevocably from him when he is ill, she does not inherit. If the vow too was made during illness, she will inherit. The reason is that ḥa' amounts to a divorce made contingent upon the passage of four months that are devoid of sexual contact. Thus, it is linked with the stipulation based upon the passage of time, and we have elaborated its underlying reasoning.

He (God be pleased with him) said: In each case where we have said that she will inherit, she inherits if he dies when she is in her waiting period. We have elaborated this. Allāh, the Exalted, knows what is correct.

13See the first issue in this discussion.
Chapter 67

Raj‘ah (Recourse to Wife for Retracting Divorce)

If a man divorces his wife through a revocable repudiation or two repudiations, he may have recourse to her during her waiting period whether or not she consents to this.¹ This is based upon the words of the Exalted, “Take them back on equitable terms,”² without further detail (about the consent of women in such a case). The waiting period must still be continuing, because retraction is the continuation of the ownership (of the benefits of nikāḥ). Do you not see that it has been called imsāk (taking back), which is continuation. The continuation (of ownership) is realised within the waiting period, because there is no ownership once the waiting period terminates.

Raj‘ah takes place by his saying, “I have taken you back” or “I have taken my wife back.” This is the clear statement about raj‘ah and there is no disagreement among the jurists about this.

He said: Or he has intercourse with her, or kisses her, or fondles her with desire, or looks at her vagina with desire. This is the position in our view. Al-Shāfi‘ī (God bless him) said that raj‘ah is not valid except by a formal expression where he possesses the ability to speak, because raj‘ah has the status of the initial marriage contract so much so that it is prohibited to have intercourse with the woman.³ In our view, it is the seeking of the continuance of nikāḥ, as we have elaborated and we will be establishing it again,⁴ God willing. The occurrence of the act (of retraction) is

¹There is consensus (ijmā‘) on this point. Al-‘Aynī, Vol. 5, 455.
²Qur’ān 2:231
³That is, according to al-Shāfi‘ī. Thus, intercourse is not permitted in this case without formal expression of retraction, in his view.
⁴At the end of the chapter that a revocable divorce does not prohibit intercourse.
an evidence of the attempt to continue it as in the case of the termination of an option. This evidence is found due to an act that is specific to marriage. These acts (mentioned) are specific to it in the case of a freewoman as against fondling and looking without desire, because such acts may be permitted without marriage as well, as in the case of the physician, the midwife and others. A glance at the body other than the vagina occurs in the case of those residing together, and the husband is living with the wife during 'iddah. If such other acts were to amount to raj'ah, he would have to divorce her again, thus, prolonging her 'iddah.

He (al-Quḍūrī) said: It is recommended that two witnesses testify to the act of retraction, but if they do not testify, the act of retraction is (still) valid. Al-Shāfiʿi (God bless him), in one of his two opinions, said that it is not valid, which is also the view of Mālik (God bless him), due to the words of the Exalted, "Thus when they are about to fulfill their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you,"7 because a command necessitates obligation. In our view, the divorce laid down in the texts is devoid of the restriction of testimony. Further, it is the seeking of continuation of marriage and testimony is not a condition during a state of continuation as in retraction during ilā', except that it is recommended for additional precaution so that denial is not incurred in it. What he (al-Shāfiʿi) has recited is construed to mean this. Do you not see that He has associated it with separation, therefore, for raj'ah it is recommended. It is also recommended that he (the husband) inform her about retraction so that she does not fall into sin.9

When the waiting period terminates, and he says, "I took her back during the waiting period," it amounts to retraction if she confirms it, but if she does not deem him truthful it is her statement that will be given preference. The reason is that he is reporting something that he cannot initiate at that time. His statement will be suspicious, except that

In whose case marriage is necessary for the permissibility of these acts.

And that would amount to an injury to the woman, which is not permitted due to the words of the Exalted, "Take them back on equitable terms." Qur'ān 2 : 231

Thus, when (they are about to) fulfill their term appointed, either take them back on equitable terms or part with them on equitable terms; and take for witness two persons from among you,"7 because a command necessitates obligation. In our view, the divorce laid down in the texts is devoid of the restriction of testimony. Further, it is the seeking of continuation of marriage and testimony is not a condition during a state of continuation as in retraction during ilā', except that it is recommended for additional precaution so that denial is not incurred in it. What he (al-Shāfiʿi) has recited is construed to mean this. Do you not see that He has associated it with separation, therefore, for raj'ah it is recommended. It is also recommended that he (the husband) inform her about retraction so that she does not fall into sin.9

When the waiting period terminates, and he says, "I took her back during the waiting period," it amounts to retraction if she confirms it, but if she does not deem him truthful it is her statement that will be given preference. The reason is that he is reporting something that he cannot initiate at that time. His statement will be suspicious, except that

with verification the suspicion is removed. In this case, she is not to be administered an oath according to Abū Ḥanīfah (God bless him). This is one of the issues that pertains to oaths in six things and that has preceded in the Book of Nikāḥ.

If the husband says, "I have taken you back,"10 and in response to this she says, "My waiting period is over," the retraction is not valid according to Abū Ḥanīfah (God bless him). The two jurists said that retraction is valid as it has coincided with the 'iddah, for it still remains prima facie until she informs him of it, and in this case it has preceded such information. Accordingly, if he were to say, "I divorced you" and she says in response, "My waiting period is over," then divorce takes place. Abū Ḥanīfah's reasoning is that it has coincided with the state of termination of the 'iddah, because a woman is deemed trustworthy with respect to the report about termination.11 Thus, when a woman makes such a report it indicates that termination was prior (to retraction), because the statement about the termination is the closest to the statement of the husband.12 The issue of divorce is a matter of dispute,13 but even if it was a matter of agreement divorce would take place through his admission after termination (of the waiting period). Retraction, on the other hand, is not established through admission (ʿiqrār).

If the husband of a slave woman, after the termination of her waiting period, says "I took her back," and the owner (of the woman) deems him truthful, but she does not, then, it is her statement that will be given precedence, according to Abū Ḥanīfah (God bless him). The two jurists said that the statement of the owner will be given precedence. The reason is that her body is owned by the master, and he has acknowledged what is purely his right in favour of the husband, therefore, his statement resembles his acknowledging her marriage to him. He (Abū Ḥanīfah) argues that the rule of raj'ah is structured upon the waiting period, and the statement to be given precedence about the waiting period is her statement; likewise in a matter that is based upon it. Had the situation been the

6In the case of marriage is necessary for the permissibility of these acts.

7And that would amount to injury to the woman, which is not permitted due to the words of the Exalted, "Take them back on equitable terms." Qur'ān 2 : 231

8Qur'ān 2 : 238, 239: "And their husbands have the better right to take them back in that period," and "the parties should either hold together on equitable terms, or separate with kindness."

9When the husband has intercourse with her when the 'iddah is actually over and he is not aware of it.

10The text in al-'Aynī is: "I have taken you back within the 'iddah."

11That is, trustworthy with respect to reports about what is in their wombs. Allah Almighty has said: "Nor is it lawful for them to hide what Allah Hath created in their wombs, if they have faith in Allah and the Last Day." Qur'ān 2 : 228

12Had she remained silent for some time and then made her statement the position would have been different.

13Due to the absence of witnesses.
reversethen according to the two jurists, the statement preferred would be that of the master, and so also in his view according to the authentic report, because she has passed the waiting period at that time and the ownership of the master over her benefits has taken over, therefore, her statement nulling such ownership is not valid. This is distinguished from the first situation, because in that the owner, through his verification of the waiting period, is acknowledging the existence of the waiting period for her and his ownership does not take over with the existence of the 'iddah. If she were to say, “My waiting period is over,” and the husband as well as the master were to say, “Your waiting period is not over,” then the preferable statement is hers. The reason is that she is trustworthy in this respect for she has knowledge of it.

When the blood from the third period of menstruation ceases to flow after ten days, retraction (rajah) stands excluded, even though she has not bathed. If it ceases to flow in less than ten days, retraction is not excluded until she takes a bath or one complete timing of prayer passes after it. The reason is that there is no excess over ten days for menses, therefore, by mere termination (of bleeding) she moves out of her period of menses and her waiting period is terminated, thus excluding the retraction. In what is less than ten days, there is a probability of resumption of bleeding, therefore, the reality of termination of bleeding must be strengthened with bathing by abiding by one of the rules that are to be followed by women in a state of ritual purity, that is, through the passing of one timing of prayer. This case is distinguished from that of a Kitabiyyah, because in her case the rule is not based on one of these additional factors, and it is actual termination (of bleeding) that is deemed sufficient. The bleeding is deemed to be terminated when she performs tayammum and prays, according to Abu Hanifah and Abu Yusuf (God bless them). This is based upon istislah. According to Muhammad (God bless him), the period terminates when she performs tayammum. This is based upon analogy, because tayammum in the absence of water is considered absolute purification so much so that the akhams established through bathing are established for it too. Thus, it has the same status as bathing. The two jurists maintain that it is a pollutant and does not (actually) purify. It has been deemed purification (legally) due to necessity so that the obligations do not multiply. This necessity is realised in a state of performing prayer and not in the timings prior to it. Likewise the rules established are also those demanded by necessity. Thereafter, it is said that 'iddah terminates by commencement itself in the opinion of the two jurists, and it is said after completion so that the ruling of validity of prayer is established.

When she bathes and forgets to wash a part of her body on which water does not flow, then, if this is a limb or more retraction is not cut off, but if it is less than a limb, it is cut off. He (God be pleased with him) said: This is istislah, while analogy in the case of a complete limb is that rajah should not remain, because she has washed most of her body. Analogy in what is less than a limb is that rajah should remain, because the rule for major ritual impurity and menstruation cannot be split up. The interpretation associated with istislah is the difference, that is, in what is less than a limb is subject to drying up due to its small size, therefore, one cannot be certain of water having reached it. Thus, we said that it cuts off rajah. It is, however, not permitted to her to marry on the basis of precaution about both, as distinguished from a complete limb as that is not subject to swift drying up and usually its dryness is not ignored. The two, therefore, stand distinguished. It is reported from Abu Yusuf (God bless him) that neglecting gargling and drawing water into the nostrils (madadah and istinshag) is the same as neglecting a complete limb. It is also reported from him, and it is the view of Muhammad (God bless him), that it is of the status of what is less than a limb, because there is a disagreement about their being a definitive obligation as compared to the rest of the limbs.

If a man divorces his wife when she is pregnant or gives birth to a child from it, and he says, “I did not have intercourse with her,” he has a right to take her back. The reason is that when pregnancy becomes apparent during a period in which it can be assumed that it is from the

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14 Actually, but not legally.
15 In which the state of 'iddah will continue.
16 As finding water during prayer will nullify tayammum.
17 The exclusion of rajah and marriage.
18 That is, from the marriage giving birth to the child prior to divorce. His statement, "I did not have intercourse with her," will not be accorded significance.
marriage, it is deemed to have arisen due to the marriage. This is based
upon the words of the Prophet (God bless him and grant him peace),
"The child belongs to one who has legal access for intercourse." This
is an evidence of intercourse on his part. Likewise, if the paternity of
the child is attributed to him; he will be deemed to have had intercourse.
When intercourse is established, lawful ownership of the benefits of
marriage is established, and divorce is part of such established ownership,
which is followed by retraction. His belief (statement) will be nullified
by the denial issued by the shari'ah. Do you not see that with such inter-
course the attribute of ihsan is established. Thus, rajah has a higher
priority for being affirmed (available). The interpretation of the issue
of giving birth to the child is that she give birth prior to divorce, because
giving birth after divorce will terminate the waiting period through birth
itself, and rajah cannot be conceived in such a case.

He said: If he secludes himself with her and closes the door or draws
the curtain and then says that he did not have intercourse with her, but
thereafter divorces her, he does not possess the right of retraction. The
reason is that ownership (of benefits) is established through intercourse
and he has acknowledged its absence. He, thus, affirms it against himself
for retraction is his right. He is not deemed untruthful by law as distin-
guished from dower (mahr), because the affirmation of the stated dower
is based upon delivering the counter-value not upon actual possession, as
distinguished from the first case.

If he takes her back, meaning thereby after being in seclusion with
her, and saying, "I did not have intercourse with her," and thereafter she
gives birth to a child in a period that is less than two years by one day, the
retraction is valid. The reason is that paternity stands attributed to
him as she did not acknowledge the termination of the 'iddah and the
child stays in her womb during this period, therefore, he will be deemed
to have undertaken intercourse prior to divorce and not after it, because

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him as she did not acknowledge the termination of the 'iddah and the
child stays in her womb during this period, therefore, he will be deemed
to have undertaken intercourse prior to divorce and not after it, because

in the latter case ownership is extinguished by divorce itself due to its
absence prior to (final) divorce, thus, such intercourse is prohibited and
a Muslim does not indulge in harām.

If he says to her, "When you give birth you stand divorced," and she
gives birth to a child. Thereafter, she gives birth to another child. This
amounts to rajah. This means from another pregnancy, which means
that it should be after six months, and even if it is after more than two
years as long as she did not acknowledge the termination of the waiting
period. The reason is that divorce took place with the birth of the first
child leading to the observance of the waiting period. The second child is,
therefore, through the conception due to him during the waiting period.
As she did not acknowledge the termination of the waiting period he will
be deemed to have taken her back.

If he says, "Each time you give birth to a child, you are divorced," and
she gives birth to three children through different pregnancies, then,
the first child amounts to divorce and the second child is retraction, and
so also the third. The reason is that when she gives birth to the first child,
it amounts to divorce and she enters the waiting period; with the sec-
ond he becomes one who has retracted divorce, as we have explained
that he caused the conception through fresh intercourse during 'iddah.
The second divorce occurs with the birth of the second child, because the
oath has been qualified with the word "whenever," and the waiting period
becomes obligatory. With the birth of the third child he becomes one who
retracts divorce, due to what we mentioned, and the third divorce takes
place with the third birth. The waiting period now becomes obligatory
through the menstrual periods, as she was free of pregnancy having her
periods when the third divorce took place.

A woman divorced through a revocable repudiation may become
noticeable and seek adornment. The reason is that she is lawful for her
husband and the relationship of marriage subsists between them. There-
after, retraction is recommended and adornment attracts him to her,
therefore, it is lawful.

It is recommended for the husband that he is not to approach her
unless he seeks her permission or makes his approach known to her
through the sound of his shoes. This means when he does not intend

23 It is related through many channels. One version related by Abū Hurayrah (God be
pleased with him) is recorded by all the six sound compilations. Al-Zayla'i, vol. 3, 236.
24 This means that in the case of dower all that is required is being available for inter-
course through valid seclusion not actual intercourse. This is not the case for retraction.
25 From the day of divorce and not the day of retraction.
26 This may appear strange to some who may consider the jurists to be simpletons
unaware of scientific knowledge that we possess today. The wisdom behind the law has
to be discovered beginning with the preceding tradition and the welfare of the child,
who cannot be adopted according to Islamic law.
27 This type of statement is not conceivable from a rational person, unless he is playing
games with his wife. It is obvious that it is a hypothetical example to explain the limits
of the rule.
retraction, because it is likely that she may be uncovered, and his sight may rest on parts that amount to retraction. He will then have to divorce her again and this will prolong her waiting period.

He is not to take her on a journey with him until he seeks witnesses to testify retraction. According to Zufar (God bless him), he has a right to do so as the bond of marriage exists between them. This is the reason, in our view, of permitting the husband to have intercourse with her. We rely on the words of the Exalted, "And turn them not out of their houses." Further, delay in the operation of the nullifying act (divorce) is due to the need of the husband to retract. If he does not take her back till the waiting period terminates, it becomes obvious that he did not have such a need. Thus, it becomes evident that the nullifying act operated in accordance with his wishes from the start for which reason the menstrual periods were reckoned for the waiting period. Thus, the husband does not possess the right to take her out, unless he seeks witnesses for his retraction. This will annul the waiting period and reestablish the husband's ownership. The meaning of his taking witnesses is the recommendation to do so that we mentioned earlier.

A revocable divorce does not prohibit intercourse. Al-Shafi'i (God bless him) said that it does prohibit it, because the state of marriage stands dissolved due to a terminating factor, which is divorce. We maintain that it subsists so that he possesses the right of retraction without her permission, because the right of retraction was established keeping in mind the husband so as to enable him to make amends when faced with remorse. This concept leads to retraction being a continuation of the contract of marriage. It also leads to its being a continuation and not a renewal (of the marriage contract), which is negated by the evidence (of retraction being for the husband). The operation of the nullifying factor has been delayed for a period due to consensus or for his benefit, as has preceded.

67.1 WHAT MAKES A DIVORCED WIFE LAWFUL

When the divorce is irrevocable, but is through less than three repudiations, he may marry her during her waiting period or after it. The reason is that lawfulness of the subject-matter still remains for its complete removal is contingent upon the third repudiation, and is not present prior to it. Such permissibility for another (man) is due to the resulting confusion about paternity, but no such confusion exists (for the husband) as a result of the permission (by the Lawgiver).

If the divorce is through three repudiations for a freewoman, and two for a slave, she cannot become lawful for him until she marries another husband through a valid marriage and he has intercourse with her, and who thereafter divorces her or dies while married to her. The source in this is the words of the Exalted, "So if a husband divorces his wife (irrevocably), he cannot, after that, remarry her until after she has married another husband and he has divorced her." The meaning (in the verse) is the third repudiation. Two repudiations in the case of the slave woman are like three in the case of a freewoman. The reason is that slavery, as was known, makes the subject-matter half with respect to lawfulness. The purpose is marriage with a husband in absolute terms. Such a relationship is established through a valid marriage, while the condition of intercourse is established through the indication of the text (isharat al-nass), which is done by construing the word nikah to mean intercourse, a construction that conveys a complete meaning and avoids repetition, because the words "contract of marriage" are understood from the unqualified use of the term "husband." This meaning can also be added to the meaning of the text through the well known tradition, which in the words of the Prophet (God bless him and grant him peace) is: "She does not become lawful for the first until she has tasted

\[\text{Qur'an 65:1}\]

\[\text{In usul al-fiqh.}\]

\[\text{This means that the husband may be a major or a minor or even an insane person, provided that such a person is capable of intercourse.}\]

\[\text{In the verse, the word nikah in one of its senses means intercourse. In this sense, the translation will read, "until after she has had intercourse with another husband and he has divorced her." The reason is that the term husband already conveys the meaning of marriage. Had intercourse not been implied, the words, "Until she takes another husband, who then divorces her," would have been sufficient.}\]
the sweetness of another.” It has been reported through different channels. No one disagrees about it (the condition of intercourse) except Sa`id ibn al-Musayyib (God be pleased with him). His view is not taken into account, so much so that if a qādi renders judgement on the basis of this view, his judgement will not be implemented. The condition is that of penetration and not ejaculation, because ejaculation is completion and perfection in the act. Completion becomes an additional condition.

An adolescent minor is like a major for making the woman lawful, because of the existence of penetration in a valid marriage, which is the condition imposed by the text. Mālik (God bless him) opposes us in this issue, but the proof (huqūq) against him is what we have elaborated. Muhammad (God bless him) elaborated the meaning of such a minor and said that he is “a boy who has not attained puberty, but is capable of intercourse. If such a boy has intercourse with a woman she is under an obligation to bathe and he makes her lawful for the first husband.” The meaning of this statement is that he has an erection and derives pleasure. Bathing, however, is obligatory for her (even though he cannot ejaculate) due to the meeting of the genitals, which is the cause for her orgasm. There is, thus, a need for making bathing obligatory for her (by way of precaution), but for such a minor there is no bathing, however, he is ordered to bathe so that he acquires the habit of doing so.

He said: Sexual intercourse of a master with the slave woman does not make her lawful (for the first husband), because the purpose is intercourse by the husband. If he marries her on the condition of making her lawful, then, the marriage is disapproved (makrūh). This is due to the words of the Prophet (God bless him and grant him peace), “The curse of Allah upon one who makes unlawful and the one for whom he makes unlawful,” in which the second husband has been called one who makes lawful, and he establishes lawfulness (completely).

Consequently, if he divorces her after having had intercourse with her she becomes lawful for the first, due to intercourse in a valid marriage, because marriage is not annulled as a result of the condition. It is reported from Abū Yūsuf (God bless him) that the condition renders the contract irregular (fāsid) insofar as there is an element of limited time in it, and the marriage does not make the woman lawful for the first husband due to the irregularity. It is reported from Muḥammad (God bless him) that the marriage is valid, on the basis of our explanation, but the woman does not become lawful for the first, because he attempts to hasten what has been considered delayed by the law (sharī‘), thus, he will be penalised by denying him the objective as in the case of murder of the ancestor (inheritee).

If he divorces a freewoman with one repudiation or two repudiations, and she completes her waiting period and then marries another man, but then returns to the first husband (after divorce from the second), she comes back with (the first husband possessing) three divorces. The second husband demolishes the repudiations that are less than three just as he demolishes three repudiations. This is the position according to Abū Ḥanīfah and Abū Yūsuf (God bless them), while Muḥammad (God bless him) said that he does not demolish what is less than three, because the contract is the ultimate solution for the prohibition on the basis of the text, therefore, the (second) husband removes it, but there can be no removal prior to the proof of the prohibition (through three repudiations). The two jurists rely on the words of the Prophet (God bless him and grant him peace), “The curse of Allāh upon one who makes lawful and the one for whom he makes lawful,” in which the second husband has been called one who makes lawful, and he establishes lawfulness (completely).

If he divorces her thrice and she then says, “I completed my waiting period, married again, he had intercourse with me, divorced me and thereafter I completed my waiting period,” and the duration is sufficient for all this, then it is permitted to the first husband to consider her truthful when he believes that she is generally truthful. The reason is that it is a transaction or is a religious matter with which lawfulness is associated, and in both the word of a single person is acceptable. Further, the report of the woman is not suspicious as the duration is enough. They disagreed about the minimum period of such a duration. We shall elaborate it in the Chapter on the Waiting Period.
Chapter 68

Ilā’ (Vow of Continence)

When a man says to his wife, “By Allah, I will not come near you,” or he says, “By Allah, I will not come near you for four months,” then he is one who has made a vow of continence, due to the words of the Exalted, “For those who take an oath for abstention from their wives, a waiting for four months is ordained; if then they return, Allah is Oft-forgiving, Most Merciful. But if their intention is firm for divorce, Allah heareth and knoweth all things.”

If he has intercourse with her within four months, he has broken his oath and become liable for expiation, because expiation is the consequential liability for breaking an oath. The vow of continence, however, will be extinguished, as an oath is removed when it is broken.

If he does not come near her until four months are over she is divorced irrevocably from him through a single repudiation. Al-Shāfi‘ī (God bless him) said that she is separated irrevocably by the pronouncement of the qādī. The reason is that the husband is denying her her right of cohabitation, therefore, the qādī acts in his place in pronouncing it as in the case of the person with an amputated organ or the eunuch. Our argument is that he committed injustice against her by denying her her right, therefore, the shari‘ah deemed it permissible by annulling the blessing of nikāh with the passage of this period. This is reported from ‘Uthmān, ‘Alī, the three Abd Allāhs, and Zayd ibn al-Thābit, may Allāh

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1Qur’ān 2: 226, 227.
2Al-‘Aynī uses the words “through a single irrevocable repudiation.” Al-‘Aynī, vol. 5, 489. He says this, perhaps, to emphasise that he can marry her again without an intervening marriage.
be pleased with them all, and their example is sufficient. Further, this amounted to (immediate) divorce in the period of Jāhilīyyah and the shari'ah ordained the delaying of its occurrence up to the end of the period.4

If he makes a vow to abstain for a period of four months the oath lapses,5 because it was limited in time by this period. If he makes a vow for all times, the oath subsists. The reason is that it is independent of time, and no annulment is found. The repudiation (resulting from such an oath) does not repeat itself (every four months), unless there is prior marriage, because there was no denial of her right after the occurrence of irrevocable separation. But if her goes back on it and marries her, the ʿilâ is revived. If he does not have intercourse with her (after marriage), another repudiation will occur with the passage of four months. The reason is that the oath subsists for it is absolute in nature, and her right is established again with marriage and injustice occurs. The commencement of such ʿilâ will be reckoned from the time of marriage. If he marries her a third time, the ʿilâ comes back and repudiation occurs with the passage of another four months if he does not approach her, as we have explained. If he marries her again after another husband (and subsequent divorce) no repudiation will occur due to this (the earlier) ʿilâ, because it stands restricted by the divorce of such ownership. This is a sub-issue of the disputed topic of “completion” that has preceded earlier.7 The oath, however, subsists due to its absolute form and the absence of annulment. If he has intercourse with her, he violates his oath due to the existence of the violating factor.

If he makes an oath for a period that is less than four months, he has not made the vow of continence. This is due to the words of Ibn ‘Abbas (God be pleased with him) that there is no ʿilâ in what is less than four months.8 Further, refusing to go near her for a period is without a legal obstacle (like a vow). Divorce is not established with such abstention.

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4 For those who take an oath for abstention from their wives, a waiting for four months is ordained; if then they return, Allah is Oft-forgiving, Most Merciful.” Qur’an 2:226.

5 On the passage of four months.

6 That is, a cause for the annulment of the oath, which is intercourse.

7 See Volume I of this translation, last para on p. 628 and note 4.

If he makes a vow of continence with respect to his wife whom he has repudiated with a possibility of retraction, his vow is valid, but if he makes it with respect to his wife whom he has divorced irrevocably, it is not valid. The reason is that the relationship of marriage exists in the case of the first, but not in the case of the second, and the subject-matter of 'flâ', on the basis of the text, are those who are still our wives. If the waiting period ends prior to the termination of the period of 'flâ', the oath is extinguished due to the extinction of the subject-matter.

If he says to a woman who is a stranger, “By Allah, I will not cohabit with you,” or he says, “You are like my mother’s back for me,” and thereafter he marries her, he has not made the vow of continence or that of injurious assimilation (zihar). The reason is that the statement in its expressed form is void due to the absence of the subject-matter and cannot be converted into a valid statement later. If, however, he cohabits with her he commits a sin, due to the occurrence of the violation of the vow, because the oath is found as far as violation is concerned.

The period of ‘flâ’ for a slave woman is two months. The reason is that this oath amounts to an irrevocable divorce, therefore, it is converted to half the duration of the waiting period.

If the person making the oath is ill and does not have the ability to undertake intercourse, or she is ill or suffers from ratâ’ or is a minor with whom intercourse is not undertaken or there is between them a distance and she cannot be reached within the period of the vow, then, in all these cases he may say in words that he has had recourse to her during the period of ‘flâ’. If he says this the vow is terminated. Al-Shâfi‘î said that there is no recourse except through intercourse. This is also the view upheld by al-‘Affâwî, because if it amounted to recourse it would amount to a violation. Our reasoning is that he (merely) tormented her by mentioning denial, therefore, is now appeasing her with an expression of promise. If he has removed the basis of injustice, he is not to be reprimanded through a divorce. If he recovers the ability to have intercourse during this period, the verbal recourse is annulled and his recourse now is through intercourse. The reason is that he is now able to perform the primary duty prior to the performance of the substitutory duty.

If he says to his wife, “You are henceforth prohibited for me,” he will be asked about his resolve. If he says that he was lying, it will be presumed to be so. The reason is that he formed an intention according to the actual use of his words. It is also said that for purposes of adjudication, his statement about his resolve will not be accepted, because it is an oath that is apparent. If he says that he intended divorce, then, it will be presumed to be a single irrevocable repudiation, unless he intended three. We have already discussed this under metaphorical statements. If he says that he intended injurious assimilation (zihar), it will be deemed injurious assimilation. This is so according to Abû Ḥanîfah and Abû Yûsuf (God bless them). Muhammad (God bless him) said that it does not amount to zihar due to the lack of resemblance with prohibition, which is an essential ingredient for it. The two jurists said that he has used prohibition in unqualified terms, and zihar is one type of prohibition. Here the unqualified is to be construed in terms of the qualified. If he says that he intended prohibition thereby or did not intend anything in particular, then, it is an oath by virtue of which he will be deemed to have made a vow of continence. The reason is that the basis in the prohibition of something lawful is an oath in our view. We shall mention this in the topic of vows/oaths, God willing. Among the Mashâ‘îkh are those who interpret the word prohibition to mean divorce without any particular resolve, and this according to the rule of custom. Allâh knows what is correct.
Chapter 69

Khulʿ (Redemption)

69.1 Khulʿ (Redemption)

When the spouses face constant discord and are apprehensive that they will not be able to maintain the limits imposed by Allāh (ḥudūd Allāh), then there is no harm if she seeks to redeem herself from him through wealth on account of which he will let her go. This is based upon the words of the Exalted, “If ye (judges) do indeed fear that they would be unable to keep the limits ordained by Allāh, there is no blame on either of them if she give something for her freedom. These are the limits ordained by Allāh, so do not transgress them. If any do transgress the limits ordained by Allāh, such persons wrong (themselves as well as others).”

If they do so, an irrevocable divorce occurs through khulʿ and payment of wealth becomes binding on her. This is due to the words of the Prophet (God bless him and grant him peace), “Khulʿ is an irrevocable repudiation.” Further, khulʿ implies divorce that occurs with an indirect expression, and divorce through an indirect expression is irrevocable (but it is dependent upon resolve (niyyah)). The mentioning of wealth, however, does away with the need for niyyah here. In addition to this, a woman will not deliver wealth until her own being is delivered to her, and this occurs through irrevocability.

1Qurʾān 2: 229

2It is recorded by al-Dārʾiqūṭnī in his al-Sunan and thereafter by al-Bayhaqī. Al-Zaylaʿī, vol. 3, 243.

3See volume I of this translation on page 588.
If hostility occurs on his part, it is considered disapproved that he take compensation from her (for her release), due to the words of the Exalted, "But if ye decide to take one wife in place of another, even if ye had given her the latter a whole treasure for dower, take not the least bit of it back." The reason is that he has already distressed her by taking another wife, thus, he should not add to her distress by taking wealth.

If the discord is because of/her, we consider it disapproved that he take from her more than he had given her. In the narration of al-Jāmi' al-Saghīr it is said that it is acceptable to charge excess too due to the unqualified meaning of the verse that we have recited in the beginning. Another reason is provided by the words of the Prophet (God bless him and grant him peace) in the case of the wife of Thābit ibn Qays ibn Shimās, "As for excess, no!" In this case, discord was on her part.

If he takes back in excess (of what he gave her) it is valid for purposes of adjudication. Likewise if he takes more when the discord is due to him. The reason is that the legally implied meanings in the verse are two: legal permissibility and permissibility for the hereafter. Acting upon permissibility for purposes of the hereafter has been given up due to an obstacle and that leaves the option to act upon what remains.

If he divorces her in return for compensation by way of wealth and she accepts, divorce takes place and she becomes liable for payment of wealth. The reason is that the husband is independent in pronouncing immediate or contingent divorce, and here he has made it contingent upon her acceptance. The woman, on the other hand, has the legal capacity to undertake financial transactions due to her authority over her own affairs. The ownership through nikāḥ is something that can be the object of compensation, even though it is not wealth as in the case of qisās. Divorce in such a case will be irrevocable due to what we have elaborated, because it is a transaction that entails the exchange of wealth for self. The husband came to own one of these counter-values, thus, she comes to own the other, and that is her self in confirmation of equality.

If the counter-value becomes unlawful, like giving a Muslim in lieu of khul' something like khamr (wine), swine or carrion, then, the husband gets nothing, but the separation is irrevocable. If, however, the counter-value is invalid in the case of divorce, the divorce becomes revocable. Divorce in both cases is contingent upon her acceptance, but there is a distinction between their legal rules. The reason is that when the counter-value becomes invalid, the operating factor in the first case is the word khul', which is an indirect expression (for divorce). In the second case it is explicit and its consequence is a revocable divorce. Nothing is due to the husband from her, because she did not mention marketable wealth so that she may be said to have deceived her husband. Further, there is no basis for imposing a liability for delivering the named thing nor for imposing a duty of giving something else due to the lack of obligation. This is different from the case where he participated in khul' in return for vinegar itself, but it turns out to be khamr, which is also a type of wealth, thus, she will be deceiving him. This is further distinguished from the case where he enters into an agreement of mukāṭabah or emancipates a slave in return for khamr, in which case the value of the slave will become due. The reason is that the property of the owner in this case is marketable and he has not agreed to forgo ownership gratis.

As for ownership of (rights to) sex they are not marketable at the time of termination of the relationship, as we will mention. This is distinguished from nikāḥ, because rights to sex at the time of entry into the contract are marketable. The legal basis (fiqh) in this is that it is something honourable and it is not lawful to own it without paying a counter-value in recognition of its honour. As for the extinction of the rights, it is in itself something honourable, therefore, there is no need to create a liability for wealth.

He said: What is valid as payment of dower is valid as a counter-value for khul'. The reason is that if something can be a counter-value for a marketable thing it can preferably be a counter-value for something that is not marketable.

If she were to say to him, "Grant me khul' in exchange for what is in my hand" and he agrees to give her khul', but there is nothing in her hand, then, he has no claim against her. The reason is that she did not deceive him by saying that she had some thing of value in her hand. If she were to say, "Grant me khul' for the valuable thing I have in my hand" and he did so, but there was nothing in her hand, she is under a liability to return her dower to him. The reason is that when she named something of value, the husband was not ready to undo the bond except
in exchange for something. There is no reason for imposing liability for the value of what was named due to uncertainty nor the value of sexual rights, I mean thereby reasonable dower (mahr al-mithl), because it is something that is not marketable at the time of termination of the contract. Thus, liability for what the husband had given is imposed in order to avoid harm to his interests. If she were to say, “Grant me khul‘ for the dirhams or for the number of dirhams in my hand,” but there is nothing in her hand, she is liable for three dirhams. The reason is that she mentioned a plural and the minimum number assigned to the plural is three. The word min (of) is for establishing a link and not division, because the statement would lose meaning without it.

If she is granted khul‘ for her runaway slave and she stipulates that she is absolved of all liability (for capture), she will not be absolved of such liability and is liable for delivering the slave if that is possible or for the payment of his value if she is unable to deliver him. The reason is that this is a commutative contract and, therefore, requires the soundness of the counter-value. The stipulation of no liability on her part is the stipulation of a vitiated (fasid) condition, which is annulled. The khul‘, however, is not annulled due to vitiated conditions. The same rules apply to nikāh.

69.2 Divorce in Exchange for Wealth

If she says, “Divorce me thrice for a thousand (bi-alf),” and he divorces her with a single repudiation, then she is liable for one-third of one thousand. The reason is that when she demanded three for one thousand, she demanded each one of them for one-third of a thousand. The reason is that the letter ba’ accompanies counter-values and the counter-value is divided over what it is paid for. The divorce, however, is irrevocable due to the obligation of paying wealth for it.

If she says, “Divorce me thrice on one thousand (‘ala alf),” and he makes one repudiation, then she is under no obligation to pay anything according to Abū Ḥanīfah (God bless him), but he possesses the right of retraction. The two jurists said that it is a single irrevocable repudiation for one-third of a thousand. The reasoning (of the two jurists) is that the word ‘ala has the same impact as ba‘ with respect to commutative contracts. Thus, the saying, “Transport this wheat for a dirham (bi-dirham) or on one dirham (‘ala dirham),” are the same. Abū Ḥanīfah’s reasoning is that the word ‘ala is for stipulation. Allāh, the Exalted, has said, “When believing women come to thee to take the oath of fealty to thee, that they will not associate in worship any other thing whatever with Allāh.” Further, when a person says to his wife, “You are divorced on (‘ala) entering the house,” it is a condition. The reason is that it is originally for creating an obligation, but is used as a loan-word for a condition as it accompanies a consequence. If it is used for a condition, then conditions are not split up and distributed over the consequences of a condition. This is distinguished from the letter ba’, because ba‘ is used for a counter-value as has preceded. Accordingly, when payment of wealth is not obligatory, it amounts to a declaration through which divorce takes place and he possesses the right of recourse.

If the husband were to say, “Divorce yourself for one thousand or on one thousand,” and she divorces herself with a single repudiation, no divorce takes place. The reason is that the husband did not agree to irrevocability, unless the entire one thousand is delivered to him. This is distinguished from her statement, “Divorce me thrice for a thousand,” as she was agreeing to irrevocability for a thousand, therefore, agreeing for a part of it is prior.

If he were to say, “You are divorced on (‘ala) one thousand,” and she accepts, she stands divorced. She is now under an obligation to pay one thousand. It amounts to the same thing as saying, “You are divorced for (bi) one thousand.” Acceptance is necessary in both cases, because the meaning of his words, “For a thousand” is “For a counter-value of one thousand that you have to pay me.” The meaning of his statement, “On one thousand,” is “On the condition of one thousand that you have to pay me.” A counter-value does not become due without acceptance, and something suspended upon a condition cannot be done away with prior to its coming into existence. The divorce, however, is irrevocable, on the basis of what we have said.

If a person says to his wife, “You are divorced and one thousand is due from you,” and she accepts, and he says to his slave, “You are free and one thousand is due from you,” and the slave accepts, then the slave stands emancipated and the woman divorced, but they do not owe anything according to Abū Ḥanīfah (God bless him). If they do not accept then neither divorce nor emancipation has taken place. The two jurists

*Qur’ān 60:12*
argue that this statement is used in the sense of compensation. The statement, "Transport these goods and for you is a dirham at the destination," amounts to saying bi-dirham. He argues that the later part is a complete sentence and is not to be linked by implication to what precedes it. The reason is that the basis in these is independence and not implication, because divorce and emancipation are (normally) devoid of wealth as distinguished from sale and hire as such contracts cannot take place without it.

If a person says (to his wife), "You are divorced on one thousand on the condition that I have an option for three days," or he says, "You have an option for three days," and the woman accepts, then the option is void where it belongs to the husband, but it is valid where it belongs to the wife. If she rejects the option within the three days, the divorce is annulled, but if she does not reject it she stands divorced and is liable for paying one thousand. This is the case according to Abū Hanīfah (God bless him). The two jurists said that the option is void in both cases, but the divorce occurs and she is liable for one thousand dirhams. The reason is that the option is for rescission after conclusion (of the agreement) and not for preventing conclusion. These two transactions do not admit of rescission from either party, because from his side it amounts to an oath and from her side a condition. According to Abū Hanīfah (God bless him), khul' from her perspective is of the status of a sale so much so that her retraction is valid, but such retraction does not exist beyond the session of the contract, thus, the stipulation of an option is valid in it. As for his perspective, it is an oath such that it is not valid to retract from it. For his perspective, it is an oath such that it is not valid to retract from it and it abides till after the session, and there is no option in oaths. The perspective of the slave in the case of emancipation is like her perspective in case of divorce.

If a person says to his wife that he divorced her the day before on one thousand dirhams, but she did not accept, and in response to which she says that she did accept, then the acceptable statement is that of the husband. Where a person says to another, "I sold this slave to you yesterday for one thousand dirhams, but you did not accept," and he says in response that he did accept, then the acceptable statement is that of the buyer. The underlying reasoning for the distinction is that divorce in lieu of wealth is an oath from the perspective of the husband, therefore, acknowledging it does not amount to acknowledgement with a condition due to its validity without it, however, in the case of sale it is not concluded without acceptance and acknowledging it amounts to acknowledging something that is not concluded without it. Thus, his denial of the acceptance will amount to withdrawing from the sale.

69.3 MUBĀRA'AH (DIVORCE WITH NO LIABILITIES)

He said: Mubāra'ah is like khul'. Both extinguish each of the rights that the spouses have over each other with respect to nikāh, according to Abū Hanīfah (God bless him). Muḥammad (God bless him) said: No right is extinguished in either except that named. Abū Yūsuf (God bless him) sides with him in the case of khul', but he sides with Abū Hanīfah (God bless him) in the case of mubāra'ah. Muḥammad (God bless him) argues that this is a commutative agreement and in commutative agreements only the specified conditions are taken into account and nothing else. Abū Yūsuf (God bless him) argues that mubāra'ah is a derivative of barā'ah (to absolve of all liability), therefore, this is legally required for both sides. Further, it is unqualified in meaning and we have qualified it through the rights pertaining to nikāh due to the implication of the obligation. As for khul' its legal requirement is the removing of the relationship, and this is achieved through the annulment of the contract of nikāh, but there is no necessity to cut off other legal rules as well. Abū Hanīfah (God bless him) argues that khul' is constructed upon the meaning of döffing or taking off, like taking off shoes or giving up work, and this meaning is absolute like mubāra'ah, thus, the absolute meaning has to be given operation with respect to nikāh, its legal effects, and rights.

He said: If a person obtains khul' for his daughter with her wealth when she is a minor, it is not valid for her. The reason is that she cannot form a consent for this, because rights of access for sex are not marketable at the time of moving out of the contract, while the counter-value is marketable. This is distinguished from nikāh, because rights of access for sex are marketable at the time of entry into the contract. It is for this reason that khul' in the case of a woman suffering from terminal illness are operating up to a third of her entire wealth and the contract of marriage of a man in terminal illness can operate through reasonable dower out of the entire wealth. As such a khul' is not valid, the liability for the payment of dower is not extinguished, and the husband is not entitled to her wealth. Thereafter, in one narration it is said that divorce takes place, while in another narration it is said that it does not take place. The first narration
is more authentic, because it amounts to association of the divorce with the condition of acceptance by her, therefore, it will be considered like all other contingent stipulations.

If this person (the father) obtains *khul'* for her by saying that he stands surety for payment, then the *khul'* takes effect and the father is liable for the thousand (dirhams). The reason is that stipulating payment of the counter-value by a stranger is valid, therefore, for the father it has prior validity. Her right to dower, however, is not extinguished, because that does not fall under the authority (wilayah) of the father.

If he stipulates that the thousand will be paid by her, the contract is suspended subject to her ratification if she is one who can legally accept. If she does accept, divorce takes place, due to the stipulation of wealth; but there is no liability for payment, because she is not one on whom a financial burden can be imposed. If the father accepts on her behalf, then there are two narrations in this. Likewise if he obtains *khul'* for her in lieu of her dower, but the father does not stand surety for payment of the dower. It will be subject to her acceptance; if she accepts divorce takes place, but dower is not extinguished. If the father accepts on her behalf, then there are two narrations. If the father stands surety for the dower, when it is one thousand dirhams, she stands divorced, due to his acceptance, which is a condition. On the basis of istisâan he is made liable for five hundred, but on the basis of analogy he is liable for the entire one thousand. The rule for a woman who is a major when she obtains *khul'* prior to consummation in lieu of one thousand where her dower is also one thousand, is liable for an additional five hundred, on the basis of analogy. On the basis of istisâan, however, she is not liable for anything, because it is usually intended in such a case that she give what she is bound to pay.

Chapter 70

**Zihâr (Injurious Assimilation)**

If a man says to his wife, “You are for me like the back of my mother,” then she stands prohibited for him. It is not permitted to him to have intercourse with her or to fondle her or to kiss her, unless he offers expiation for his oath of *zihâr*. This is based upon the words of the Exalted, “But those who pronounce the oath of *zihâr* to abstain from their wives, then wish to go back on the words they uttered,—(it is ordained that such a one) should free a slave before they touch each other: thus are ye admonished to perform: and Allah is well-acquainted with (all) that ye do.”

The pronouncement of *zihâr* amounted to divorce in the days of the Jâhilîyyah. The *shar*’ (law) affirmed its basis, but transferred its legal effects to those of temporary prohibition to be done away with expiation (kaffârah) without eliminating the contract of *nikâh*. The reason is that *zihâr* is an offence due to the use of false and iniquitous words, therefore, it is suitable to impose the penalty of her prohibition that is removed through expiation. Thereafter, intercourse that is prohibited is prohibited along with its preliminaries so that he does not succumb to it as in the case of *ihram*. This is distinguished from the cases of menstruation and fasting as they occur frequently, thus, if the preliminaries are

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1Qur’ân 58: 3
2The Qur’ân says: “If any men among you pronounce *zihâr* for their wives, they cannot be their mothers; none can be their mothers except those who gave them birth. And in fact they use words (both) iniquitous and false: but truly Allah is All-Pardoning, All-Forgiving.” Qur’ân 58: 2
3That is, *ihram* for *hajj* prohibits intercourse and its preliminaries.
prohibited it will lead to hardship. The cases of *zihār* and *iḥrām* are not like this.⁴

If he has intercourse with her prior to expiation, he is to seek the forgiveness of Allāh, but there is no (additional) liability for him except the first expiation. He is not to repeat his act until he offers expiation. This is based upon the words of the Prophet (God bless him and grant him peace) in the case of a person who committed intercourse prior to the offering of expiation, “Seek the forgiveness of Allāh and do not commit it again until you offer expiation.”⁵ Had there been some other liability he would have indicated that.

He said: This word (*zihār*) cannot mean anything other than *zihār*, because it is explicit in its use for such meaning (does not have a figurative sense). If he intends a divorce thereby it is not valid. The reason is that such an implication has been abrogated, thus, he cannot bring it about through his intention.⁶

If he says, “You are for me like the body of my mother,” or names her thighs or her vagina, then he is a *muẓāḥīr*. The reason is that *zihār* is nothing more than drawing a similarity between a permitted woman and a prohibited woman. Such a meaning, however, stands realised in a limb that is not to be looked at (in the case of a prohibited woman).

The same rule applies if he draws such a similarity with a woman who is prohibited forever with respect to glancing at her, like his sister, aunt or foster mother. The reason is that these women with respect to perpetual prohibition are like the real mother.

Likewise, if he says, “Your head is for me like the back of my mother” or he names her vagina, her face, legs, half her body, one-third of the body, or her body. The reason is that he has used an expression for her about her entire body, and the rule is established for an undivided part and then extends to the entire body, as we elaborated in the case of divorce.

If he says, “You are for me like my mother,” or “You are like my mother,” recourse is to be had to his intention, so as to unveil the rule.

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⁴That is, they do not occur frequently.

⁵It is recorded by Abu Dawūd, al-Tirmidhi, Ibnn Majah and al-Nasa’i in their Sunan.

⁶Al-Zayla’i, vol. 5, 246.

⁷The earlier implication of the period of Jāhiliyyah has been abrogated by the *sharī’ah* and the subject cannot alter such an abrogation through his intention. al-Āyni, vol. 5, 535.

If he says, “I merely intended respect,” then it is as he says. The reason is that according respect through similarities is widespread in speech. If he says, “I intended *zihār*,” it is to be treated as *zihār*. The reason is that the similarity drawn is with the entire person, which includes a similarity of limbs, but it is not explicit, therefore, the need of recourse to his intention arises. If he says, “I intended divorce,” then it is an irrevocable repudiation. The basis is that it is a similarity drawn with the mother with respect to prohibition. It is as if he had said, “You are prohibited for me,” and had intended divorce. If he did not form any intention, then it amounts to nothing, according to Abū Ḥanīfah and Abū Yūsuf (God bless them) due to the probability of being construed as the according of respect. Muhammad (God bless him) said that it amounts to *zihār*. He maintains that drawing a similarity with her in the case of a limb amounts to *zihār*, therefore, drawing a similarity with her whole person is to be accorded greater precedence. If he had meant prohibition thereby and nothing more, then, according to Abū Yūsuf (God bless him) it amounts to *illa* so that what is established is the lowest category of prohibition. According to Muhammad (God bless him), it is *zihār*, because the character *kāf* of similarity is specific to *zihār*.

If he says, “You are prohibited for me like my mother,” and intended *zihār* or divorce thereby, then it will be as he intended. The reason is that it probably implies both forms. It implies *zihār* due to the existence of similarity, and divorce due to the existence of prohibition where the similarity is for emphasis. If he does not have an intention, then, according to the view of Abū Yūsuf (God bless him), it is *illa*, but according to the view of Muhammad (God bless him), it is *zihār*. The two probabilities we have explained.

If he says, “You are prohibited for me like the back of my mother,” and he intends thereby divorce or *illa*, it will not be anything else but *zihār*, according to Abū Ḥanīfah (God bless him). The two jurists said that it will be as he intended. The reason is that prohibition implies all this, as we have explained, however, according to Muhammad (God bless him) if he intends divorce the pronouncement does not amount to *zihār*. According to Abū Yūsuf (God bless him) it amounts to all these forms, and this has been explained at its occasion. According to Abū Ḥanīfah (God bless him), it is explicit for purposes of *zihār* and does not imply another form. Further, it is *muḥkam* (unalterable), therefore, the prohibition is associated with it.
Zihār does not apply to cases other than that of the wife so that if he makes the pronouncement for his slave woman he does not become a muzāhir. This is based upon the words of the Exalted, "If any men among you pronounce zihār for their wives..."? The reason is that the permissibility pertaining to the slave woman is secondary and is not to be associated with that for the lawfully married wife. Further, the legal effects of zihār have been transferred from divorce, and there is no divorce in the case of owned slaves.

If he marries a woman who has not consented (as yet) and then pronounces zihār with respect to her, but thereafter the woman ratifies the marriage, the zihār stands annulled. The reason is that he was truthful at the time of drawing the similarity between prohibitions, therefore, his statement was not false. Zihār is not a right from among his rights so that it can be suspended, as distinguished from the emancipation of a slave by a buyer who has bought him from an abductor, because there it is a right of ownership.

Where a man says to his wives, "You are (all) for me like the back of my mother," he becomes a muzāhir with respect to all of them. The reason is that he attributed zihār to all of them, just like he would link divorce with all of them. He is liable for expiation (independently) for each one of them. The reason is that prohibition is established for each one of them and expiation is for the termination of the prohibition, thus, it will multiply with their multiplication, as distinguished from ilā with respect to all of them, because expiation there is for protecting the sacredness of the name and the name mentioned does not increase in number.

70.1 Kaffārah (Expiation)

The expiation for zihār is the emancipation of a slave (raqabah). If a slave is not found then consecutive fasting for two months. If that is not possible then sixty needy persons are to be fed. This is based on the text laid down for this purpose, for it requires expiation in this order.

He said: And all this is prior to cohabitation. This is obvious from the text in the case of emancipation and fasting, but it is the same for feeding as well, because expiation does away with prohibition, therefore, it is necessary that it precede intercourse so that the intercourse becomes lawful.

He said: It is deemed sufficient to emancipate a slave who is an Unbeliever, Muslim, male, female, minor or major. The reason is that the term raqabah applies equally to all of them, as it is an expression for the person of an enslaved owned human being from all perspectives. Al-Shāfi‘ī (God bless him) opposes us in the case of an unbelieving slave. He maintains that expiation is the right of Allāh, the Exalted, therefore, it is not proper to apply it to the enemies of Allāh, as is the case with zakāt. We say that what is stated in the text is the emancipation of a raqabah and that meaning is realised. The intention (of the person offering expiation) is the granting of the ability to be obedient. Thereafter, commission of sins will be construed to arise from the bad choices made by the emancipated slave.

It is not deemed sufficient to emancipate a slave who is blind or whose hands or legs have been amputated. The reason is that the lost limbs are part of the benefits, which are sight, grasping and walking and this prevents expiation. If, however, the benefit is diminished, it does not prevent expiation, thus, a slave with one eye or one amputated hand or leg from the opposite side is acceptable, because what is lost is part of the benefits but are available in a diminished form. This is distinguished from the case where a hand and a leg are amputated from the same side that do not make the benefit of walking available for that is difficult for such a person. It is permissible to emancipate a deaf slave for expiation, although analogy dictates that he is not acceptable, which is a narration in the Nawādir. The reason is that it is part of the main benefit, but we permitted it on the basis of istīḥsān, because the essential benefit still remains for he may hear when shouted at. If, however, he does not hear at all, having been born deaf, and he is dumb, it is not deemed sufficient.

It is not valid to emancipate a slave whose thumbs have both been amputated, because the power of grasping is due to them and with their loss an essential benefit is lost.

It is not permitted to emancipate an insane slave, who cannot comprehend, as the utility derived from limbs is based upon reason, thus, he has lost the main benefit. It is valid to emancipate a slave who has fits of

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\[QR\text{ān 58:2}
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\[\text{The main purpose being milk yamin.}
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\[\text{Of Allāh Almighty.}
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\[\text{The reason obviously is that the slave should not be one who is useless for the master anyway, and he tries to get rid of him through expiation.}
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insanity, but then recovers, because disturbance of the benefits does not prevent the main benefit.

It is not sufficient to emancipate a *mudabbar* slave (to be set free on death of master) nor a slave mother, because they are entitled to freedom from one aspect and the attribute of slavery in them is deficient. Likewise the *mukātab* who has made some payments, because his emancipation is based upon payment of a counter-value. It is narrated from Abu ʻHanīfah (God bless him) that his emancipation is sufficient due to the existence of slavery in all respects, therefore, rescission of the contract of *kitābah* is permitted. This is distinguished from the categories of slave mothers and *mudabbars*, because these transactions do not admit of rescission. If the *mukātab* is emancipated when he has not paid anything, the emancipation is valid, with al-Shāfiʿi (God bless him) disagreeing. He maintains that the *mukātab* has become entitled to freedom from the perspective of *kitābah*, therefore, he resembles the *mudabbar*. We argue that the attribute of slavery is present in all respects, as we have explained. This is based upon the words of the Prophet (God bless him and grant him peace), "The *mukātab* is a slave as long as a single *dirham* is owed by him." Further, *mukātabah* does not negate the attribute of slavery, it is merely the removal of interdiction like the authorisation for undertaking trade, however, it is in lieu of a counter-value and is binding on the master. Had it been enough to prevent emancipation, it would be revoked as a requirement of emancipation, because it admits of revocation. The earning and children are delivered to him, however, because emancipation, as far as the slave is concerned, is on the basis of *kitābah* or that (in the alternative) revocation is necessary, but this necessity does not extend to children and earning.

If he buys his (slave) father or son, intending expiation through the purchase, it is valid for expiation. Al-Shāfiʿi (God bless him) said that it is not permitted. On the same disagreement is based the violation of an oath, and the issue will come before you, God willing, in the Book of Aymān (Vows/Oaths).

If he emancipates one-half of a jointly owned slave, when he enjoys financial ease, and guarantees the value of the remaining, it is not permitted according to Abū ʻHanīfah (God bless him), while it is permitted according to the two jurists. The reason is that he comes to own the share of his co-owner through the guarantee, and is like a person who emancipates a whole slave in lieu of expiation when he owns the slave. This is distinguished from the case where the emancipator is in financial straits, because it will become obligatory on the slave to work for the share of the co-owner and this converts it to emancipation for a counter-value. According to Abū ʻHanīfah (God bless him) the share of the co-owner is eliminated from his ownership and then reverts back to him through *damān* (guarantee), and this transaction prevents expiation.

If he emancipates one-half of his slave in lieu of expiation and thereafter emancipates the remaining part for the same reason, it is valid. The reason is that he emancipated him through two statements and the loss (in the remaining part) is possible in his own share due to emancipation for the purpose of expiation, and such a transaction does not act as an obstacle. It is like a person who lays out a goat for sacrifice and the knife pierces the goat's eye. This is different from the previous case, because in that the loss occurred in the share of the co-owner. This is the position according to the principle upheld by Abū ʻHanīfah (God bless him). As for the two jurists, emancipation cannot be split into parts, therefore, the emancipation of one-half is the emancipation of the whole, thus, it is not emancipation through two statements.

If he emancipates one-half of his slave and thereafter has intercourse with his wife for whom he pronounced *zihār* following which he emancipates the other half of the slave, it is not valid according to Abū ʻHanīfah. The reason is that emancipation can be split into parts in his view, and the condition of emancipation, on the basis of the text, is that he emancipate prior to cohabitation; in this case, emancipation of one-half occurred after cohabitation. According to the two jurists, the emancipation of one-half is the emancipation of the whole, therefore, the entire emancipation occurred prior to cohabitation.

If the *mughābir* does not find a slave for emancipation, then the expiation for him is fasting consecutively for two months without an intervening month of Ramaḍān or 'īd al-fitr or the day of sacrifice or the days of *tashrīq*. As for consecutive months it is based upon the texts. The month of Ramaḍān (cannot be included in these two months) as it

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6It is recorded by Abū Dāwūd in his Sunan. Al-Zayla'i, vol. 3, 247.
does not qualify as expiation for zihār insofar as it amounts to cancelling what has been made obligatory. Fasting in the other days (mentioned) is prohibited, thus, they cannot become a substitute for completing the obligation.

If he has intercourse with the wife, against whom he pronounced zihār, during the two months, intentionally during the night and out of forgetfulness during the day, he is to start fasting all over again according to Abu Ḥanīfa and Muhammad (God bless them). Abu Yūsuf (God bless him) said that he is not to start over again, because the consecutive fasting is not prevented as the fast is not rendered fāsid and that is the condition. He argues that if the precedence of expiation is a condition for cohabitation then what we uphold is the precedence of part of it, and in what you hold is the delaying of cohabitation till the whole is completed. The two jurists argue that the condition for fasting is that it precede cohabitation, and such fasting should be free of cohabitation as a necessary requirement of the text. This condition is violated, therefore, he is to start all over again. If he does not fast for a day with or without an excuse, he is to fast all over again. This is due to the absence of consecutive fasting when he is able to do so.

If a slave pronounces zihār, the only expiation for him is through fasting, because he does not own anything, therefore, he is not eligible for expiation through wealth. If the master were to emancipate a slave on his behalf, or feed the needy, it is not valid. The reason is that he does not have the legal capacity for ownership, therefore, passing ownership to him does not make him an owner.

If the muzahir is not able to fast, then, he is to feed sixty needy persons, due to the words of the Exalted, “And if any has not (the means), he should fast for two months consecutively before they touch each other. But if any is unable to do so, he should feed sixty indigent ones, this, that ye may show your faith in Allah and His Messenger. Those are limits (set by) Allah. For those who reject (Him), there is a grievous Chastisement.” He is to feed each needy person one-half sā‘ of wheat or one sā‘ of dates or barley or give him the value of these. This is based upon the words of the Prophet (God bless him and grant him peace) in the tradition of Aws ibn al-Ṣamīt and Sahl ibn Ṣakhr, “For each needy person is one-half sā‘ of wheat.” The reason is that the factor to be considered is meeting the need of the day of each needy person, therefore, it is estimated on the analogy of sadaqat al-fitr. His statement “Or the value of these” is the opinion of our school, and we have mentioned it in the Book of Zakāt.

If he gives one maund of wheat and two maunds of dates or barley, it is valid. The purpose is achieved as the class is common. If he orders another to feed on his behalf for his zihār, and this person does so, he is rewarded. The reason is that it is the taking of a loan in meaning. The poor man first takes possession on his behalf and thereafter for himself, therefore, making him the owner and then acquiring ownership is realised.

If he gives them meals in the afternoon and in the evening, it is valid whether they have consumed less or more. Al-Shafi’i (God bless him) said that he is not to be rewarded except by making them owners in consideration of what is done in the case of zakāt and sadaqat al-fitr. The reason is that making one an owner is more effective in meeting needs, therefore, permissibility (of meals) cannot be made a substitute for ownership. Our argument is that what is stated in the text is feeding, which is the real meaning of granting the ability to have meals. The permissibility of meals carries this meaning just like the making of a person an owner. In the obligation of zakāt, however, the meaning is of giving, while in sadaqat al-fitr it is payment, and these two meanings carry the sense of ownership in reality.

If there is among the persons given a meal an infant who has not weaned, he is not rewarded. The reason is that he cannot consume a meal. It is necessary to serve curry (or fatty substance) with barley bread so that the person fed can eat to his satisfaction. Curry is not stipulated for wheat bread.

If he feeds a single needy person for sixty days, he is rewarded. If he grants him the entire food (liability) in one day, he will not be rewarded except for one day, because the purpose is to drive away the want of the needy person, and his want is renewed every day. Thus, giving him food the next day is like giving food to another person. This is the view, without disagreement, in the permissibility of giving meals. As for making a

13Qur’an 58:4

14According to al-Zayla’i, the correct name is Salamah ibn Ṣakhr and the tradition is ghardh, however, there are other traditions that give the same meaning. Al-Zayla’i, vol. 3, 247.

15The class is common here means that the class is feeding and not clothing.
single needy person an owner in one day through (sixty) instalments, it is said that he is not rewarded, while it is also said that he is rewarded, because the need to own is renewed within one day. This is distinguished from the making of one single payment as the making of a distinction is obligatory due to the text.

If he cohabits with the wife subject to *zihār*, while the meal is being taken, he is not to renew the feeding. The reason is that Allah, the Exalted, has not laid down that the feeding be prior to cohabitation, except that he is prohibited from doing so before it. Perhaps, it is possible that he may acquire the ability to emancipate a slave or fast, and in such a case they will occur after touching. A prohibition that exists due to an external reason does not negate legality in itself.

If he gives food on account of two *zihārs* by giving sixty needy person one sa` of wheat each (instead of one-half), he is not to be rewarded except for just one of the two *zihārs*, according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said that he is to be rewarded for both. If he feeds like this on account of breaking his fast and *zihār*, he is to be deemed rewarded for both. Muḥammad (God bless him) argues that what he has given is enough for the satisfaction of the two obligations, and those to whom he has given are the object of the grant, therefore, it is rightly given to them. It is as if the causes are different or a distinction has been made in payment. The two jurists argue that the intention (in this case) for one of the categories becomes redundant and it is taken into account in (the absolute sense for) both categories. Thus, when the intention becomes redundant, but the given food qualifies for one expiation, because one-half sa` is the minimum quantity, reduction is prevented and not excess, therefore, it is valid for one expiation, as if he had made a resolve for this expiation itself. This is distinguished from the case where he makes a distinction in payment, because the second payment will be treated as payment to another needy person.

If a person is under an obligation to make expiation for two *zihārs*, and he emancipates two slaves, without specifying an intention for either one of them, it is valid for both. Likewise if he fasts for four months or feeds one hundred and twenty needy persons, it is valid. The reason is that there is unity of category, therefore, a specific intention is not needed. If he emancipates one slave for both or fasts for two months, he is required to determine for which of the two the expiation is intended.

If he does this for intentional homicide and for *zihār*, it is not valid for either. Zufar (God bless him) said that he is not to be deemed rewarded in both cases. Al-Shāfi`ī (God bless him) said that it is up to him to allocate to one in both cases, because all expiations due to the unity of purpose are a single genus. Zufar’s argument is that he emancipated one-half slave for each *zihār* and he does not have the choice to allocate them to one after he has done it for both, because the matter is out of his hands now. Our argument is that the intention of ascertainment in case of unity of genus is not beneficial and is deemed redundant. It is beneficial in case of different genera, and the difference in genera for purposes of the rules is expiation here with different causes. The example of the first is where he fasts for one day by way of *qada’* (delayed substitute performance) for two days of Ramadān, he is to be rewarded for one day. The illustration of the second is that he is under an obligation to offer *qādā* for Ramadān and *nadhīr* (vow), so he must make a distinction through intention. Allah knows best.
Chapter 71

Li‘ān (Imprecation)

If a person accuses his wife of having committed zinā, when both spouses are eligible to give testimony, while the woman is one whose accuser can be awarded ḥadd for qadhf, or he denies the paternity of her child, and she demands the consequences of qadhf to follow, then he is under a duty to follow the procedure of li‘ān. The basis is that li‘ān, in our view, are testimonies strengthened through oaths and linked to cursing, and these are a substitute for the ḥadd of qadhf in the case of the husband and a substitute for the ḥadd of zinā in the case of the wife. This is based upon the words of the Exalted, “And for those who launch a charge against their wives, and have (in support) no evidence but their own,” the exception being made from the genus (of witnesses). Allah, the Exalted, has said, “Let one of them testify four times by Allah that he is of those who speak the truth,” which is explicit in the meaning of testimony and oath. Accordingly, we say that the essential ingredient (rukn) is testimony supported by oath. Thereafter, the rukn is associated in his case with a curse if he is untruthful, and this is a substitute for the ḥadd of qadhf and then it is linked with wrath in her case and this is a substitute for the ḥadd of zinā.

When this is established, we say: It is necessary that both be eligible for rendering testimony, because the rukn is testimony. It is also essential that she be one whose false accuser is liable for the ḥadd, because it acts as a substitute for the ḥadd of qadhf in his case, therefore, she must be a muḥṣan. This becomes obligatory by the denial of paternity. The reason is that as soon as he denies paternity he has apparently committed qadhf. The possibility that the child could be of some other man through

‘Qur’ān 24 : 6
intercourse based upon doubt is not to be taken into account, just like the case of a stranger denying the paternity of a person from his well known father. The reason is that the governing basis in case of paternity is lawful access for sexual relations, and unlawful access is related to it, therefore, his denying valid access amounts to qadhf until it becomes evident that unlawful access is now linked to it. Her demand of proceedings is stipulated as it is her right, therefore, it is necessary that the demand is initiated by her as in the case of all other rights.

If he refuses to take the oath of li'an, the judge is to imprison him until he takes the oath of li'an or declares himself to be a liar. The reason is that it is a right being claimed from him and he is in a position to meet this claim, thus, he is imprisoned until he delivers what is being claimed from him or declares himself to be untruthful so that the cause of action is removed.

If he agrees to the process of li'an, the procedure of li'an becomes obligatory upon him, due to the text that we have recited, however, we begin with the husband for he is the complainant.

If she refuses to take the oath, the qādi is to imprison her till she takes the oath or deems him truthful. The reason is that it is his right against her, and she is able to meet the claim, therefore, she is imprisoned on account of it.

Where the husband is a slave, or an unbeliever or has been convicted for qadhf, and he commits qadhf against his wife, he is to be subjected to the hadd. The reason is that li'an is not possible due to a disqualification found in him, therefore, it is converted to the original obligation, which is established by the words of the Exalted, "And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations)—flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors; Except those who repent thereafter and mend (their conduct); for Allah is Oft-Forgiving, Most Merciful." Li'an is a substitutory duty for this (primary) obligation.

If the wife is one who is qualified to testify, but is an unBELIEVER or has been awarded hadd for qadhf, or is one whose false accuser is not punished, like being a minor, or insane, or one convicted for zina,

\[\text{then, there is neither hadd for him nor li'an, due to the negation of the legal capacity of rendering testimony, the lack of ihsān (chastity), and this is from her side. The prevention of li'an is due to a fault in her, therefore, hadd is waived; it is as if she confirmed his statement. The legal basis for this are the words of the Prophet (God bless him and grant him peace), "There are four persons between whom and their spouses there is no li'an: a Jew or a Christian woman married to a Muslim; a slave woman married to a freeman; and a freewoman married to a slave." If the spouses have been convicted (and punished) for qadhf, then, the husband will be subjected to hadd, because the prevention of the li'an procedure is due to a fault in him as he is not eligible for it.}

The description of li'an is that the qādi begins with the husband. He testifies four times, saying each time, "I testify by Allah that I am truthful in my accusing her of zina." The fifth time, he says, "The curse of Allah be on him, if he is untruthful with respect to his accusation of zina." In all these statements he points towards her. The wife then testifies four times, saying each time, "I testify by Allah that he is untruthful in the accusation he has made against me with respect to zina." In the fifth testimony, she says, "The wrath of Allah be on her if he is truthful with respect to the accusation against me about zina." The legal basis in all this is the text that we have already recited. It is narrated by al-Ḥasan from Abū Ḥanifah (God bless him) that he is to use the form of direct address by saying, "In what I have accused you of zina insofar as that is explicit in removing uncertainty. The reasoning underlying what has been stated in the Book (by al-Qudūrī) is that when the form used for one absent is corroborated by pointing to her the probability of uncertainty is removed.

He said: When they have both made the statements of li'an, a separation does not occur between them until the qādi separates them with his pronouncement. Zufar (God bless him) said that separation does occur by their li'an statements, because perpetual prohibition is established by the operation of the tradition. We argue that the proof of prohibition

\[\text{3Ibn Majah and al-Dārṣuqni have recorded it in their Sunan. Al-Zayla'î, vol. 3, 248.}
\[\text{3Al-Zay'ali says that it appears he is pointing to the tradition, "The spouses participating in li'an can never come together." He says that it is recorded by Abū Dāwūd in his Sunan. Al-Zayla'î, vol. 3, 249, 250. Al-'Ayni says that it has been recorded by 'Abd al-Razzāq as a mawqūf tradition. Al-'Ayni, vol. 5, 571.}\]
eliminates the retention of the relationship in fairness, therefore, the husband is to adopt fairness. If he refuses to do so, the qadi becomes his deputy in order to avoid injustice. This is indicated by the Companion who said, “I have accused her unjustly, and she is divorced thrice if I take her back.” This he said after the li'an proceedings.

The separation will amount to a single irrevocable repudiation, according to Abū Hanīfah and Muḥammad (God bless them), because the act of the qadi is attributed to him. He can propose again if he declares himself to be untruthful, according to the two jurists. Abū Yūsuf (God bless him) maintains that it amounts to perpetual prohibition due to the words of the Prophet (God bless him and grant him peace), “The spouses participating in li'an can never come together,” which is explicit in the meaning of perpetual prohibition. The two jurists maintain that admitting falsehood amounts to retraction and testimony has no force after retraction. Further, they cannot come together as long as they remain in the state of li'an, but such li'an no longer subsists and has no legal value after admission of falsehood, therefore, they can come together.

If the li'an was based upon the denial of paternity, the qadi annuls his paternity and associates him with his mother's name. The form of li'an (in this case) is that the qadi orders the man to say, and he says: “I testify by Allāh that I am truthful in what I have accused you of with respect to the denial (of the paternity) of the child.” The similar form is adopted from the woman's side.

If he accuses her of zina and also denies the paternity of the child, he mentions both things in his li'an statement. Thereafter the qadi revokes the paternity of the child and associates it with its mother. This is based upon the report “that the Prophet (God bless him and grant him peace) revoked the paternity of the child of Hīlāl ibn Umayyah's wife with respect to Hīlāl and associated it with her.” Further, the purpose of this li'an is the denial of paternity for the child and this purpose is achieved completely, and it is included in the pronouncement of separation through the judgement. It is reported from Abū Yūsuf (God bless him) that he said: The qadi pronounces the separation and says, “I have made him a dependant of his mother and removed him from the paternity of the father.” As denial of paternity is independent of separation, it is necessary to mention it.

If the husband repeats the accusation and then admits that he was lying, the qadi is to subject him to hadd, due to his admission leading to the obligation of awarding hadd to him. And he permits him to remarry her. This is the view according to the two jurists, because after the awarding of hadd, he is no longer eligible to participate in li'an, therefore, the rule on which it is based, which is perpetual prohibition, is also removed. Likewise if he commits qadhf against another woman and is awarded hadd for it, due to what we have explained. And likewise if she commits zina and is awarded hadd, due to the negation from her side of the eligibility for li'an.

If he commits qadhf against his wife, who is a minor or is insane, there is no li'an between them. The reason is that hadd is not awarded to the accuser of such a woman, even if she is a stranger, thus, the husband is not to proceed with li'an as he stands in the same position. Likewise if the husband is a minor or is insane, due to the lack of liability in such a case.

Qadhf by a dumb person is not relevant for li'an, because it pertains to an express accusation like the hadd of qadhf. In this al-Shafi'i (God bless him) disagrees, however, the basis is that this case is not free of doubt and the hudud are to be waived on account of doubt.

If the husband says to her, “Your pregnancy is not due to me,” then there is no li'an between them. This is the view of Abū Ḥanīfah and Zufar (God bless them), because he is not sure of the existence of pregnancy, therefore, he does not become an accuser (qadhf). Abū Yūsuf and Muḥammad (God bless them) said that li'an becomes obligatory by the denial of pregnancy when he denies it in a period that is less than six months, which is the point made (by Muḥammad) in al-Āṣf, because

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we come to know for sure about pregnancy in such a period, therefore, qadhl is affirmed. We would say to this that if it does not amount to qadhl immediately, then, it becomes subject to a condition. It is as if he is saying to her, "If you are pregnant, then it is not because of me." Qadhl that is suspended upon a condition does not take place.

If he says to his wife, "You have committed zina and this pregnancy is due to zina," they are to undergo the procedure of li'an. This is due to the existence of qadhl as he has expressly mentioned zina. The qadhi in this case will not revoke paternity. Al-Shafi'i (God bless him) said that he is to revoke paternity, because the Prophet (God bless him and grant him peace) revoked the paternity of the child of Hilal as he had accused her when she was pregnant. We maintain that the legal effects do not take place except after the birth of the child due to the possibility of absence of pregnancy. The tradition is construed to mean that he had come to know about the existence of conception on the basis of revelation.

If a man denies the child of his wife after birth or at a time when felicitations are accepted and things subsequent to birth are procured, his denial is valid and li'an proceedings are in order. If he denies it after this, he is to undergo li'an, but paternity is established. This is the view according to Abū Ḥanīfah (God bless him). Abū Yusuf and Muḥammad (God bless them) said that his denial is valid if it takes place within the postnatal period. The reason is that denial is valid within a short period, but not valid after a long period, and we have separated the two periods with the period of nifās (postnatal period), because it is the consequence of birth. The Imam (God bless him) says that there is no point in such fixing of durations, because time is needed for pondering over the matter and the situation of people differs with circumstances. Accordingly, he says, we have taken into account things that indicate lack of denial and these are like his acceptance of felicitations, or his silence when congratulated, or his buying of things needed after birth, or the passage of this period with his non-denial of paternity. If he was absent and did not know about the birth, but arrives thereafter, the period will be taken into account on the basis of both rulings that we have mentioned.

**He said:** If she gives birth to twins through the same pregnancy and he denies the first and accepts the second, their paternity stands established as they have been conceived as twins from the same sperm. The husband is to be subjected to hadd, because he has admitted his falsehood through the second claim.

If he accepts the first and denies the second, their paternity stands established, on the basis of what we have mentioned, and they undergo li'an proceedings. The reason is that he has become a qadhl through the denial of the second and has not retracted his claim. The acknowledgement of chastity is prior to the commission of qadhl. It is as if he first said that she is chaste and then said that she is a zāniyah. In such a situation li'an is the consequence, so also here.
Chapter 72

Impotence and Other Causes of Divorce

If the husband is impotent the qādī is to grant him a year. If he is able to cohabit with her, then it is good, otherwise he is to announce a separation between them if the woman makes a request for that. This is how it has been reported from 'Umar, 'Alī and Ibn Mas'ūd (God be pleased with them). The reason is that her right to intercourse is established, but it is probable that the inability may be due to some temporary ailment and it is probable that it is due to a congenital defect. It is, therefore, necessary to have a duration to gain knowledge about this. We have fixed this duration to be a year as it consists of all the four seasons. When the period is over and he has not been able to cohabit with her, it becomes obvious that it is due to some congenital (or permanent) defect. This leads to the demise of retention in marriage according to what is good, and dealing with her in fairness becomes obligatory. If he refuses, the qādī acts as his representative and pronounces the separation between them. It is necessary that the woman demand separation, because separation is her right (in such a case).

This separation amounts to a single irrevocable repudiation. The reason is that the act of the qādī is attributed to the husband; it is as if he has divorced her himself. Al-Shāfi‘ī (God bless him) said that it is revocation, however, nikāh does not accept revocation in our view. It amounts to an irrevocable divorce, because the purpose, which is the elimination of injustice to her, cannot be achieved without it. If it is not irrevocable, the woman will be suspended due to the possibility of retraction.

These reports are to be found in the works of 'Abd al-Razzāq, Muḥammad ibn al-Hasan al-Shaybānī and Ibn Abī Shaybah. Al-Zayla‘ī, vol. 3, 254.
She is entitled to full dower if he went into seclusion with her, because seclusion with an impotent husband is valid. The waiting period is obligatory, because of what we elaborated earlier. This is the case where the husband acknowledges that he has not been able to have intercourse with her.

If the husband and wife differ about his being able to have intercourse with her, then if she is a non-virgin the acceptable statement will be that of the husband along with his oath. The reason is that he is denying the entitlement to the right of separation, and the basis is the fitness or the functioning of the organ.

Thereafter, if he takes the oath, her right is extinguished, but if he refuses the matter is to be delayed for a year. If she is a virgin, the women are to examine her and if they testify that she is a virgin the delay of a year is to be granted, due to the manifestation of his falsehood. If they say that she is deflowered, the husband is to be administered the oath. If he takes the oath, she has no right, but if he refuses the matter is delayed for a year. If he has a cut up organ, the separation is to be pronounced at once if she so demands. The reason is that there is no use in delaying the matter. The case of a castrated person is also to be delayed like that of the impotent person, because there is some hope of his being able to cohabit.

If the impotent man is granted a year and then he says that I have had intercourse with her, but she denies it, she is to be examined by women. If they say that she is a virgin, she is to be given an option. The reason is that their testimony has affirmed the underlying factor and that is virginity. If they say that she is a non-virgin, the husband is to be administered the oath. If he refuses to take the oath, she is not granted an option.

If the husband suffers from insanity, baras or leprosy, then the wife does not have an option (of revocation) according to Abu Hanifah and Abu Yusuf (God bless them). Muhammad (God bless him) said that she does have the option, so as to repel injury to her, as in the case of loss of organ or impotence, as distinguished from his case for he is able to do away with the injury through divorce. The two jurists maintain that the case is the absence of an option insofar as it amounts to annulling the right of the husband. It is granted in the case of a partially missing organ or impotence as they prevent the attainment of the objective for which marriage has been made lawful. These defects, on the other hand, do not upset such objective, therefore, the two are distinguished. Allāh knows best what is correct.

If the wife has a defect, the husband does not have an option (of revocation). Al-Šāfi'i (God bless him) said that she is to be rejected on account of five defects: leprosy; baras (skin disease); insanity, ratq; and qarn. The reason is that they prevent contact for physical access and desire. Desire is emphasised in the shari' (law) due to the words of the Prophet (God bless him and grant him peace) "Run from the person with leprosy like you run from the lion." We argue that the extinction of satisfaction essentially upon death does not lead to revocation, therefore, it is necessary that by mere disturbance due to defects it should not be so. The reason is that satisfaction is derived from the fruits of marriage, and the claim is that these be available and they are.

If the husband has a defect, the husband does not have an option (of revocation) according to Abu Hanifah and Abu Yusuf (God bless them). Muhammad (God bless him) said that she does have the option, so as to repel injury to her, as in the case of loss of organ or impotence, as distinguished from his case for he is able to do away with the injury through divorce. The two jurists maintain that the basis is the absence of an option insofar as it amounts to annulling the right of the husband. It is granted in the case of a partially missing organ or impotence as they prevent the attainment of the objective for which marriage has been made lawful. These defects, on the other hand, do not upset such objective, therefore, the two are distinguished. Allāh knows best what is correct.

[Note: The text contains references to various defects and their implications, which are detailed further in the notes provided.]
Chapter 73

‘Iddah (Waiting Period)

If a man divorces his wife through an irrevocable or a revocable repudiation, or a separation occurs between them without divorce,¹ when she is a freewoman who has menstrual periods, then her ‘iddah (waiting period) extends to three periods, due to the words of the Exalted, “Divorced women shall wait concerning themselves for three monthly periods.”² Separation when it takes place without divorce bears the meaning of divorce, because ‘iddah has been made obligatory to identify the vacation of the womb in a separation that is imposed upon nikāh, and this occurs within the separation. The term “period” is applied to mean menses in our view. Al-Shāfi`i (God bless him) said that it applies to the period of purity. The word qurū in its actual application is used for both meanings and has been used for the opposite meanings. This is what has been stated by Ibn al-Sikkit. It does not, however, apply to both meanings at the same time as a mushtarak word. Construing it to mean menses is better. First, by acting upon the plural meaning, because applying it to mean period of purity where divorce takes place in a period of purity prevents it from being a plural. Second, in its meaning as an identifier of the vacation of the womb, which is the purpose of ‘iddah. Third, by interpreting it in the light of the words of the Prophet (God bless him and grant him peace), “The waiting period of the slave woman are two menses,” and these words act as an elaboration (bayān) for the word.

If she is one who does not menstruate due to young or old age, then, her waiting period is three months, due to the words of the Exalted,

¹This separation may occur through khiyār al-bulūgh, emancipation, one spouse coming to own the other, and apostasy. Al-‘Aynī, vol. 5, 593.
²Qur'ān 2: 228
“Such of your women as have passed the age of monthly courses, for them the prescribed period, if ye have any doubts, is three months.” Likewise those who have reached the age of puberty, but have not begun to menstruate, due to the words at the end of the verse.4

If she is pregnant, then, her 'iddah is up to the time she delivers the child, due to the words of the Exalted, “For those who are pregnant, their period is until they deliver their burdens.”

If the wife is a slave woman her 'iddah is two menses, due to the words of the Prophet (God bless him and grant him peace), “The divorce of the slave woman is two repudiations and her waiting period is up to two menses.” The reason is that slavery converts matters into half, but the menstrual period cannot be halved, therefore, they are fixed at two menses. This is what ‘Umar (God be pleased with him) is reported to have said, “If I could I would have deemed it a menses and a half.” If the slave woman is one who does not menstruate, then her waiting period is a month and a half. The reason is that it can be divided and it is possible to make it half while acting upon the attribute of slavery.

The waiting period of a freewoman in the case of death (of her husband) is four months and ten days, due to the words of the Exalted, “If any of you die and leave widows behind, they shall wait concerning themselves four months and ten days.” The waiting period of a slave woman (in this case) is two months and five days, because slavery converts it to half.

If she is pregnant, then, her waiting period is until she delivers, due to the unqualified meaning of the verse, “For those who are pregnant, their period is until they deliver their burdens.”5 ‘Abd Allah ibn Mas‘ūd (God be pleased with him) said, “If anyone wants I can engage with him in mutual curses to show that this verse was revealed after the verse that is in Surat al-Baqarah.”6 Umar (God be pleased with him) said that “if she was released from her waiting period that has passed is erased and she is to renew her waiting period on the basis of months, and then sees bleeding, her waiting period that has passed is erased and she is to renew her waiting period on the basis of months. This means that if she witnesses bleeding as was usual for her. The reason is that her reverting to her normal

1Qur‘an 65: 4
2That is, “And for those who have no courses (it is the same).” Qur‘an 65: 4
3Qur‘an 65: 4
4It is recorded from ‘A‘ishah and Ibn ‘Umar (God be praised with them). The different versions are recorded by Abu Dāwūd, al-Tirmidhi, Ibn Majah and others. Al-Zayla‘i, vol. 3, 226, 255.
5It is recorded by ‘Abd al-Razzāq, Al-‘Aynī, vol. 3, 256.
6Qur‘an 3: 234
7Qur‘an 65: 4
8It is recorded by al-Bukhārī. Al-Zayla‘i, vol. 3, 256.

If a slave woman is emancipated within her waiting period following a revocable divorce, her waiting period is converted to the waiting period of free women, because of the continuance of marriage in all respects. If she is emancipated following an irrevocable divorce or is one whose husband has died, her waiting period is not converted to that for freewomen due to the termination of marriage after an irrevocable divorce or death.

If she is a woman who has had menopause and is undergoing the waiting period on the basis of months, and then sees bleeding, her waiting period that has passed is erased and she is to renew her waiting period on the basis of months. This means that if she witnesses bleeding as was usual for her. The reason is that her reverting to her normal

9It is recorded by Mālik (God bless him) in al-Muwaffa‘. Al-Zayla‘i, vol. 3, 256.
courses annuls the menopause, which is the correct view, thus, it is apparent that it is not a substitutory duty. The reason is that the condition for substituting a duty is the confirmation of menopause and this takes place through the inability (to bleed) until death, as is the case of fidyah (ransom) for the enfeebled old person. If, however, she has two menstrual periods (in her waiting period) and then her menopause, she is to calculate her waiting period on the basis of months, as a precaution in order to avoid combining what is substitutory with the original.

In the case of a woman who is married through an irregular nikah, and a woman who has had intercourse on the basis of shubhah, their waiting period, both in the case of separation and death, is through menses. The reason is that this is for identifying the vacation of the womb and not for complying with the requirements of marriage, because menses are the identifier for this purpose.

If the master of a slave woman, who has borne him a child, dies or he emancipates her, then, her `iddah is up to three menses. Al-Shafi`i (God bless him) said that it is a single menstruation. The reason is that it becomes obligatory due to the termination of lawful ownership, therefore, it resembles vacation of the womb. We argue that it becomes obligatory due to the termination of the relationship permitting lawful access for sex, therefore, it resembles the `iddah of nikah. Thereafter, our leader in this is `Umar (God be pleased with him), for he said: “The `iddah of the `umm al-walad is three menses.” If she is one who does not menstruate, then, her waiting period is three months, as in the case of nikah.

If the minor husband of a woman dies and she is pregnant, then, her `iddah is up to the time she delivers. This is the view according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yusuf (God bless him) said that her waiting period is for four months and ten days, which is also the opinion of al-Shafi`i (God bless him). The reason is that the pregnancy is not established as to paternity with respect to him. It is as if it existed legally at the time of death.

The paternity of the child will not be established in either case. The reason is that the minor does not have sperm, therefore, conception on his account cannot be thought of, so the nikah acts as the substitute for sperm conceptually.

If a man divorces his wife during her menstrual period, she is not to reckon the period in which the divorce occurred, because the waiting period is determined to be three complete menses, thus, their number is not to be reduced.

If a woman undergoing `iddah is made to cohabit due to shubhah (doubt), then, she is to undergo another `iddah. The two waiting periods will run concurrently and the bleeding that the woman witnesses during menses will be counted towards both. When the first waiting period terminates, and the other has not ended, it is obligatory for the woman to complete the second waiting period. This is our view. Al-Shafi`i (God bless him) said that the two waiting periods will not run concurrently. The purpose is worship, he said, and it is worship that prevents marriage and going out of the house, therefore, the periods will not run concurrently just like two fasts cannot be undertaken in one day. Our argument is that the purpose is to verify the vacation of the womb, and this purpose is achieved with one waiting period, therefore, they will run concurrently. The meaning of worship here is secondary. Do you not see that the waiting period passes without her knowledge even if she gives up not going out?

13 Al-Zayla'i says that it is gharib, however, he records a similar statement from `Amr ibn al-`Ass. Al-Zayla'i, vol. 3, 258.
14 Qur'an 65:4

That is, conception before death or after it.
If a woman undergoing 'iddah following death is led to cohabitation as a result of doubt, she is to undergo the waiting period on the basis of months and she is also to take account of the menses occurring during this period. This is to ensure concurrence as far as it is possible.

The commencement of 'iddah in the case of divorce is after the divorce, while in the case of death it is after death. If she does not come to know of the divorce or the death till such time that the duration of the waiting period is over, then, her 'iddah is over. The reason is that the cause of the waiting period is either divorce or death, therefore, its commencement is reckoned from the time the cause comes into existence. Our jurists (from Bukhārah) have issued a ruling (fatwā) in the case of divorce that the commencement of the waiting period is from the time of acknowledgement (of divorce) so that the accusation of having conspired is avoided.

The (commencement of the) waiting period arising from a fāsid contract is after separation, or after the determination of the man that he will not have intercourse with her. Zufar (God bless him) said that it begins after the last intercourse, because it is intercourse that is the obligating cause. We argue that each intercourse found within the fāsid contract is like a single intercourse due to the association of all with the rule for a single contract. It is for this reason that it is sufficient to have a single dower for all. Accordingly, the commencement of the waiting period is not established prior to mutual relinquishment or determination to abstain when there is the likelihood of another taking place (after the last). Further, the ability to undertake it by way of shubhah acts as a substitute for actual intercourse due to its concealed nature, and there is a need to know the rule for the sake of the right of another man.

If a woman undergoing the waiting period says that her 'iddah has terminated, but her husband denies this, then the acceptable statement will be that of the wife along with her oath. The reason is that she is considered trustworthy in this, and when she has been accused of falsehood she takes the oath, just like the custodian of a deposit.

If a man divorces his wife through an irrevocable divorce, and thereafter marries her during her waiting period, but divorces her (again) prior to cohabitation, he is liable for a complete dower, and she has to undergo a subsequent (renewed) 'iddah. This is the view according to Abū Hanīfah and Abū Yūsuf (God bless them). Muhammad (God bless him) said that he is liable for one-half dower and she is to complete the previous waiting period. The reason is that it is a divorce prior to touching, therefore, it does not give rise to full dower nor the renewal of the waiting period. The completion of the first 'iddah is due to the first divorce, when the second marriage has not affected the first waiting period. Thus, when the legal effects of the second marriage are removed through the second divorce, the legal effects of the first come into view, as if he had bought his slave woman who had borne him children and then emancipated her. The two jurists maintain that she is within his grasp in reality due to the first intercourse and its effect remains, which is the waiting period. Thus, when he renews the marriage, while she is still under his control, the first control stands in the place of the second control to which he derived the right through this marriage. It is like a usurper buying the usurped item that is in his possession, where he (now) comes to have possession by the contract alone. This makes it evident that it is divorce after cohabitation. Zufar (God bless him) said there is no waiting period at all for her, because the first waiting period was extinguished by the second marriage and cannot return, while the second was never imposed. The response to his view is what we have said.

If a Dhimmi divorces a Dhimmiyyah, there is no waiting period for her. Likewise, if a woman from the enemy land crosses over to our side as a Muslim. If she marries it is valid, unless she is pregnant. This is the view according to Abū Ḥanīfah (God bless him). The two jurists said she as well as the Dhimmiyyah have to undergo the waiting period. As for the Dhimmiyyah, the disagreement here is similar to the disagreement about their marrying within the prohibited category, and we have elaborated this in the Book of Nikāh. The view of Abū Ḥanīfah (God bless him) applies where there is no waiting period for them according to their belief. As for the woman migrating, the reasoning of the two jurists is that if the separation had occurred between them due to another reason, there would be a waiting period, likewise in the case of such separation. This is distinguished from the case where a man migrates and leaves her behind (there will be no waiting period) due to the lack of information about the shari'ah. Abū Ḥanīfah (God bless him) argues on the basis of the verse, "O ye who believe! When there come to you believing women refugees, examine (and test) them: Allah knows best as to their Faith: if ye ascertain that they are Believers, then send them not back to the Unbelievers. They are not lawful (wives) for the Unbelievers, nor are the (Unbelievers) lawful (husbands) for them. But pay the Unbelievers what they have spent
(on their dower), and there will be no blame on you if ye marry them on payment of their dower to them.\textsuperscript{10} The reason is that when the waiting period becomes obligatory, the right of humans is attached to it, and the enemy is associated with these rights so that he can be the subject matter of ownership. The exception is where the woman is pregnant, because inside her womb is a child whose paternity is established. There is a narration from Abū Ḥanīfah (God bless him) that it is permitted to marry such a (pregnant) woman, but he is not to have intercourse with her, as is the case with a woman pregnant after zinā. The first view, however, is more authentic.

73.1 Mourning

For the irrevocably separated woman,\textsuperscript{11} as well as one whose husband has died, when she is a major and a Muslim, is prescribed mourning. As for the woman whose husband has died, it is due to the words of the Prophet (God bless him and grant him peace), “It is not lawful for a woman, who believes in Allāh and the Day of Judgement, to mourn for the dead in excess of three days, except for her husband for four months and ten days.”\textsuperscript{12} As for one irrevocably separated, it is the opinion of our school. Al-Shāfi`i (God bless him) said that there is no obligation of mourning for her. The reason is that it has been prescribed for expressing sorrow upon the death of her husband who stood by his compact with her till his death. The husband (separated from her) has cast her into despair through separation so there is no cause for sorrow upon his loss. We rely upon the report from the Prophet (God bless him and grant him peace) in which he forbade the woman undergoing `iddah from using henna as a hair dye. He said, “Henna is perfume.”\textsuperscript{13} Further, the reason is that it is necessary to express sorrow for the loss of the blessing of marriage, which was the cause of her protection and support for her subsistence. Separation is more severe for her in this case than death insofar as she can bathe her dead husband prior to separation but not later.

Hīdād (mourning), also called ʾiḥdād, and both are part of usage, is that the woman give up perfume, adornment, kohl, and the use of oil whether it is perfumed or non-perfumed, except due to a valid excuse. The narration in al-Jāmī’ al-Šaghir is: except when in pain. The underlying reason is understood in two ways. The first is what we have mentioned with respect to the expression of sorrow. The second is that these things become a cause for arousing desire when she is prohibited from marrying, therefore, she is to avoid them so that they do not become the means for committing the prohibited. It has been reported through authentic narrations from the Prophet (God bless him and grant him peace) that he prohibited the woman undergoing `iddah from using kohl,\textsuperscript{14} while oil is not free of some kind of perfume and is used for the adornment of hair. It is for this reason that one in a ritual state of iḥrām has been prohibited from using it. He (al-Qudārī) said, “Except due to an excuse,” because there is necessity in it, but the meaning is for medicinal use not adornment. If the woman is used to applying oil and she fears pain (if avoided), and if this is more likely, it is lawful for her to use it for the usual occurrence is like the actual. Likewise silk if she needs to wear it due to an excuse; there is no harm in it.

She is not to use henna, due to what we have related nor is she to use a dress dyed with the yellow dye or with saffron, because a pleasant smell arises from such a dress.

He said: There is no hīdād for the unbelieving woman, because the claims of the shari`ah are not addressed to her. There is no ʾiḥdād for the minor either, because the communication of liability is lifted in her case.

The slave woman is to undertake hīdād, because the communication of liability (khita`b) is addressed to her for meeting the duties owed as rights of Allāh insofar as these do not annul the right of the master. This does not apply to going out of the house as it amounts to annulling the right of the master, when the right of the individual has precedence due to his need.

He said: There is no ʾiḥdād during the waiting period of the slave mother nor one following a fasīd (irregular) marriage. The reason is that

\textsuperscript{10}Qur`ān 60 : 10
\textsuperscript{11}Through divorce or khul` and so on.
\textsuperscript{12}This tradition has been reported through many sound channels and the various traditions have been recorded by most of the authentic compilations. Al-Zayla`i, vol. 3, 260.
\textsuperscript{13}This tradition has preceded in the section on offences during hajj. It is recorded by Abū Dāwūd in his Sunan. Al-Zayla`i, vol. 3, 261.
\textsuperscript{14}It is recorded by the six sound compilations. Al-Zayla`i, vol. 3, 261–62.
they have not lost the blessing of nikāh so that sorrow be exhibited, and permissibility is the original rule.

It is not proper to make a proposal of marriage to a woman undergoing the waiting period, but there is no harm in conveying one's interest in her. This is based upon the words of the Exalted, "There is no blame on you if ye make an indirect offer of betrothal or hold it in your hearts. Allah knows that ye cherish them in your hearts: But do not make a secret contract with them except in terms honourable, nor resolve on the tie of marriage till the term prescribed is fulfilled. And know that Allah knoweth what is in your hearts, and take heed of Him; and know that Allah is Oft-Forgiving, Most Forbearing." The Prophet (God bless him and grant him peace) said, "A secret proposal amounts to nikāh."

Ibn `Abbās (God be pleased with him) said that ta`rid is when the man says, "I need to get married." Sa`id ibn Jubayr (God be pleased with him) said in a well known statement, "I am interested in you" and "I wish we could be together."

It is not permitted to a woman divorced through a revocable repudiation or a woman separated irrecoverably to go out of her house during the day or night. A woman whose husband has died may go out during the day and for part of the night, but she is not to spend the night out of her house. As for the divorced woman, it is based upon the words of the Exalted, "And turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness. Those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation." It is said that fahishah (lewdness) here means going out of the house itself. It is also said that it means zina. They have to go out for the execution of the hadd.

As for the woman whose husband has died, the reason is that she does not have any kind of maintenance, therefore, she has to go out for seeking a livelihood and this may extend up to the arrival of the night. The case of the divorced woman is not similar, because her maintenance is reaching her from the wealth of her husband. If she bargained away her right to maintenance through khul', it is said that she may go out during the day.

It is also said that she is not to go out as she extinguished her own right, therefore, this extinction cannot annul the claim that is made against her.

The woman undergoing the waiting period is to stay in the house associated with her for her residence in case of the occurrence of separation or death (of husband). This is based upon the words of the Exalted, "And turn them not out of their houses." The house attributed to her is the house in which she lives, therefore, if she is visiting her relatives and her husband divorces her, she is required to return to her house and complete the waiting period there. The Prophet (God bless him and grant him peace) is reported to have said to a woman whose husband was killed, "Reside in your house till the term prescribed by the Book is complete."

If her share in the house of the deceased is not sufficient for her, and the heirs dispossess her of her share, she is to move out. The reason is that this is moving out due to an excuse, and an excuse is effective in the case of acts of worship. It is as if she is apprehensive about her goods or she is apprehensive about the collapsing of the house, or that it is on rent and she does not have enough to pay for it.

Thereafter if a separation occurs through an irrevocable divorce or three repudiations, it is necessary to have a veil between them, after which there is no harm in it (residing in the house). The reason is that the husband has made known her prohibition, unless he is a fāsiq with whom a woman is not safe. In such a case she is to leave the house, because it is an excuse. She is not to move out of the house where she has moved. It is better, however, that he move out of the house leaving her behind.

If they appoint a reliable woman who is able to act as a barrier, it is good. If the space in the house becomes constricted, the woman is to move out. His moving out, however, is better.

If a woman travels with her husband to Makkah and he divorces her thrice or dies in a place other than the city, then, if there is between her and her city a distance of less than three days travel she is to return to her city. The reason is that it does not carry the meaning of moving out, but is part of the entire duration. If the distance is equal to three days travel, then she may return if she likes or spend the time of the period there whether or not there is a wall with her. The meaning here is that when there is three days journey towards the destination as well. The reason is...
that staying at this location is more fearsome for her than moving out, except that returning is preferable so that the waiting period is spent in the house of the husband.

He said: The exception is where her husband divorces her or dies within a city. In this case she is not to come out and is to complete the waiting period. After which she is to come out if there is a relative of the prohibited degree with her. This is the view of Abū Ḥanīfah (God bless him). Abū Yūsuf and Muḥammad (God bless them) said that if there is such a mahram with her, there is no harm if she moves out of the city prior to the completion of the waiting period. They argue that such moving out is permissible in order to eliminate the torment of being a stranger and the dread of being alone, and this acts as an excuse. The prohibition pertains to travelling and this is removed with the presence of a mahram. The Imam (God bless him) argues that the waiting period bears a greater prohibition as compared to the absence of a mahram, because a woman is permitted to go out without a mahram for a distance that is less than a journey. The woman undergoing the waiting period does not have this permission. As going out for a journey is prohibited for her without a mahram there is greater priority for prohibition during 'iddah.

Chapter 74

Proof of Paternity

A man says, "If I marry so and so, she stands divorced," and he then marries her. If she gives birth to a child within six months from the day he married her, the child belongs to him and he is liable to pay dower. As for paternity, the reason is that he has legal access for intercourse, and as she brought forth a child in six months of the marriage, she did so within the minimum prescribed period from the time of divorce, therefore, the conception took place before divorce in a state of marriage. This is conceptually established as he married her while he was cohabiting with her, therefore, ejaculation corresponded with marriage. Paternity is something in which precaution has to be exercised. As for dower, the reason is that when paternity is established through him, he is legally considered to have had intercourse, and dower is affirmed due to it.

He said: The paternity of the child of a woman divorced through a revocable repudiation is established if she delivers the child within two years or more as long as she does not acknowledge the termination of her waiting period, due to the possibility of conception during the waiting period and due to the validity of her being one with a lengthy period of purity.

If she brings forth the child in less than two years, she stands irrevocably separated from her husband upon the termination of her 'iddah, and paternity of the child is established for the husband, due to the existence of conception during the period of marriage or the waiting period. He is not deemed to have taken her back due the probability of conception prior to divorce. There is also the probability of conception after this, but he will not be deemed to have retracted on the basis of doubt.
paternity, that is less than two years. Will be that he had intercourse with her during the waiting period due to the presumption is the absence of doubt. Therefore, the paternity of the child stands established, if she gives birth to it in a period that is less than nine months, according to Abu Hanifah and Muhammad (God bless them). Abu Yusuf (God bless him) said that paternity is established by way of precaution. If she is a minor, who claims pregnancy within the waiting period, which is two years. If she is a woman undergoing the waiting period a duration is fixed and that is on the basis of months. The reason is that there is a (legal) possibility of marriage. According to Abu Hanifah (God bless him), her acknowledgement does admit of disagreement, while her acknowledgement is legally more persuasive than her acknowledgement. The reason is that if the woman undergoing the waiting period is fixed, thus, by having intercourse he is deemed to have cohabited with her towards the end of the waiting period, unless she is a woman undergoing the waiting period, which is of three months. The reason is that the exception after the divorce is granted, because such intercourse is prohibited. Unless she is a woman undergoing the waiting period, unless she is a woman undergoing the waiting period, unless she is a woman undergoing the waiting period. The reason is that we cannot know about the falsification of the child having been conceived at the time of divorce, therefore, the determination of the waiting period is not established. The reason is that the law (qur'an) has ruled about the determination of the waiting period by fixing it through the method of months, therefore, it amounts to acknowledging the termination of the waiting period, as we explained in the case of the minor. We say, however, that the determination of the waiting period by fixing it through the method of months, therefore, it amounts to acknowledging the termination of the waiting period, as we explained in the case of the minor.
the termination is not a valid proof, therefore, there is a need to establish paternity ab initio, accordingly the meeting of the need is stipulated. This is distinguished from the case where the pregnancy becomes obvious or the husband issues an acknowledgement, because paternity is established prior to birth and determination is established through her testimony.1

If a woman is undergoing the waiting period after the death of her husband and the heirs deem her truthful about the birth of a child, and none of them testify to the effect, then the child belongs to the dead husband, according to the unanimous view of the three jurists. This is manifest with respect to the right of inheritance, which is solely their right, therefore, their confirmation in this respect is accepted. As for the right of child, is it established with respect to others? They (the jurists) said: If they are eligible as witnesses, the right of paternity is established due to the furnishing of proof. It is for this reason it is said that the word "testimony" is stipulated. It is also said that it is not stipulated, because the proof with respect to others is secondary to the proof with respect to the heirs through their acknowledgement. What is established as a secondary fact does not require the stipulation of conditions for it.

If a man marries a woman and she gives birth to a child within six months from the day of marriage, the paternity of the child is not established, because the conception precedes marriage, therefore, the child does not belong to the husband. If she gives birth to it within six months or more, paternity is established irrespective of the husband acknowledging it or remaining silent. The reason is that legal access to intercourse subsists and the period is complete.

If he denies the birth, it is established with the testimony of a single woman, who renders testimony about the birth, so much so that if the husband denies this he has to undertake li`ân. The reason is that paternity is established due to the continuance of the legal access for sexual intercourse. Li`ân becomes obligatory due to qadhl (false accusation of unlawful sexual intercourse), and the existence of a child is not necessary for it; it can be committed without the child.

If the woman gives birth to a child and then they differ with the husband saying, "I married you four months ago," while she says, "You married me six months ago," then the acceptable statement is hers and the child is attributed to him. The reason is that the prima facie evidence supports her, for she gives birth evidently as a result of marriage and not as a result of an unlawful act. He has not mentioned the taking of oaths, which is a matter that is disputed.

If he says to his wife, "If you give birth to a child you stand divorced," and after this a woman (midwife) testifies that she has given birth to a child, she is not divorced, according to Abū Ḥanīfah (God bless him). Abū Yusuf and Muḥammad (God bless them) said that she is divorced. The reason is that her testimony amounts to proof for this purpose. The Prophet (God bless him and grant him peace) said, "The testimony of women, in things that men are not allowed to see, is permitted." Further, when it is accepted in matters of birth, it is acceptable in matters that are based upon it, that is, divorce. According to Abū Ḥanīfah (God bless him), the wife is alleging the breaking of oath, and this cannot be established without complete proof. The reason is that the testimony of the woman in the case of birth is necessary, but it is not effective in the case of divorce for that is a separate matter.

If the husband acknowledges the pregnancy, she stands divorced without testimony, according to Abū Ḥanīfah (God bless him). According to the two jurists, the testimony of the midwife is stipulated. The reason is that it is essential to have proof for her claim of (the husband) breaking his oath, and her testimony is proof for this according to what we elaborated. Abū Ḥanīfah (God bless him) maintains that acknowledgement of the pregnancy is also acknowledgement of what it leads to, which is birth. Further, he has acknowledged her to be trustworthy, therefore, her statement is to be accepted when she gives back what is due.

He said: The maximum period for gestation is two years, due to the words of 'A`ishah (God be pleased with her), "The child does not stay in the womb for more than two years, even if it is like the shadow of the spindle." The minimum period is six months, due to the words of the Exalted, "The carrying of the (child) to his weaning is (a period of) thirty months,"4 after which the Almighty said, "And in years twain (two) was his weaning."5 This leaves six months (minimum) for the gestation

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1That is, the testimony of the midwife.

2It is ghārib and is reported by Ibn Abī Shaybah as well as by Abū al-Raḍḍāq, Al-Zayla`i, vol. 3, 264.

3It is recorded by al-Dār`qūnī and by al-Bayhaqī in their Sunan. Al-Zayla`i, vol. 3, 265–65.

4Qur`ān 46 : 15

5Qur`ān 31 : 14
period. Al-Shāfi`i (God bless him) determines the maximum period to be four years, and the proof against him is what we have related. It is obvious that she (`A'ishah) stated this on the basis of transmission, because reason does not lead to this conclusion.

Where a person marries a slave woman then divorces her and thereafter buys her, if she brings forth a child in less than six months from the date he bought her, he is bound by it (for purposes of paternity), otherwise he is not bound to accept it. In the first situation (less than six months), it is the child of a woman undergoing 'iddah, the conception being prior to purchase, while in the second case it is the child of an owned slave, because the conception is to be attributed to the closest time. It is, therefore, necessary to file a claim of paternity. This is the case if it was a single irrevocable repudiation, khul' or a revocable repudiation. If, however, two repudiations were pronounced, the paternity will be established for up to two years from the time of divorce, for she was prohibited for him with an enhanced prohibition, therefore, the conception cannot be attributed to a period other than what was prior to it, because she cannot become permitted through purchase.

If a man says to his slave woman, “If there is a child in your womb, it is due to me,” and a woman testifies to the birth of a child, she becomes his umm al-walad, because the need is to determine the existence of the child. This is established through the testimony of the midwife, on the basis of consensus (ijma`).

If a man says about a male slave, “He is my son,” and thereafter dies after which the mother of the slave appears and says that she is his wife, then she is his wife and the boy his son; they will both inherit from him. In the book al-Nawādir, this response is deemed to be istihlās. Analogy dictates that she is not entitled to inheritance, because just as paternity is established through a valid nikāḥ, it is established through an irregular nikāḥ as well as through unlawful intercourse and lawful ownership; therefore, his statement does not amount to acknowledgement of marriage. The reasoning for istihlās is that the issue applies where the woman is known to be free and that she is the mother of a slave. A valid marriage determines paternity both under the law and in practice.

If it is not known that she is a freewoman, and the heirs say, “You are an umm al-walad,” then there is no inheritance for her. The reason is that proof of freedom on the basis of the dar is admissible for refuting the claim of slavery, but not for establishing inheritance. Allāh knows best.

Chapter 75
Right to Custody of Child

If a separation occurs between the spouses, then the mother has a superior right to the custody of the child, due to the report that a woman said, “O Messenger of Allāh, this child of mine, for him my belly is like a cradle, my lap like a tent, and my breast like a beaker, but now his father wants to separate him from me.” The Prophet (God bless him and grant him peace) said, “You have a superior right to him, as long as you do not wed.” Further, the reason is that the mother is more loving and more capable of bringing up (hadānah) the child. Accordingly, there is greater justice in giving the child to the mother. It is this toward which Abū Bakr al-Ṣiddīq (God be pleased with him) pointed when he said, “Her saliva has greater blessing in it than the nectar and honey you will give him, O Umar.” He said this when a separation occurred between him and his wife making the statement when a large number of Companions (God be pleased with them) were present. The maintenance is upon the father as we shall mention.

The mother, however, is not to be forced to undertake hadānah, because it is possible that she may become unable to bring up the child.

If the child does not have a mother, then the mother’s mother, however remote she might be, has a higher priority than the father’s mother. The reason is that this form of wilāyah (authority) belongs to the mothers.

1 It is recorded by Abū Dāwūd in his Sunan. Al-Zayla'i, vol. 3, 266.
2 It is gharib in these exact words, but it has been recorded by Ibn Abī Shaybah and others. Al-Zayla'i, vol. 3, 266.
3 Includes the case where she does not wish to take care of the child
If there is no mother's mother (or her mother) then the father's mother is better than the sisters, for they too are mothers and for which reason they are granted one-sixth of the inheritance being more loving towards the offspring.

If the child does not have a paternal grandmother, then the sisters have a higher priority as compared to the paternal and maternal aunts, for they are the daughters of both parents. It is for this reason that we have given them precedence for purposes of inheritance. In one narration it is said that the maternal aunt has priority over a sister from the father's side, due to the words of the Prophet (God bless him and grant him peace), who said, "The maternal aunt is a mother." It is also said that it is due to the words of the Exalted, "And he raised his parents high on the throne," where she was his maternal aunt.

The sister from both father and mother has been given precedence for she is more loving thereafter the sister from the mother's side followed by the sister from the father's side, because they have a greater right on account of the mother.

Thereafter, the maternal aunts are preferable to the paternal aunts by giving preference to the close relationship with the mother. They descend just like we made the sisters descend. This means preference to those with relationship from both sides and then according to the relationship with the mother. Thereafter the descending scale for the paternal aunts is the same.

And each one out of these who marries extinguishes her right, due to what we have related, and also because the husband of the mother, when he is a stranger, will give him what is less and will look down upon him, which is not in the welfare of the child.

He said: The exception is the paternal grandmother when her husband is the paternal grandfather, for he stands in the place of the father, and will keep the welfare of the child in view. Likewise each husband who is within the category of the prohibited degree, due to the existence of the love, taking into account the nearness of kin.

For a woman who has lost her right due to marriage, the right will revert if the marriage relationship is dissolved, because the obstacle stands removed.

If the child does not have a woman among the relations and the men disagree about him, then the preference is to be given to one who is closest on the basis of 'asabiyyah (residuaries), because wilayah belongs to the nearest of kin, and the grades have been identified at the relevant place. The infant girl, however, is not to be given to male relatives who are not within the prohibited degree, like the emancipating master and paternal uncle's son in order to avoid temptation.

The mother and the maternal grandmother have a greater right to the custody of a boy until he is able to eat, drink, dress, and perform istinja' all by himself. In al-Jam'a' al-Saghir the statement is until he is independent and is able to eat, drink and dress up all by himself. The meaning of both statements is the same, as being completely independent is possible with the ability to perform istinja'. The reasoning is that once he is independent, he needs to be disciplined and to be taught the manners and habits of men. The father is more capable of disciplining him and give him training for the cultivation of the mind. Al-Khaṣṣaf (God bless him) determined the age of independence to be seven years going by the majority of the cases.

The mother and the maternal grandmother have a superior right for the custody of the girl until she starts menstruating. The reason is that after becoming independent she is in need of learning the ways of women and the mother is more capable of imparting such training. After puberty, she is more in need of security and protection, and the father is stronger in this and in providing guidance. It is narrated from Muhammad (God bless him) that she is to be given to the father when she reaches the age of desire, for the need for protection is realised then.

Women other than the mother and maternal grandmother have a greater right to the girl until she reaches the age of desire. In al-Jam'a' al-Saghir until she is independent. The reason is that these women cannot employ her in work, and for this reason cannot give her services on hire, therefore, the purpose is not attained, as distinguished from the mother and maternal grandmother as they are able to do so under the law (shar').

The slave woman, when she is emancipated by the master, as well as the umm al-walad when manumitted, are like the freewoman in their
rights of custody over the child. The reason is that they are both free-women at the time of accrual of the right. They do not have the right to custody of the child prior to their emancipation, because of the inability to provide care to the child, being occupied with the service of the master.

The Dhimmi woman has a right to the custody of her children till such age that they do not understand the difference between religions or till the time that there is an apprehension that they will become unbelievers, due to the loving care required prior to such age and the likelihood of injury after it.

The boy and the girl do not have an option (in all this). Al-Shafi'i (God bless him) said that they do have an option, because the Prophet (God bless him and grant him peace) granted them such an option. We argue that the child, due to lack of discretion, will choose the person who is more lenient and who gives a free hand for play. In such a case loving care is not realised. It has been proved as authentic that the Companions (God be pleased with them) did not grant an option. As for the tradition, we would say that the Prophet (God bless him and grant him peace) said, “O Lord, guide him,” and with his prayer the child was guided in his choice. In the alternative, the tradition will be construed to apply to a child who is a major.

75.1 LEAVING THE CITY

If a divorced woman wishes to leave the city along with her child, then she does not have the right to do so, due to the injury in this to the father. Unless she is going with the child to her hometown, and it is a town where the husband married her, because the husband made that location binding for himself according to custom and the law (shar'). The Prophet (God bless him and grant him peace) said, “He who establishes family relations in a city is one of them.” It is recorded by Abu Diwud. Al-Zayla’i, vol. 3, 269.

Indicates in the Book that she does not have a right to do so. This is the narration of the Book of Divorce. It is, on the other hand, stated in al-Jami’ al-Saghir that she does have such a right. The reason is that when a contract takes place in a certain location, it gives rise to the operation of the rules there, just like sale gives rise to the delivery of goods at the place of contract, and among these rules is the right to the custody of the child. The reasoning underlying the first view is that marriage in a strange land is not, according to custom, an undertaking to reside there. This is the correct view. The conclusion is that it is necessary to have both conditions together, that is, the homeland and the fact that the marriage took place there.

All this applies when there is between the two towns a sufficient distance. If the towns are close by that it is possible for the father to see his child and then be able to spend the night at his own house, there is no harm in her moving there. The same response is given for two villages. If she moves from a village of the city to the city, there is no harm. This is in consideration of the welfare of the minor so that he can grow up learning the culture of the city. There is no harm in this for the father. In the reverse situation there is harm for the minor if he grows up among the villagers and adopts the habits of the people of the countryside; in such a case she is not to move to the village.

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It is recorded by the compilers of all the four Sunan. Al-Zayla’i, vol. 3, 268.

It has preceded, for example, in the case where Abu Bakr (God be pleased with him) delivered the child to the mother. Al-Zayla’i, vol. 3, 269.

It is recorded by Abu Dawud. Al-Zayla’i, vol. 3, 269.

It is recorded by Ibn Abi Shaybah in his Musnad. Such a person is to offer the prayer of the resident there. Al-Zayla’i, vol. 3, 471.
Chapter 76

Nafaqah (Maintenance)

He said: It is obligatory for the husband to provide maintenance to his wife whether she is Muslim or an unbeliever, when she is ready to stay at the residence (to be provided), in which case he is under an obligation to provide maintenance, clothing and residence. The basis for this are the words of the Exalted, "Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him," and His words, "But he (the father of the child) shall bear the cost of their food and clothing on equitable terms." In addition there is the saying of the Prophet (God bless him and grant him peace) on the occasion of the Farewell Pilgrimage, "They have a right over you for their food and clothing according to what is customary." Further, maintenance is the compensation for the restraints placed upon her. Each person who is restricted to meeting obligations for another is entitled to maintenance. The basis for this is the office of the qādī and the official in the case of zakāt. In these evidences there are no details, therefore, the Muslim woman and the unbelieving woman are equal for this purpose.

In the provision of maintenance the status of both shall be considered. This feeble servant has to say that this is the investigation of Khāṣṣāf (God be pleased with him) and the fatwā today is upon this. The meaning in detail is that if they are enjoying financial ease, the maintenance of the well off is to be provided, but if the spouses are in financial straits, the

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1 Qur'ān 65:7
2 Qur'ān 2:233
3 This has preceded as a lengthy tradition from Jābir (God be pleased with him). Al-Zayla'i, vol. 3, 271.
maintenance of those who are hard up is to be provided. Al-Karkhi (God bless him) said that the status of the husband alone is to be taken into account. This is also the view of al-Sha`f`i (God bless him). The basis are the words of the Exalted, "Let the man of means spend according to his means."4

The reasoning for the first view is the directive of the Prophet (God bless him and grant him peace) to Hind the wife of Abú Sufyán, "Take what is fair from the wealth of your husband what is sufficient for you and for your child."5 In this he considered her status and that is the underlying fiqh. Maintenance is obligatory in accordance with what is sufficient and a poor woman does not need the maintenance of those who enjoy financial ease. Accordingly, the meaning of excess does not apply. As for the text, we give a ruling according to what it requires and the requirement is that he is to pay according to what is within his capacity at the time and the remaining becomes a debt attached to his liability. The meaning of the word ma`ruf in the text is "the average," and that is obligatory. This elaborates that there is no meaning in the fixing of the quantity as has been held by al-Sha`f`i (God bless him) saying that for the well off it is two mudds, for the person in financial straits it is one mudd, while for one having reasonable means it is one and one-half mudd. The reason is that what is made obligatory by way of being adequate does not admit of quantification according to the shar` (law).

If she refuses to submit herself to her husband until she is paid her dower, she is still entitled to maintenance, because she refused on the basis of a right. Thus, the absence of being restrained is due to a cause that originated with him, therefore, the right is deemed not to have been lost.

If the woman goes away, she is not entitled to maintenance until she returns to his house, because the loss of confinement is due to her. If she returns the confinement will be renewed and maintenance will be revived. This is distinguished from the situation where she refuses to have sexual intercourse while remaining in her husband's house as confinement persists and the husband is able to coerce her to have intercourse.6

4`Qur'ān 65: 7
5It has been recorded by all the sound compilations, except al-Tirmidhi, Al-Zayla`i, vol. 3, 271.
6This is being considered marital rape today.

If she is a minor with whom intercourse is not undertaken, then there is no maintenance for her, because the denial of cohabitation is due to a cause found in her. Obligatory confinement is such that it becomes a means to the entitled purpose through marriage and that is not found here, as distinguished from the case of a woman who is ill, which we will elaborate. Al-Sha`f`i (God bless him) said that she is entitled to maintenance for he considers her the subject-matter of ownership as is the case with an owned slave woman through lawful ownership. We maintain that the dower paid is compensation for ownership, and two counter-values cannot be combined for one counter-value, thus, she has dower and not maintenance.

If the husband is a minor who is not old enough to have intercourse, while she is grown up, she is entitled to maintenance from his wealth. The reason is that submission is complete on her part and the inability is from his side and he is deemed equivalent to the husband with an amputated organ or one who is impotent.

If a woman is imprisoned for non-payment of a debt, there is no maintenance for her. The reason is that loss of confinement to the house is due to her because of the demand by the creditor. If it is not due to her as when she is unable to pay, the cause is still not due to him. Likewise, when she is forcefully abducted by a man who flees with her. According to Abú Yūsuf (God bless him) she is entitled to maintenance, but the fatwā today is according to the first view. The reason is that the loss of confinement is not due to him so the confinement may be determined to persist. Likewise if a woman proceeds on hajj with a mahrām, because the loss of confinement to the house is due to her. It is narrated from Abú Yūsuf (God bless him) that she is entitled to maintenance, because undertaking a definitive obligation amounts to an excuse, however, he is obliged to pay the maintenance of one resident and not that of one going on a journey, for she is entitled to that alone. If the husband travels with her for hajj she is entitled to maintenance by agreement. The reason is that confinement continues with her being in his control, but the maintenance of the resident is due and not that of one on a journey, nor is rent due on the basis of what we said.

If she falls ill in the house of the husband, she is entitled to maintenance. Analogy dictates that there be no maintenance for her, because illness prevents intercourse, as there is loss of confinement for purposes of intercourse. The reasoning underlying istihsān is that the husband can
come close to her and touch her and she looks after the house, and the prevention is due to an obstacle that is similar to menstruation. According to Abū Yūsuf (God bless him) if she submits herself and thereafter falls ill, maintenance is obligatory due to the realisation of submission. If, however, she falls ill and then submits herself, it is not obligatory, because submission was not sound. The jurists said that this is good (as istiḥāṣ) and in the Book are statements that indicate this.

The husband, if he is well off, is obliged to pay maintenance for her as well as for her servant. The meaning here is the elaboration of the maintenance of the servant. Consequently, it is stated in some manuscripts, "It is made obligatory for the husband, if he is well off, to pay the maintenance of her servant." The construction placed on this is that providing adequately for her is obligatory. Providing for the servant is part of giving submission was not sound. The jurists said that this is good (as istiḥāṣ) and in the Book are statements that indicate this.

Maintenance for more than one servant is not to be made obligatory. This is the view according to Abū Ḥanīfah and Muhammad (God bless them). Abū Yūsuf (God bless him) said that it is to be made obligatory, because she needs one servant for household chores and another for dealing with matters outside the house. The two jurists argue that the same person can look after both tasks, therefore, there is no need for two persons. The reason is that if he were to meet her needs himself it would be deemed sufficient, likewise if one person were to stand in his place. They said that the financially well off husband is obliged to provide the same maintenance for the servant that a husband in financial straits provides for his wife, which is the minimum subsistence. His statement in the Book, "If he is enjoying financial ease," is an indication that there is no obligation to pay the maintenance of a servant if he is in financial straits. This is a narration of al-Hasan from Abū Ḥanīfah (God bless him), which is the correct view as distinguished from what Muhammad (God bless him) said. The reason is that the obligation upon the husband in financial straits is to pay the minimum subsistence and this is one where the wife serves herself.

If a person is unable to pay his wife's maintenance, they are not to be separated rather it will be said to her, "Borrow against the liability of your husband." Al-Shāfi`i (God bless him) said that they are to be separated, because he has failed to retain her in an equitable way. The qādī stands in his place in pronouncing the separation, as is the case of the person with an amputated organ or the impotent person. In fact, this case has a higher priority for separation, because maintenance is a much stronger thing. Our argument is that (by separation) his right stands annulled and her right is delayed. The first is stronger with respect to injury, and this (the lesser injury) is so as maintenance becomes a debt imposed by the qādī, thus, it can be recovered in the next period. The loss of a right to wealth is servient in the case of marriage and is not attached to what is the main purpose, which is procreation. The benefit of the instruction to raise a loan, along with judicial support, is that she can transfer the claim of the creditor to the husband. If, however, the raising of the loan is without the directive of the qādī, the debt will be claimed from her and not the husband.

If the qādī awards her the maintenance of a person in financial straits, but then he becomes financially well off after which she files a claim for more, the maintenance of one in financial ease is to be completed for her. The reason is that maintenance varies with financial ease and hardship, and what he awarded was maintenance that is not obligatory (now), thus, if the husband's financial status changes, she has a right to demand her full right.

If the husband does not provide her with maintenance for a certain period, and she demands this maintenance from him, then there is nothing for her, unless the qādī had determined maintenance for her or if she had made a settlement with the husband for part of the past maintenance, in which case the qādī will award her the past maintenance. The reason is that maintenance is a grant in our view and not a counter-value, as has preceded, therefore, the obligation is not strengthened except through adjudication. It is just like a gift, which does not become obligatory except by a strengthening factor and that is possession. Settlement (sulḥ) has the same status as adjudication, because his authority over himself is stronger than the authority of the qādī over him. This is distinguished from dower, which is a counter-value.

If the husband dies after an award of maintenance is pronounced against him, and several months pass, the claim of maintenance lapses. Likewise if the wife dies. The reason is that maintenance is a grant and grants lapse on account of death, just as a gift becomes void with death prior to taking possession. Al-Shāfi`i (God bless him) said that it is converted into a debt prior to adjudication and is not extinguished because of death. The reason is that it is a counter-value in his view, and is to be
treated like all other debts. The response to this we have already elaborated.

If he grants her in advance the maintenance of a year, that is, hastens payment, and thereafter dies, nothing is to be recovered from her. This is the view according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muhammad (God bless him) said that the maintenance of the period that has passed is to be calculated and the remainder is to be credited to the (estate of the) husband. This is also the view upheld by al-Shāfī`ī (God bless him). The same disagreement governs clothing, because the wife has hastened it as a counter-value in conformity with what is due to her as a result of confinement to the house. The entitlement stands annulled due to death, therefore, the counter-value is diminished in the same ratio, just like the subsistence paid to the qāḍi and the grants made to the fighters. The two jurists argue that it is a grant and it is followed by possession. There is no recovery of grants after death as their hukm (legal effect) stands terminated, as in the case of a gift. Consequently, if the maintenance is lost without having been consumed by the woman, it is not to be recovered from her on the basis of consensus (ijmā‘). It is related from Muhammad (God bless him) that if she takes possession of the maintenance of a month or what is less nothing is to be recovered from her as it is insignificant and takes the rule of what is consumed currently.

If a slave marries a freewoman then her maintenance becomes a debt for which he can be sold. The meaning is that if he marries her with the permission of the master. The reason is that it is a debt that becomes obligatory as his liability due to the existence of its cause. Its existence becomes evident with respect to the master, therefore, it becomes linked to his slave like the debt of trade in relation to the slave authorised to trade. It is up to him to ransom him with payment, because the wife's right is attached to maintenance and not to the corpus of the slave. If the slave dies, the claim is extinguished. Likewise if he is killed according to the authentic narration, because it was a grant (and not a debt).

If a freeman marries a slave woman and her master lets her stay with him at his house, then he is liable for maintenance, because confinement to the house stands realised. If he does not permit her to stay with the husband then there is no maintenance, due to the absence of confinement. Permission to stay with the husband is where he leaves her alone at the husband's residence and does not employ her for services. If he employs her after letting her stay there, maintenance is extinguished, because confinement is lost. Letting her stay exclusively with the husband is not binding on him in the case of marriage, as has preceded. If, however, the woman serves the master occasionally without his employing her, maintenance is not extinguished for he did not employ her so as to amount to her return. The mudābbarah (to be set free upon the death of the master) and the slave mother are like the married slave woman in this respect. Allāh, the Exalted, knows what is correct.

76.1 Right to Residence

It is the liability of the husband to make her reside in an independent house in which there is no one else who belongs to his family, unless she chooses that herself. The reason is that residence is part of what is deemed adequate for her, therefore, it is obligatory like maintenance. Accordingly, Allāh has made it obligatory along with maintenance. If the Almighty has made it obligatory as her right, then he has no right to make her share it with another. The reason is that such sharing is injurious for her as she cannot be carefree about her things, it prevents her free interaction with her husband as well as from cohabitation. The exception is where the woman chooses this herself for then she is agreeing to the reduction of her rights.

If he has a child from another, the husband does not have the right to make it reside with her, due to what we have elaborated. If he makes her reside in a room within a house, where it can be closed it would be sufficient as the purpose has been achieved.

He has a right to prevent her parents, children from another man, and her relatives from visiting her in her house. The reason is that the residence is in his ownership and he has a right to prevent entry into his property. He is not to prevent them (her relatives) from looking at her and to speak to her at any time they choose, as that will amount to the severing of the womb. In letting them do so there is no injury being caused to him. It is said that he is not to prevent them from visiting her or speaking to her, but he may prevent them from staying on and constant presence, because their prolonged stay and speech is detrimental. It is also said that he is not to prevent her from going out to visit her parents nor to prevent them from visiting her each Friday. In the case of other persons, the number is linked to one year.
If the husband disappears and he has wealth that is in possession of another, who acknowledges it as well as the marriage contract, the qāḍi is to award maintenance from this wealth for the wife of the missing husband, the minor children and his parents. Likewise if it is in the knowledge of the qāḍi even though the man (in possession) denies it, the reason is that when he acknowledged the existence of marriage as well as the deposit, he acknowledged that she is entitled to take it, because she has a right to take from the wealth of her husband without his consent. The acknowledgement of the person in possession is admissible against him (the husband), especially in this case. If he denies either of the two facts, the testimony of the woman will not be admissible against him (the custodian), because the custodian is not a party in the issue of establishing the relationship of marriage against him nor is the woman a party in proving the rights of the person missing. If this (marriage) is established in his case, the proof will also operate against the missing person. Likewise if the wealth in his possession is held by way of ṭudārābah. The same response is given in the case of a debt. All this applies if the wealth is of a type that can be claimed through her right, like dinārs, dirhams, food or clothing that is suitable for her right. If, however, the wealth is of another species, maintenance is not to be awarded as for that he will need to sell the goods, and the wealth of the missing person cannot be sold by agreement. In fact, according to Abū Ḥanīfah (God bless him) it cannot be sold even in the case of one present, therefore, the same applies to one absent. As for the two jurists, the reason is that he adjudicates against the person present when he is denying it, but he cannot adjudicate against a person absent for he does not know whether he is denying it.

He said: He is to take a surety from her for the amount paid, in the interest of the person absent, because it is possible that she has already taken the maintenance or her husband has divorced her and her waiting period is over. He (the Author) distinguished between this case and the case of the inheritance when it is divided between the heirs in the presence of witnesses (confirming them as heirs) and they have not said that they know of another heir. In such a case a surety is not obtained according to Abū Ḥanīfah (God bless him). The reason is that in this case the person for whom surety is taken is unknown, while in this case he is known, and it is the husband. She is also required to take the oath by Allāh for what she is paid to preserve the interest of the missing person.

76.2 Divorceses, Widows and Other Cases

If a man divorces his wife, then she has maintenance and residence during her waiting period whether the divorce is revocable or irrevocable. Al-Shāfī’ī (God bless him) said that there is no maintenance for the woman separated irrevocably, unless she is pregnant. As for the one whose divorce is revocable, her nikāḥ still continues, especially in our view, for it is lawful for him to have sexual intercourse with her. As for one whose divorce is irrevocable, the reasoning underlying his view is based upon what is reported from Fātimah bint Qays, who said, "My husband divorced me thrice, and the Messenger of Allāh (God bless him and grant
him peace) did not award me residence or maintenance." He has no rights of ownership with respect to her, and maintenance is based upon ownership. It is for this reason that maintenance is not obligatory for the woman whose husband has died due to the lack of ownership. This is distinguished from the case where she is pregnant, because that we have identified through the text, which in the words of the Exalted is, "And if they are pregnant, then spend (your substance) on them until they deliver their burden." Our argument is that maintenance is made in lieu of confinement to the house, as we have mentioned, and confinement subsists with respect to the main purpose of nikāh, which is procreation. As the waiting period is obligatory for the preservation of progeny, it leads to the obligation of maintenance due to which she has residence too on the basis of consensus (ijmā'). It is as if she has become pregnant. The tradition of Fātimah bint Qays was rejected by 'Umar (God be pleased with him). Thus, he said: "We will not cast aside the Book of our Lord nor the Sunnah of our Prophet for the statement of a woman about whom we do not know whether she is telling the truth or is lying, has retained it in memory or forgotten. I heard the Messenger of Allah (God bless him and grant him peace) saying, 'For the woman divorced thrice is maintenance and residence as long as she is in her waiting period.'" Her tradition was also rejected by Zayd ibn Thabit, Usāmah ibn Zayd, Jābir and 'A'ishah (God be pleased with them all).

There is no maintenance for the woman whose husband has died. The reason is that her confinement is not due to the right of the husband rather it is due to the right of the law (šarī'), and her staying confined is worship on her part. Do you not see that identification of the vacation of the womb is not taken into account in this so that taking note of menstruation is not stipulated in her case. Accordingly, maintenance is not made obligatory for her. Further, maintenance becomes due in phases, and he has no ownership after death, thus, it cannot be imposed on the ownership of the heirs.

In the case of each separation that occurs due to an offensive act of the woman, like apostasy or kissing the son of the husband (stepson), there is no maintenance for her. The reason is that she has confined herself without lawful right, and it is as if she has become rebellious. This is distinguished from the case of dower after consummation of marriage, because submission is found through intercourse in lieu of dower. It is also distinguished from the case where separation has occurred on account of her, but without an offence, like the option of emancipation or the option of puberty as well as separation due to lack of proportional status. The reason is that in such a case she has confined herself due to a right, and such a case does not extinguish maintenance, like the situation where she keeps herself confined for obtaining her dower.

If he divorces her thrice and then, God forbid, she becomes an apostate, her maintenance is extinguished, but if she lets the son of her husband have physical access to her, she is entitled to maintenance. The meaning here is that she lets him have access to her after divorce, because separation occurs due to the three repudiations. Apostasy and physical involvement have no operation in this case, except that the apostate female is kept in confinement till she repents. There is no maintenance for one confined, and one who has physical contact is not kept in confinement. It is for these reasons that the distinction is found.

76.3 MAINTENANCE OF MINOR CHILDREN

The maintenance of minor children is the liability of the father and no one else participates in this with him, just like no one else participates with him in the maintenance of the wife. This is due to the words of the Exalted, "But he (the father of the child) shall bear the cost of their food and clothing on equitable terms." The nāwī  is the father. If the child is breast-fed, then the mother is not obliged to breast-feed him, due to what we elaborated that adequate subsistence is the liability of the father. The wages of breast-feeding are like maintenance. Further, the reason is that she is probably not able to do so due to an inability found in her, therefore, compelling her to do so has no meaning. It is said in the interpretation of the words of the Exalted, "No mother shall be treated unfairly on account of her child," that she is obliged to do so despite her reluctance. This is what we have mentioned as an elaboration of the rule, which means that if someone is found who will breast-feed

\[\text{Qur'ān 65:6}\]

\[\text{Qur'ān 2:233}\]
the child. If, however, no one is found to feed the child, the mother is to be compelled to feed the child for the survival of the child and its loss.

He said: The father is to hire the woman who will feed the child where the mother is. As for the hiring by the father, it is so because hiring is his duty. His statement "where the mother is" means if she so desires as bringing up the child is her responsibility.

If he hires her to feed his child when she is his wife or one who is undergoing the waiting period on account of him, then this is not valid. The reason is that feeding is her moral obligation. Allah, the Exalted, has said, "The mothers shall give suck to their offspring," unless she offers an excuse due to the possibility of her inability. If she undertakes it for wages, her ability to do so becomes apparent when the act is obligatory upon her. Thus, taking wages for such an act is not permitted. In the case of a woman undergoing the waiting period after a revocable divorce, this is the position according to a unanimous narration (from our jurists), because the marriage subsists. Likewise there is one narration about the woman separated irrevocably. In another narration it is said that hiring her is valid, because the marriage stands dissolved. The reasoning of the first narration is that the marriage subsists for purposes of some ahl al-kalam. If he hires her when she is still married to him or is in the waiting period for feeding a child of his from another woman, it is valid, because it is not part of her duties. If her waiting period is over and then he hires her, that is, for the feeding of his child it is valid, because the marriage is dissolved in all respects and she is now like a stranger.

If the father says: "I will not hire her (the mother)," and brings another woman, but then the mother agrees on similar wages or without wages, then she has a greater right to feed the child. The reason is that she has more love for the child and the welfare of the child requires that he be given to her (for nursing). If, however, she demands higher wages, the father is not to be compelled to hire her, in order to avoid loss to the father. It is this that has been indicated by the words of the Exalted, "No mother shall be treated unfairly on account of her child, nor the father on account of his child," that is, by making it binding upon him to accept her on wages higher than those of a stranger.

76.4 MAINTENANCE FOR PARENTS AND GRANDPARENTS

A man is under an obligation to spend on his parents, his grandfathers and grandmothers, if they are poor, even if they profess a different faith. As for the parents, it is based upon the words of the Exalted, "Bear them company in this life with justice (and consideration)." The verse was revealed in the case of unbelieving parents. It is not part of justice and fairness to live enjoying the blessings of Allah and to leave them to die of hunger. Likewise for the grandfathers and grandmothers for they too are like fathers and mothers. It is for this reason that the grandfather stands in the place of the father at the latter's death. Further, they were the cause of his life and that gives rise to their survival with the same status as parents. Poverty is stipulated, however, as the possession of wealth lends greater priority to the obligation of maintenance from their own wealth as compared to its obligation from the wealth of another. Maintenance is not prevented due to a difference in religion on the basis of what we have recited.

Maintenance does not become obligatory with a difference in religion, except for the wife, parents, grandfathers, grandmothers, children and grandchildren. As for the mother it is due to what we have recited:

11Qur'an 2:233
12Qur'an 31:15
13Which are the waiting period and the obligation of providing residence.
14Qur'an 2:233
and that it is obligatory due to a valid contract that leads to her confinement as a duty that has a purpose. All this is not related to a common religion. As for the others, because being a part is established and the part of a man is like the man himself, just as it does not prevent spending on himself due to his unbelief, it does not prevent the maintenance of his part. The exception is that if they are the enemy, their maintenance is not obligatory on a Muslim even when they have come over on safe-custody (aman). The reason is that we have been prohibited to be kind to those who fight with us due to our din.

The Christian is under no obligation to provide maintenance for his Muslim brother, likewise a Muslim is under no obligation to provide maintenance for his Christian brother. The reason is that maintenance is linked to inheritance by the text as distinguished from manumission through ownership for it is annulled due to kinship and being in the prohibited degree of marriage on the basis of a tradition. Further, kinship gives rise to a bond that is further strengthened with the similarity of religion. The continued ownership (of relatives) is stronger in cutting off the bonds of the womb than the non-payment of maintenance. Accordingly, we have adopted for what is stronger the true underlying cause ('illah), and in the case of the lesser case the 'illah that strengthens. It is for this reason that the distinction is made.

No one is to participate with the child in the provision of maintenance for his parents. The reason is that they have priority in the wealth of the child on the basis of a text, while they do not have such priority in the wealth of another, and also because the child is the closest person to them, thus, he is the first from whom their maintenance is claimed. The obligation falls equally upon the males and females according to the most authentic narration (zahir al-riwayah), which is correct as the meaning includes both.

Maintenance is due for each relative within the prohibited degree of marriage if such relative is a poor minor, or is a poor major woman or is a major male who is poor and has a chronic illness or is blind. The reason is that maintaining the bond of the womb is obligatory in the case of close relatives and not distant relatives, and the distinguishing factor is that they be in the prohibited degree of marriage. Allâh, the Exalted, has said, “An heir shall be chargeable in the same way.” In the recitation of ‘Abd Allâh ibn Mas‘ûd (God be pleased with him), “An heir within the prohibited degree of marriage shall be chargeable in the same way.” Thereafter, it is necessary that attributes like need, minority, and being a female be found. Chronic illness and blindness are signs of need due to the existence of the inability. One who is able to earn is well off due to his earning as distinguished from the parents as the labour of earning is linked with them. The child is commanded to eliminate injury to them, therefore, maintenance is made obligatory despite their ability to earn.

The share of maintenance is in proportion to the share of inheritance and the person will be compelled to pay it. The reason is that mentioning the heir in the text is an indication for considering the (share in) inheritance. Further, liability is in proportion to revenue, while compelling is for the satisfaction of the right of one to whom it is due.

The maintenance of a major daughter and a son, who is chronically ill, is upon the parents in thirds: on the father is two-thirds and on the mother one-third. The reason is that inheritance is due to them in this proportion. This feeble servant says: This is what is related through the narration of al-Khassâf and al-Hasan (God bless them). In the Zahir al-Riwayah the entire liability is that of the father due to the words of the Exalted, “But he (the father of the child) shall bear the cost of their food and clothing on equitable terms.” Here the chronically ill is like a minor child. The distinction on the basis of the first narration is that the authority of wilâyâh and the burden of support are gathered in the father so much so that he is liable for his sadaqat al-fitr (amount due on id al-fitr), therefore, maintenance is also made specific to him. The major child is not like them due to the lack of wilâyâh in his case, therefore, the mother participates in this with him. For persons other than the father, the ratio of inheritance is taken into account, so that the maintenance of the minor is upon the mother and the grandfather in thirds, while the maintenance of the brother in financial straits is upon various sisters who are well off in fifths in accordance with inheritance, except that what is considered is the eligibility for inheritance on the whole and not its actual disbursement. Thus, if the person in financial straits has a maternal uncle and the son of

18 It is recorded by al-Nâsî'î to the effect that whoever comes to own a relative in the prohibited degree of marriage, such relative is set free on his account. Al-`Ayni, vol. 5, 702.
If the parents hold wealth belonging to the missing son and they spend on themselves from it, they are not to be held liable for compensation, because they have satisfied their claim as their maintenance becomes obligatory prior to adjudication, as has preceded. They have taken a species compatible with their right.

If a stranger holds his wealth and he pays their maintenance without the permission of the qādi, he is held liable. The reason is that he has undertaken a transaction in the wealth of another without authority, because he is a deputy merely for safe-custody of the wealth. This is distinguished from the case where the qādi orders him to do so, as his directive is binding due to his general authority. When he is held liable, he cannot have recourse to the person who took possession of the wealth, as he came to own it through ḍamān and it is as if he made a donation.

Where the qādi makes an award of maintenance for the child, parents, and the next of kin, and a certain period passes over such award, it lapses. The reason is that the maintenance of these persons becomes obligatory to meet a need and is not due when financial ease exists, and such ease is found with the passage of time. This is distinguished from the maintenance of the wife, when the qādi makes an award, because that is obligatory even with financial ease, and is not extinguished with the attainment of financial ease in the past days.

The exception is where the qādi has allowed (the relatives) to raise a loan in the person's name. The reason is that the qādi has general authority and his order becomes the order of the missing person, thus, the debt becomes his liability that does not lapse with the passage of time. Allāh, the Exalted, knows what is correct.
76.5 MAINTENANCE FOR SLAVES

The master is under an obligation to spend for the maintenance of his slave woman and male slave, due to the words of the Prophet (God bless him and grant him peace) about slaves, "They are your brothers whom Allâh, the Exalted, has made to fall under your authority. Feed them out of what you eat and clothe them out of what you wear, and do not torment the servants of Allâh."\(^{19}\)

If he refuses to do so and they have a means of earning, they should earn and spend on themselves, because in this is the securing of the interests of both sides, as it will keep the owned slave alive and remain within the ownership of the master.

If they do not have a means of earning like a slave who is chronically ill or a slave girl whose services are usually not let out on hire, then the master will be compelled to sell them. The reason is that they are eligible for maintenance, and in their sale is the satisfaction of their right as well as the survival of the right of the master by substitution (the price). This is distinguished from the maintenance of the wife as that becomes a debt that can be delayed. The maintenance of the slaves does not become a debt, and is annulled. It is also distinguished from the remaining animal species, because they are not eligible for maintenance, therefore, the owner cannot be compelled to spend on them, except that he has been ordered to do so with respect to what is between him and Allâh, the Exalted. The reason is that the Prophet (God bless him and grant him peace) has prohibited the tormenting of animals, and this occurs by not spending on them. He also forbade the wasting of wealth, and by not spending leads to the wasting of animals. It is narrated from Abû Yûsuf (God bless him) that the owner is to be compelled, however, the correct view is the one we have stated. Allâh knows best.

\(^{19}\)It is recorded by al-Bukhârî and Muslim. Al-Zayla'i, vol. 3, 276.
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Chapter 77

The Legal Status of Emancipation

Emancipation is a transaction that is recommended. The Prophet (God bless him and grant him peace) said, "If any Muslim emancipates a believer, Allāh will protect from the Fire each limb of his for each limb of the person set free." It is for this reason that they deemed recommended that a man emancipate a male slave, and a woman set free a female slave so that the comparison of limb for limb may be realised.

The Author (God be pleased with him) said: Emancipation is valid on the part of a freeman, who is major and sane, with respect to his ownership. Freedom is stipulated, because emancipation is not valid except where ownership is found, and owned slaves cannot own. Majority is stipulated, because a minor does not possess legal capacity for the transaction as it amounts to a manifest loss, and for this reason the wali does not have such authority over him. Sanity is stipulated as the insane person does not have legal capacity. Accordingly, if a person who has attained puberty were to say, "I emancipated him when I was a minor," his statement will be followed. Likewise if a person who emancipated were to say, "I emancipated him when I was insane," where his insanity was manifest, and factors existed that negated the likelihood of emancipation. Similarly, if a minor were to say, "Every slave that I own will be free when I attain puberty," it is not valid, because he does not have the capacity to issue a binding statement. It is essential that the slave be in the ownership of the emancipating person, thus, if he were to emancipate another person's slave such emancipation will not be executed, due to the words of the

1It has been recorded by all the six sound compilations. Al-Zayla'i, vol. 3, 277.
Prophet (God bless him and grant him peace), “There is no emancipation where one does not own a human being.”

If a person says to his male slave or to his female slave, “You are free,” or “You are emancipated,” or “You are liberated,” or “You are released,” or “I have set you free,” or “I have emancipated you,” then he has emancipated the slave whether or not he had intended emancipation. The reason is that these words are explicit in the meaning of emancipation as they are employed in the law and in practice for the purpose. Accordingly, the need for intention is eliminated. These forms even when they are meant as reports are employed for the creation of rights in legal transactions on the basis of need, as is the case in divorce, sale, and other matters.

If he says that he meant thereby a false report or meant that he is released from work, he is to be deemed truthful morally (not legally), as such meaning is probable but he is not deemed truthful legally, because the intention opposes the apparent meaning.

If he were to say to him, “O Freeman,” or “O Emancipated One,” the slave is emancipated. The reason is that it amounts to calling someone by a name that is explicit as it amounts to summoning the person called with the specific description mentioned. This is the actual application. It requires the realisation of the attribute in him and is established from his side. By proving it he requires its verification, and we shall repeat this in what follows, God, the Exalted, willing. The exception is where he has named him Freeman and then calls him by that name, because the purpose is naming with his proper name, which is the title he has given him. If he calls him in Persian saying, “O Azad,” where he has given him the name Hur, the jurists maintain that he stands emancipated. Likewise, the opposite, because it does not amount to calling him by his proper name, which is the title he has given him.

Likewise if he says, “Your head is free,” “Your face is free,” “Your neck is free,” or “Your body is free,” or he says to his female slave, “Your vagina is free.” The reason is that these words are employed to express the meaning of the entire body, and the discussion has preceded in the Book of Divorce.

If he associates emancipation with an undivided part (percentage), it applies to that part (and thereafter extends to the whole), and the disagreement about this will be coming up God, the Exalted, willing. If,

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2 It has been recorded by Abū Dāwūd and al-Tirmidhī. Al-Zayla’ī, vol. 3, 278.
to the time of conception. If the slave has a well known parentage, his
paternity is not established due to the impossibility of this being true,
but he is emancipated by acting on the statement in its figurative mean-
ing due to the difficulty of acting upon the actual meaning. The meanings
of figurative use will be mentioned by us God, the Exalted, willing.

If he says, “He is my client (mawla),” or “O my client,” the slave is
emancipated. As for the first, the term mawla even though it includes
the meanings of “helper,” “paternal uncle’s son,” “authorities in religion,”
“superior and subordinate in emancipation” yet the subordinate is identi-
fied here and becomes like a proper name for him. The reason is that
the master is usually not given help by his owned slaves, and the
paternity of the slave is well known, therefore, the first meaning is elimi-
ated. The second and the third are a type of figurative use when the statement
requires actual application. Attributing the meaning to the slave negates
his being the emancipator, therefore, the meaning of the subordinate
mawla is identified and linked to an explicit meaning. Likewise if he says
to his female slave, “She is my client,” on the basis of what we have said.
If he says that I intended thereby mawla with respect to religion or that
he made a false statement, his statement will be deemed truthful for what
is between him and Allah the Exalted. He will not be deemed truthful for
purposes of adjudication as it opposes the apparent meaning. As for the
second, when the subordinate was identified as the intended meaning it
became attached to the explicit meaning, and calling by an explicit word
leads to emancipation, as if he had said, “O Freeman” or “O Liberated
Man.” Likewise, calling with this word. Zufar (God bless him) said that
he is not set free through the second meaning as he intended respect like
saying “O my master” or “O my owner.” We would say that the statement
is used in its actual meaning and it has become possible to act upon it in
distinction from what he has said, because there is nothing in it that is
specific to emancipation and is, therefore, mere respect.

If he were to say, “O my son” or “O my brother,” the slave is not
emancipated. The reason is that a call is to alert the one called, except
that when it is through an attribute that is possible for the one calling to
affirm on his part, it will be for the affirmation of that attribute in the
one called, so that he can be made to come with that specific attribute.
as was the case with the statement, “O hurr,” as we elaborated. When
the call is made through an attribute that is not possible for the caller
to affirm from his side, it is merely a name without the affirmation of
that attribute in that person due to the obstacle in the way. Sonship is
not established by calling him so, for if he was created with the sperm of
another he cannot be his son through such a call, therefore, it is merely
for identification through a name. It is narrated from Abū Ḥanīfah (God
bless him) through an isolated report that the addressee is set free with
these statements, but the reliance is on the authentic narration.

If he says, “O son,” the slave is not emancipated, because the truth
is as he has stated that the slave is the son of his father. Likewise, if he
says, “O small son” or “O small daughter,” The reason is that this is
the diminutive form of son and daughter without attributing them to
himself, and the matter is as he has stated.

If he says about a male slave, who cannot be born of him, “This is
my son,” he is emancipated according to Abu Ḥanīfah (God bless him).
The two jurists said that he is not emancipated and that is the opinion
of al-Shāfi’i (God bless him) as well. These jurists argue that this state-
ment is meaningless in its true application, therefore, it is to be rejected
and deemed redundant. It is like his saying, “I set you free prior to my
being created, or your being created.” According to Abū Ḥanīfah (God
bless him), though this statement in its actual application cannot be given
meaning, it can be given meaning in its figurative sense, because it is a
report about his freedom from the time he came to own him. The rea-
son is that sonship in the case of slaves is a cause for their freedom either
by way of consensus or due to the bond of kinship. Using the cause and
thereby intending the effect in the figurative sense is permitted in usage.
Further, freedom coexists with (is dependent upon) sonship in the case of
slaves. Expressing a similarity through a dependent attribute is one way
of intending the figurative meaning, as has been known, therefore, it is
to be construed in such meaning in order to avoid redundancy. This is
different from the case that the jurists have presented as there is no possi-
bility of the figurative meaning in that, therefore, rejection is determined.
This is distinguished from the case where he says, “I cut you hands,” but
the man takes out both hands and displays them as being sound, then this
cannot be construed in the figurative sense with respect to an acknowl-
edgement for paying compensation and undertaking it as an obligation,
even though cutting of the hands is the cause for the obligation of paying
wealth, as cutting by mistake is the cause for the obligation of specific
damages called arsh. This opposes the meaning of wealth in the unqual-
ified sense in its description insofar as it is imposed upon the 'aqilah to
be paid within a period of two years. Establishing all this is not possible without actual cutting of the hands. Cutting is not the cause of what can be established. As for freedom, it does not differ in essence and in its legal rule, therefore, it is possible to deem it the figurative meaning.

If he were to say, “This is my father,” or “This is my mother,” and a person of this age cannot be born to them, then it is the opposite of what we have elaborated. If he were to say about a minor boy, “This is my grandfather,” it is said that it is governed by the same disagreement, while it is also said that he is not emancipated by consensus, because this statement does not affect ownership except through a link, which is the father, and this is not established in his statement. Accordingly, it is not possible to deem a figurative meaning with respect to emancipation. This is distinguished from paternity and sonship, because they have a direct bearing on ownership without an intervening cause. If he were to say, “This is my brother,” the slave is not to be emancipated according to the Zahir al-Riwayah. According to Abū Hanifah (God bless him), he stands emancipated. The reasoning of both narrations we have already explained. If he were to say to his male slave, “This is my daughter,” it is said that it is governed by the same disagreement, while it is also said that it is governed by consensus as the person pointed to is not of the same gender as the one named, therefore, the ḥukm is related to the one named, and she is non-existent, therefore, is not taken into account. We have established all this in the *Book of Nikah*.

If he says to his slave girl, “You are divorced” or “You are irrevocably separated,” or “Put on a veil,” and he intends emancipation thereby, she is not emancipated. Al-Shāfi‘i (God bless him) said that if he intends that then she stands emancipated. Likewise on the same disagreement are interpreted all the explicit words as well as figurative meanings (in marriage as well as emancipation), according to what their Masha‘ikh (jurists) (God bless them) have said. Al-Shafiri (God bless him) said that if he intends what his words probably imply, because in both types of ownership (marriage and slave) there is some compatibility, because both types are ownership of something that can be taken into possession. As for *milk yamin*, it is obvious and likewise ownership arising from marriage with respect to the ḥukm of an *ayn*. Consequently, perpetuity is a condition for it and limitation by time annuls it. Both statements operate to extinguish what is his right, which is ownership. It is for this reason that making it contingent through a condition is valid. As for the *akhām*, they have been established due to a prior cause and that is his being a subject with legal capacity. It is for this reason that the words emancipation and freedom may be used figuratively for divorce. Likewise its opposite.

In our view, he has intended something that his statement does not imply as a probable meaning. The reason is that emancipation is a term that established greater strength, while divorce removes a restriction. The reason is that a slave is associated with inanimate things and with emancipation he is revived with ability. The married woman is not like this for she already possesses ability, but the restriction of marriage is an obstacle. This obstacle is removed through divorce and the power reappears. There is no ambiguity that the first has greater strength, and that the ownership of the right hand is superior to the ownership through marriage, therefore, its extinction has greater strength too. A word is suitably used in its figurative sense for what is lesser in reality, and not for what is superior to it. Consequently, it will be prevented in what is disputed and will be permitted in what is its opposite.

If he says to his slave, “You are like a freeman,” the slave is not emancipated. The reason is that the term “like” (*mithl*) is used for participation in some of the attributes in practice, therefore, a doubt is created with respect to freedom.

If he were to say, “You are nothing but a freeman,” the slave stands emancipated, because an exception for a negative meaning establishes the positive meaning with emphasis, as is the case with the kalimat shahādah (There is no God, but God).

If he says, “Your head is the head of a freeman,” he is not emancipated, because it is a comparison by eliminating the letter used for comparison. If he says, “Your head is a free head,” the slave is emancipated. The reason is that this establishes freedom in his being, because the head is an expression for the entire body.

### 77.1 Slave Relatives

If a person comes to own a relative in the prohibited degree of marriage, the slave is emancipated on his account. This is a report related from the Prophet (God bless him and grant him peace), “Whoever comes to

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3That is, the character *kāf* to say *ka-ra’s*.
own a relative in the prohibited degree that relative is emancipated.” This tradition in its generality includes each relative permanently prohibited for marriage whether it is by birth or otherwise. Al-Shafii (God bless him) opposes us in those who are not related by birth. He argues that the proof of emancipation without the consent of the owner is negated by qiyas or it does not require it. Brotherhood and what resembles it is lesser than kinship by birth (that is, between parents and children), therefore, it prevents linking with them or reasoning leading to it. It is for this reason that Mukātabah within a Mukātabah is not allowed for other than those related by kinship of birth, when it is not disallowed for those related by birth.

We rely on what we have related and also on the argument that he has come to own a relative whose relationship is effective in prohibiting marriage, therefore, such relative is emancipated on his account. In fact, this is effective in reality and kinship by birth is to be rejected (for this purpose), because it is this for which the strengthening of the bond has been made obligatory and its severing is prohibited so much so that maintenance becomes obligatory and nikāḥ prohibited. There is no difference if the owner is a Muslim or an unbeliever in the dar al-Islām due to the generality of the underlying cause (Ilāh). The Mukātabah when he buys his brother or other such relative, the relative does not become a Mukātabah as he does not have complete ownership that can enable him to emancipate him, and the obligation is linked with the ability to undertake the act. This is distinguished from kinship by birth, because emancipation (of the entire family) is one of the purposes of kitābah. Accordingly, the sale of such a relative is prohibited and the slave is set free in order to realise the purposes of the contract. It is narrated from Abu Ḥanīfah (God bless him) that even the brother will be part of the Mukātabah. This is the view of the two jurists as well. Accordingly, we are obliged to prevent sale. This is distinguished from the case where he comes to own the daughter of his paternal uncle when she is also his sister through rada’ (foster-sister), because the prohibition is not established through kinship. A minor is deemed eligible for such emancipation and likewise an insane person so that a close relative is emancipated on their account when they come to own him, because here the right of the individual is involved and this resembles maintenance.

If a person emancipates a slave for the sake of Allāh, or for Satan, or for an idol, the slave stands emancipated, due to the issuance of the essential element (rukn) of emancipation from one who has the legal capacity to do so with respect to the subject-matter. The words for nearness, “for the sake of,” with respect to the first case (where it is for Allāh) is an excess and its absence with respect to the other two cases does not cause any disturbance.

Emancipation by one coerced to do so or one in a state of intoxication takes effect, due to the issuance of the essential element from one with legal capacity with respect to the subject-matter (slave) as is the case in divorce, and we have elaborated this earlier.

If he makes emancipation contingent upon ownership or another condition, it is valid as in the case of divorce. As for ownership, there is a disagreement with Al-Shafii (God bless him), and we elaborated this in the Book of Divorce. As for making it contingent with a condition, the reason is that it amounts to relinquishment (isqāt), therefore, associating it with a condition is valid as distinguished from other types of ownership, as has been known within its own discussion.

If the slave of an enemy moves over to our territory as a Muslim, he stands emancipated. This is based upon the words of the Prophet (God bless him and grant him peace) about the slaves of Taif when they crossed over to him as Muslims, “They are the emancipated slaves of Allāh.” Further, he has preserved himself in a state when he was a Muslim, and slavery cannot be imposed on a Muslim as a new imposition.

If a person emancipates a pregnant woman, the foetus is emancipated, as it is linked to her. If he emancipates the foetus exclusively, it stands emancipated without the mother. The reason is that there is no intended legal basis for her emancipation due to the absence of association with her nor with the foetus as a consequence for it amounts to inverting the object of emancipation. Thereafter the emancipation of the foetus is valid, but its sale and gift is not valid, but none of these is a condition for emancipation, therefore, they are distinguished.

If a person emancipates a foetus in lieu of wealth, it is valid, but the wealth is not due, because there is no basis for obligating the payment of

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1It is related by the compilers of the four Sunan. Al-Zayla’i, vol. 3, 279.

2This means that if a Mukātab slave who is paying in instalments for his freedom comes to own his father, the father is also treated as part of the Mukātabah. This does not apply if he comes to own his brother.

3It is recorded by Abū Dawūd in the chapter on jihad. Al-Zayla’i, vol. 3, 280.
wealth for the foetus, due to the lack of authority over it, nor is there a basis for making it binding for the mother with respect to a being whose existence is separate from her. Further, stipulating a counter-value for emancipation on someone other than the one being emancipated is not valid, as has preceded in the discussion of *khul'*. The existence of pregnancy at the time of emancipation will be known when she brings forth the child in a period that is less than six months from the time of emancipation, as that is the minimum period of gestation.

The child of a slave woman from her master is a free person, as it has been created from his sperm, therefore, it is emancipated on his account. This is the basic rule and there is nothing conflicting with it, as the child of a slave girl belongs to the master.

The child of a slave woman from her husband belongs to her master, due to its inclination towards the mother on the basis of *hadânah* or due to the mingling of his sperm with hers where mutual exclusion is realised, while the husband has consented to this, as distinguished from the child of the one deceived for in that case the father has not consented.

The child of a freewoman is a freeman under all circumstances, because inclination towards her is greater, therefore, he follows her with respect to the attribute of freedom just as he follows her in ownership, slavery, *tadbir* (freedom after death), being the child of the slave mother, as well as *kitâbah*. Allâh, the Exalted, knows best.

Chapter 78

Partial Emancipation

If the master emancipates part of his slave that part stands emancipated, and he works for the rest of the value for his master, according to Abû Hanîfah (God bless him). The two jurists said that the slave is fully emancipated. The basis is that emancipation can be split into parts in his view and emancipation can thus be confined to the part that is emancipated. According to the two jurists emancipation cannot be split into parts, and this is also the view of al-Shâfi`î (God bless him). Accordingly, associating emancipation with part of the slave is like associating it with the whole, therefore, the slave is emancipated as a whole. The two jurists argue that emancipation is the establishing of freedom, which is a legal power, and it is established by negating its opposite, which is slavery and that is a legal deficiency. In their view, all this cannot be split into parts and is like divorce, pardon in the case of *qisâs*, and declaring a slave woman to be an *umm al-walad*. According to Abû Hanîfah (God bless him) emancipation is the establishing of the attribute of freedom by eliminating ownership or it is the elimination of ownership itself, because ownership is his right, while slavery is the right of the law (sharî`î) or it is a public right. The authority for transaction is whatever falls under the authority of the person undertaking the transaction and this is restricted to the extinction of his right and nothing more. The basic rule is that a transaction is restricted to the object to which it is associated, while extension beyond that takes place due to necessity and in the absence of divisibility. Ownership, however, is divisible as in the case of sale and gift. Accordingly, emancipation in this case will follow this rule.

Earning becomes obligatory as the value of the remaining part of the ownership is in control of the slave. According to Abû Hanîfah (God bless
him), the slave on whom earning becomes obligatory has the status of a mukātāb slave, because attributing emancipation to a part gives rise to the affirmation of ownership in the whole (for purposes of emancipation), but the continuance of ownership in part of the slave prevents this. Consequently, we have acted upon both evidences by granting him the status of the mukātāb, for he has the possession and not the ownership, and earning has become like the counter-value of kitābah. The master has the right to demand earning from him and he has the option to emancipate him (completely), because the mukātāb is eligible for emancipation, except that in this case if he is unable to pay he does not revert to slavery. The reason is that it is an extinction of a right that is not in favour of anyone, therefore, it does not accept rescission, as distinguished from the case where kitābah is intended ab initio, as that is a contract that accepts iqālah (negotiated settlement) as well as rescission. In divorce and pardon from gisās there is no middle ground, therefore, we have affirmed it for the whole giving preference to the prohibited over the permitted. Istilād is divisible in his view, thus, where the owner makes a mudābbīrahab and umm wala'd up to the extent of his share, it will be restricted to that share alone. In the case of a (jointly owned) slave girl, when he guarantees the share of his co-owner by rendering his ownership ġāsid through istilād, he comes to own her fully through the guarantee and istilād is completed.

Where the slave is owned by two co-owners and one of them emancipates his share, the slave is emancipated as a whole. If the emancipator is enjoying financial ease, the co-owner has the option to either emancipate the slave to the extent of his share or to hold his co-owner liable for the value of his share or even to hold the slave liable for earning and paying his share. Where he holds the co-owner liable, he has recourse to the slave, and the wala' belongs to the emancipator. If he sets him free or asks him to earn his share, then the wala' belongs to both. If the emancipator is in a difficult financial position, the co-owners has the option to emancipate the slave or to ask him to earn his share, and the wala' is shared by them in both cases. This is the position according to Abū Hanifah (God bless him). The two jurists maintain that he has no choice in the case of financial ease except to hold the emancipator liable for his share and in the case of financial difficulty to ask the slave to earn his share. Further, the emancipator does not have recourse to the slave for the amount, and the wala' belongs to the emancipator.

This issue is structured upon two principles. The first is the divisibility and non-divisibility of emancipation, as we have explained. The second is that the financial ease of the emancipator does not prevent the imposition of earning on the slave according to Abū Hanifah (God bless him), while it does prevent it according to the two jurists. The two jurists argue, with respect to the second principle, on the basis of the words of the Prophet (God bless him and grant him peace) about a person emancipating his slave that if he is well off, he is to be held liable for the share of the partner, but if he is poor the slave is to earn his share.2 Thus, he divided the liabilities, and division negates participation. According to Abū Hanifah (God bless him), he locked up the value of the partner within the slave, therefore, he has the right to hold him liable. It is just like the blowing wind casting the dress of a person into the dye prepared by another thereby colouring the dress; the owner of the dress is liable for paying the cost of the dye whether he is in financial difficulties or is well off, as we have said. Likewise here, except that the slave is poor, therefore, he is asked to earn. Thereafter, the financial ease that is stipulated is that of adequacy, that is, he should own wealth that is sufficient to pay for the share of the co-owner. It is not the financial ease of the wealthy, because with adequate ease a balance is maintained between the two sides by the realisation of what the emancipator intended with respect to nearness to Allah and the delivery of the share to the one who remained silent.

Thereafter the legal reasoning for deriving the rule (takhrij) emerging from the view of the two jurists is obvious, which is that the absence of recourse to the slave by the emancipator for the amount for which he has been made liable is due to the absence of imposing earning on the slave in the state of financial ease where the wala' goes to the emancipator, as emancipation is entirely on his part due to its indivisibility. As for the takhrīj on the basis of his (Abū Hanifah's) opinion, the option of emancipation is due to the continuation of his ownership in the slave, as emancipation is divisible in his view. The imposition of liability on the emancipator is that of an offender for he has rendered vitiated the co-owner's share in the slave insofar as it prevents his sale, gift and so on, that is, transactions other than emancipation and its consequences along with requiring him to work, as we have elaborated. The emancipator has

1That is, recourse by the emancipator to the slave for the value of the remaining ownership and not having recourse to him on the provision of security.

2It is recorded by all the six sound compilations. Al-Zayla'i, vol. 3, 282.
recourse to the slave for the payment he guaranteed, because he comes
to stand in the place of the one remaining silent through the provision
of surety. The co-owner had the right to recover the amount by making
him earn; likewise the emancipator. The reason is that he came to own
him indirectly by the payment of the amount due. It is now as if he owns
him solely and he has emancipated a part of the slave, therefore, he has
the option to emancipate the remaining part or if he likes to ask him to
earn the value. The *wala*’ belongs to the emancipator on the basis of this
reasoning. The reason is that emancipation is entirely on his part inso-
far as he came to own him entirely on the payment of the amount due.
In the case of financial difficulty of the emancipator if he likes he may
emancipate him (entirely) due to the continuation of his ownership and
if he likes he asks him to work as we have elaborated, *wala*’ belongs to
the emancipator in both cases, because emancipation is on his part. The
person (slave) obliged to work does not have recourse to the emancipa-
tor for what he has paid on the basis of a consensus among our jurists,
because he has worked for release from his bondage and he is not paying
a debt on account of the emancipator, for he does not owe anything due
to his financial hardship. This is different from the pledged slave if he is
emancipated by the pledgor who is in difficult straits, because he is work-
ning for the release of bondage or for a debt that is due from the pledgor,
therefore, he has recourse to him.

The opinion of al-Shafi`i (God bless him) in the case of financial
difficulties is like the opinion of the two jurists. In the case of financial
difficulties, he said the share of the co-owner stays within his ownership
and he may sell it or gift it. The reason is that there is no basis for making
the co-owner liable due to his financial hardship, nor is there a basis for
making the slave earn its value for the slave is not an offender and he has
not consented to this. Further, there is no basis for emancipating the slave
completely due to the injury being caused to the silent co-owner, there-
fore, what stands determined is what we determined. We said that earning
is a means for it does not need an offence to be justified, rather earning is
based on the arresting of value within the slave. Thus, the power arising
from ownership and the negative deficiency cannot both be combined in
one person.

If each co-owner furnishes testimony against his co-owner about
emancipation, the slave will work for both for their shares whether they
are in financial ease or difficulty, according to Abū Ḥanīfah (God bless
him). Likewise, if one of them is enjoying financial ease, while the other
is facing financial hardship. The reason is that each one of them believes
that his co-owner has emancipated his share, therefore, he has become
like a mukātib in conformity with his belief, according to Abū Ḥanīfah
(God bless him). Consequently, it has become prohibited for him to
enslave him, and he acknowledges this with respect to himself, therefo-
re, he is prevented from keeping him in bondage and he makes him
earn. The reason is that we are sure about the right to make him earn
whether he is lying or is truthful for he is either his mukātib or his slave.
Accordingly, they make him work and this does not differ with finan-
cial ease or difficulty, because his right in both situations is in one of
two things. The financial ease of the emancipator does not prevent the
requirement of earning, in Abū Ḥanīfah’s view. Making the co-owner
liable has become difficult due to the denial of the co-owner, thus, the
other option is implemented, which is the requirement of earning. *wala*’
belongs to both of them for each one of them claims that the share of the
co-owner has been emancipated against his right, due to emancipation
on his part, thus, the *wala*’ belongs to him, and he says: “My share has
been emancipated through earning, therefore, *wala*’ belongs to me.”

Abū Yūsuf and Muhammad (God bless him) said that if both are
enjoying financial ease there is no requirement of work for the slave. The
reason is that each one of them absolved him of earning through his claim
of emancipation against his co-owner, because the financial ease of the
emancipator prevents earning in the opinion of the two jurists. The claim
is not established due to the denial of the other, however, being absolved
of earning is established by his acknowledgement against himself.

If they are in financial difficulties, he is to work for both, because
each one of them claims that he is required to work for him whether he is
lying or is truthful, as we have elaborated, for the emancipator is in
financial straits.

If one of them is enjoying financial ease while the other is facing
financial constraints, he is to work for the one who is enjoying finan-
cial ease. The reason is that he is not claiming compensation from his
co-owner due to his financial difficulty, he merely demands earning from
the slave, therefore, the slave is not absolved from earning. He is not to
earn for the one who is in a difficult financial situation. The reason is
that he claims compensation from his co-owner due to his financial ease,
therefore, he is absolving the slave from earning. *Wala*’ is suspended in
If the co-owner says, “If so and so does not enter this house tomorrow, then this slave is a freeman.” The other co-owner says, “If he enters this house, he is free.” The next day passes, but it is not known whether or not the person entered the house, one-half of the slave stands emancipated, and he works for them for the other half. This is the rule according to Abu Hanifah and Abu Yusuf (God bless them). Muhammad (God bless him) said that he is to work for his entire value.

The reason is that by the extinction of the requirement of work, the person against whom judgement has to be given becomes unknown, and an award cannot be made against an unknown person. It is as if he says to another, “You have a claim of one thousand dirhams against one of us.” In such a case, no ruling can be issued against either one of them due to uncertainty. Likewise here. The two jurists argue that we are certain about the extinction of one-half of the earning. The reason is that one of them here is certainly breaking his vow, and with certainty about the extinction of one-half. How then can a ruling be given about the obligation of the entire amount? Uncertainty is removed through spreading and distribution (of the liability), as in the case where a person emancipates one of his two slaves without identifying one specific slave or by identifying him, but forgetting which one and dying before recalling or elaborating. The derivation of rules in this is based upon the issue whether or not financial ease prevents the requirement of earning, and this is in accordance with the disagreement that has preceded.

If they take the oath (as in the previous issue) about two slaves, each one owned by them separately, none of them will be emancipated. The reason is that the person against whom the ruling with respect to emancipation is to be given is unknown. Likewise, the subject-matter of emancipation is unknown. Uncertainty, therefore, becomes intense and prevents judgement. In the case of a single slave, the person in whose favour the judgement is to be rendered and the subject-matter of the judgement is known, thus, the known part dominates the unknown part.

If two persons buy the son of one of them, the share of the father stands emancipated. The reason is that he has come to own a part of his relative and such purchase amounts to emancipation, as has preceded. No compensation is imposed on him (for the share of the co-owner).

whether or not the other was aware that he was his relative. The same applies if they come to inherit him, and the co-owner has the option to either emancipate his share or to require the slave to earn the value. This is the rule according to Abu Hanifah (God bless him). The two jurists said that in the case of purchase the father pays one-half of the value if he is enjoying financial ease. If he is in financial difficulties, the son works for the entire value. The same disagreement governs cases where they come to own him through a gift, charity or bequest. In accordance with this reasoning, if two persons buy him, when one of them has taken an oath that he will emancipate him if he comes to own one-half share in him, the two jurists maintain that the father has annulled the share of his co-owner through emancipation, because buying a relative amounts to emancipation. This becomes similar to the case where two strangers come to own the slave and one of them emancipates his share. According to Abu Hanifah (God bless him), he has consented to the vitiation of his share, therefore, he cannot ask him for compensation. It is as if he had expressly asked him to emancipate his share, and the evidence of this is that he participated with him in something that becomes the underlying cause of emancipation, which is purchase. The reason is that purchase of a close relative is his emancipation to the extent that he becomes free of the liability of expiation through it, in our view. According to the apparent meaning of the opinion of the two jurists, the payment of the value is compensation for wasting his share, and it differs in the case of financial ease and difficulty, while it is extinguished due to consent. The rule does not differ with knowledge or lack of it, which is an authentic narration (zahir al-riwayah) from Abu Hanifah (God bless him). The reason is that the rule revolves around the cause; it is as if he says to another, “Eat this food,” when the food is owned by the one giving the order, but the one giving the order is not aware of this.

If a stranger begins first and purchases one-half of the slave, after which the father comes and purchases the other half, and he is well off, then the stranger possesses the option; if he likes he can hold the father liable for compensation. The reason is that he did not consent to the vitiation of his share. If he likes, he can make the son work for the value of his half, for his share stands arrested within the slave. This is the view according to Abu Hanifah (God bless him). The reason is that the financial ease of the emancipator does not prevent the requirement of work, in his view. The two jurists said that he has no option, and he is to hold the
father liable for half the slave's value. The reason is that financial ease of the emancipator prevents the requirement of work in their view. If a person buys one-half of his son, while he is enjoying financial ease, there is no liability for him (paying for the other half), according to Abū Ḥanīfah (God bless him). The two jurists said that he is liable if he is enjoying financial ease. This means that he buys one-half from a person who owns the entire slave. Thus, the seller will have no claim of compensation in his view. We have already stated the underlying legal reasoning.

If a slave is owned by three persons, and one of the co-owners enjoying financial ease declares that he will be free after his death, thereafter another co-owner, also enjoying financial ease, emancipates him, after which they agree upon liabilities, then the one remaining silent has the right to make the mudabbir liable for one-third of the value of the entire slave, but he does not make the emancipator liable, while the mudabbir has the right to make the emancipator liable up to one-third of the value of the mudabbir slave (that is, one-third of two-thirds of the whole), and he does not hold him liable for the one-third that he paid. This is the position according to Abū Ḥanīfah (God bless him). The two jurists said that the entire slave now belongs to the one who made him a mudabbir initially, and he is liable to his two co-owners for two-thirds of the value of the slave irrespective of his being financially sound or in difficult straits. The basis for this issue is that tadbir is divisible according to Abū Ḥanīfah (God bless him) with the two jurists disagreeing as is the case with emancipation. The reason is that tadbir is an offshoot of emancipation and will be analysed accordingly. As it is divisible in his view, it will be restricted to the share of the mudabbir, but he has vitiated the shares of the two other co-owners. Thus, each one of the two has an option to either to adopt tadbir for his share, to emancipate, to adopt mukāṭabah, to hold the mudabbir liable for compensation, to make the slave work for compensation, or to leave him in that state. The reason is that the shares of each of the two co-owners continue to be owned by them having been vitiated through the vitiation of their co-owner insofar as the means of benefiting from him through sale or gift have been blocked for them, as already explained. If one of these two opts for emancipation, his right is determined with respect to the slave, and he loses his other options. This gives rise to two causes of liability for the co-owner who is silent: tadbir by the mudabbir and emancipation by the emancipator. He has the right, however, to hold the mudabbir liable so that the compensation becomes compensation as a counter-value, as that is the primary form of compensation, and it has even been deemed so for usurpation according to our principle. This is possible in the case of tadbir, because it is possible to transfer it from one ownership to another at the time of tadbir, but it is not possible in the case of emancipation for at that time he is either a mukāṭab or a freeman, subject to the disagreement between the two principles. Further, rescission requires the consent of the mukāṭab so that it can accept transfer. For these reasons he is to hold the mudabbir liable. Therefore, the mudabbir has the right to hold the emancipator liable for a third of the value in the state of tadbir, because he caused vitiation of his share as a mudabbir. Compensation is estimated according to the value of the destroyed thing, and the value of the mudabbir is two-thirds of the value of the entire slave according to what they (the jurists) say. He is not to hold him liable for his value for compensation from the perspective of the silent co-owner, because the ownership is established after reliance on tadbir. It is established at the time of compensation and not at the time of tadbir, therefore, it is not applicable to the liability of the emancipator. Wala' will be shared between the mudabbir and the emancipator on the basis of thirds, with two-thirds going to the mudabbir and one-third to the emancipator, because the slave has been emancipated through their ownership in this ratio. As tadbir is not divisible in the opinion of the two jurists, the entire slave will belong to the mudabbir. He has vitiated the shares of the two co-owners, as we elaborated, therefore, he will compensate them. This rule does not differ on the basis of financial ease and hardship, for it is compensation in lieu of transfer of ownership, thus, it resembles the case of the umm walad, and is distinguished from emancipation for that is compensation arising from an offence (of vitiation). Wala' in this case belongs entirely to the mudabbir, which is obvious.

If a slave girl is owned by two men where one of them thinks that she is the umm walad of the other, but the other denies this, then she is to remain suspended from service for one day and the next day she is to serve the one who denied, according to Abū Ḥanīfah (God bless him). The two jurists said that the one who denies, if he likes, may make her work for half her value, and thereafter she becomes free with no hold over her. The two jurists argue that when his co-owner does not
confirm his claim, the acknowledgement reverts to the one who made the claim. It is as if he has himself made her an umm walad. The case becomes like one where the buyer makes a claim that the seller emancipated the slave prior to the sale as in this case he (the buyer) will be deemed to have emancipated her. Likewise here. This prevents service to him, but the share of the one denying remains under the rule of ownership. Thus, she can move towards freedom through earning, as in the case of a Christian slave mother when she converts to Islam. According to Abū Ḥanīfah (God bless him) had his claim been affirmed, the entire service would have been for the one denying (in reality), but if it was denied the denier would have half of the service, thus, what is certain is established, which is one-half. There is no service for the co-owner who testified nor is there the option of earning, because he extinguished all this through his claim of istilād and compensation. An acknowledgement of being an umm walad includes the acknowledgement of paternity; it is a presumption that is not rebuttable, therefore, it is not possible to consider the one acknowledging as one who has declared her his umm walad.⁴

If an umm walad is owned by two men, and one of them emancipates her, while he is in a sound financial condition, there is no liability for compensation on him, according to Abū Ḥanīfah (God bless him). The two jurists said that he is liable for one-half of her value. The reason is that in his view the umm walad does not have a marketable value, while she does have a marketable value in their opinion. On this rule, a number of issues are structured and these we have recorded in Kifāyat al-Muntahi.

The reasoning of the two jurists is that she is being utilised for sex, hiring and service. This is an evidence of her having a marketable value. By the prevention of her sale, her marketable value is not extinguished, as in the case of the mudābar slave. Do you not see that a Christian umm walad, when she converts to Islam, is obliged to earn her value, and this is a sign of her having a marketable value, except that her value is one-third of the value of a regular slave, as the jurists have said, due to the loss of the benefit of sale and working after death (of the master). This is distinguished from the case of the mudābar, because what is lost is the benefit of sale, but earning and service still continue.

⁴This is a response to the above assertion of the two jurists, “It is as if he has himself made her an umm walad.”

According to Abū Ḥanīfah (God bless him), marketable value is based on the type of ownership, and she is in possession for procreation and not for having a marketable value. Possession for marketability is secondary. It is for this reason that she does not work for repaying a debt, or for an heir, as distinguished from the case of the mudābar. The reason for this distinction is that the cause (which is freedom) has been realised for her in her current state, and this is the relationship between her and the master through the child, as has been known about the prohibition of marriage, except that its operation has not been given effect with respect to ownership due to the necessity of benefiting from her. The cause, therefore, operates to extinguish her marketability. In the case of the mudābar the cause comes into effect after death (of the master), and the prevention of sale in his case is for the realisation of this purpose, therefore, the two are distinguished. In the case of the Christian umm walad we have ruled about her becoming a mukātab slave in order to avoid injury to both sides. The counter-value of mukātabah does not necessitate the existence of marketability.
Chapter 79

Emancipating One of Several Slaves

If a person has three slaves, and when two of them come to him he says, "One of you is a freeman." Thereafter one departs, and another enters, and then he says, "One of you is a freeman." He dies following this without elaborating. The slave who faced the statement twice will be free to the extent of three-fourths, while the two other slaves will be free to the extent of one-half of each. This is the view according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muḥammad (God bless him) said the same except for the third slave who he said would be free to the extent of one-fourth. The first statement applies to the one who went out and to the one who remained, who heard the statement twice, thus, the emancipation from slavery applies equally to both due to their equality with respect to slavery. Both are, therefore, entitled to one-half emancipation. The slave who stayed back derived another fourth from the second statement, because the second statement applies to him and to the one who entered later, and he is the one whom he (Imām Muḥammad) called "the other" in the Book, therefore, it will be distributed in halves among them. The first, however, who stayed behind, became entitled to one-half of freedom with the first statement, thus, the entitlement with respect to the second statement will be spread over his two halves (one free and the other in bondage). The half that applies to the half freed due to the first statement becomes redundant, while the second half that applies to the unoccupied part will apply and he will be free to the extent of one-fourth. This completes three-fourths for him. The reason is that if the master had intended thereby the slave staying behind, he would be free to the extent of one-half and had he intended the one entering later, this half would not be emancipated. Consequently, the halves are spread out and
he is emancipated up to one-fourth by the second statement and to the extent of one-half by the first. As for the slave entering later, Muhammad (God bless him) says that when the statement applies to him and to the one staying behind, and when the one staying behind derives one-fourth from it, the one entering later should derive the same. The two jurists say that it does apply to both, but the issue is of spreading the halves, which reduces it to one-fourth for the one staying on due to his entitlement to one-half through the first statement, as we have mentioned. The one entering later was not entitled to any emancipation prior to this so he will be given one-half.

He (Muhammad) said: If the statements made by him were during terminal illness, one-third of this (wealth) will be distributed. The commentary of this statement is that the emancipated shares are to be gathered together, and these are seven according to the two jurists. The reason is that we take the lowest denominator for each slave to be four due our need for working on the basis of three over four (the largest fraction). We therefore say: The one who stayed back is emancipated to the extent of three shares, while the other two are emancipated to the extent of two shares. The emancipated shares, thus, come to seven. Emancipation during terminal illness is a bequest and its implementation is up to one-third of the subject-matter. It is, therefore, necessary to make the share of the heirs double of this. Accordingly, each slave will be analysed into seven shares with the entire wealth coming to twenty-one shares. The one who stayed back will be emancipated up to three shares and he is made to earn the remaining four. From the other two slaves, two shares each are to be emancipated and they earn the remaining five shares. When you ponder over this and make the addition it all adds up to one-third plus two-thirds. According to Muhammad (God bless him), each slave is analysed into six shares, for the one entering later is given one share in his view. This reduces the emancipated shares by one share and the entire wealth comes to eighteen shares. The remaining derivation is according to what has preceded.

Had this happened in the case of divorce, where the marriage had not been consummated with any of them, with the husband dying prior to an elaboration, one-fourth of the dower of the one who went out would be extinguished, three-eighths from the one who stayed and one-eighth from the dower of the one who entered later. It is said that this is exclusively the view of Muhammad (God bless him), while the two jurists

maintain that one-fourth will be extinguished. It is also said that it is the view of the two jurists as well. We have mentioned the difference and all its sub-issues in (the commentary of) al-Ziyādī.

If a man says to his two slaves, "One of you is free." Thereafter he sells one of them or one of them dies, or if he said to him (one of them), "You are free after my death," the (remaining) slave stands emancipated. The reason is that the slave is no longer the subject-matter of emancipation due to death and for emancipation by this man due to his sale, and also for emancipation from each perspective for purposes of tadbīr. Accordingly, the remaining slave will be identified for emancipation. Further, through sale he intended to obtain the price and through tadbīr the derivation of benefit up to his death. Both purposes negate emancipation that has been made an obligation, therefore, the remaining slave is identified by implication. Likewise if he declares one of two female slaves as an umm walad. In this case, there is no difference between valid and irregular sales with or without possession, nor is there a difference between an unqualified sale or one that grants an option to one of the parties to the contract. This is due to the absolute nature of the statement in the Book. The meaning of all this is in what we said (with respect to the purposes). Making an offer for sale is linked directly to the sale according to a narration preserved from Abū Yusuf (God bless him). Gift with delivery, and donation with delivery have the same status as sale, because it amounts to transferring of title.

The same applies if he says to his two wives, "You are divorced" and then one of them dies, due to what we said. Likewise, if he has intercourse with one of them, on the basis of our elaboration.

If he says to his two slave girls, "One of you is free," but thereafter has intercourse with one of them, the other is not emancipated, according to Abū Ḥanīfah (God bless him). The two jurists said that she is emancipated. The reason is that intercourse is not permitted except on the basis of ownership and one of them is a freewoman. By undertaking intercourse he seeks to maintain ownership with the slave woman that he slept with, therefore, the other stands identified due to the elimination of ownership due to emancipation, as is the case with divorce. The Imam (God bless him) argues that ownership subsists in the case of the slave woman with whom he had intercourse, because emancipation pertains to an unknown person, while she is ascertained, therefore, having intercourse with her is permitted. This does not amount to an elaboration
of the statement (of emancipation) he made. Accordingly, having intercourse with either is permitted in his view, except that he did not issue a *fatwa* on this basis. Thereafter it is said that emancipation is not eliminated prior to an elaboration, because it is linked to it. In the alternative it is said that it is eliminated with respect to one unknown and will be evident through his acceptance, while intercourse is only possible with the one identified. This is distinguished from divorce, because the primary purpose of marriage is procreation. The intention to procreate through intercourse indicates the continuation of ownership in the woman with whom he is cohabiting in order to preserve the interests of the child. As for the slave woman, the purpose of intercourse with her is the satisfaction of carnal desire without procreation, therefore, it does not indicate the continuation of ownership.

If a person says to his slave girl, “If the first child you give birth to is a boy, then you are free,” but she gives birth to a boy and a girl, and it is not known who was born first, then one-half of the mother is emancipated and one-half of the girl, but the boy remains a slave. Each one of them (the mother and daughter) will be emancipated in one situation, which is where the woman has given birth to the boy first; she is emancipated due to the stipulation, while the girl is free as she follows the mother, and the mother is a freewoman when she gave birth to her. They will remain in bondage in another situation, which is where she gives birth to the girl first, and this due to the absence of fulfilment of the condition. Thus (in this situation), one-half of each one of them (mother and daughter) is emancipated. The boy, however, remains in bondage in both situations, therefore, he remains a slave. If the mother claims that it was the boy who was born first, whereas the master denies this, while the girl is a minor, then the acceptable statement is that of the master along with his oath as he is denying the occurrence of the condition of the emancipation. If he takes the oath, none of them will be emancipated, but if he refuses to take the oath, the mother and the girl will be emancipated, because the claim of the mother pertains to the freedom of the minor girl and this is taken into account being a pure benefit. Consequently, the refusal is taken into account for purpose of their freedom, and we declare them free.

If two men testify against a man that he emancipated one of his two slaves, then the testimony is void according to Abū Ḥanīfah (God bless him), unless it pertains to a bequest, on the basis of istihsān, which he mentioned in the *Book of Emancipation*. If two men testify that he divorced one of his two wives, the testimony is acceptable and the husband will be compelled to divorce one of them. This is based on consensus (*ijma*). Abū Yūsuf and Muhammad (God bless them) said that the position of the testimony in emancipation is the same as this (that is divorce). The rule in this is that testimony about emancipation of a male slave is not acceptable without a claim being lodged by the slave, according to Abū Ḥanīfah (God bless him), while it is acceptable according to the two jurists. Testimony about the emancipation of a slave woman and the divorce of a married woman is acceptable without a claim by agreement, and the issue is well known. Insofar as the claim of the male slave is a condition according to the Imam, it is not realised in the issue stated in the *Book*. The reason is that the claim of an unknown person cannot be the basis of adjudication, therefore, the testimony is not accepted. According to the two jurists, it is not a condition so the testimony is accepted even though the claim is non-existent. As for divorce, the absence of a claim does not give rise to vitiations of the testimony, as it is not a condition for it. If the two men testify that he emancipated one of his two slave women, the testimony is not acceptable according to Abū Ḥanīfah (God bless him), even though a claim is not a condition for it. The reason is that the claim is not stipulated as it includes the prohibition of sex, therefore, it is similar to divorce. Ambiguous emancipation does

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1 In short, the Imam is saying that the statement made by the person in this issue is not legally admissible for purposes of emancipation. Further, the act of intercourse is not linked or cannot be linked with this statement, and cannot act as an elaboration of the statement.
not give rise to the prohibition of sex, in his view, as we have mentioned, thus, it amounts to testimony about the emancipation of one of two male slaves. All this applies if the two render testimony about his emancipating one of his two slaves while he was in sound health.

If, however, they testify that he emancipated one of his two slaves while he was in a terminal illness, or they testify to his declaring tadbir in sound health or during terminal illness, and the rendering of testimony is during his terminal illness or after his death, it is accepted on the basis of istihsan, because tadbir when it occurs, it occurs by way of a bequest. Likewise, emancipation during terminal illness amounts to a bequest. The litigant in a bequest is the legator, and he is known, and he also has representatives and these are the wasi or the heir. The reason is that emancipation pronounced during terminal illness gets distributed between the two slaves, therefore, each one of them is a known litigant. If the two persons testify after his death that he said in sound health that one of them was free, then it is said that it is not to be accepted as it does not amount to a bequest, while it is also said that it is to be accepted as emancipation stands distributed between both. Allah knows best.

Chapter 80

Oath of Emancipation

If a person says, “If I enter the house then all the slaves that I own that day are free.” He does not have slaves, but if he buys them and then enters the house they stand emancipated. The reason is that his saying, “that day,” means “the day I enter,” except that he extinguished the act through the syntax so that what is taken into account is the existence of ownership at the time of entry. Likewise, if on the day of the oath there was in his ownership a slave who remained in his ownership till he entered, he too will be emancipated, due to what we have said.

If he had not said in his oath the words “that day,” they would not be emancipated. The reason is that his saying, “all the slaves that I own,” applies to the present and the consequence is the freedom of the slaves owned at present, except that when the condition is inserted into the consequence, it is delayed till the time of the fulfilment of the condition, therefore, the slave is emancipated if he remains in his ownership up to the time of entry. This statement, however, does not include the slaves who were bought after the oath.

If a person says, “All the male slaves I own are free,” then if he has a slave woman who is pregnant and gives birth to a male, he is not emancipated. This is the case if she gives birth to the child within six months or more. The reason is that the statement is for the present, and there is a probability of the conception taking place at the time of the oath due to the passage of the minimum period after it. The same applies if she gives birth to the child in less than six months, because the statement includes owned slaves in absolute terms, and the foetus is owned too following the mother, though not as the intended purpose. The reason is that he is like a limb in some respects and the term owned slaves includes life and
not limbs. Accordingly, the master does not have the right to sell the \textit{futus} independently. This feeble servant says: The effect of the qualification with the words “male” is that had he said, “all the slaves owned by me” it would have included the pregnant woman and consequently the foetus.

If he were to say, “Each slave that I own is free day after tomorrow,” or he says, “Each slave that I have, is free day after tomorrow,” and he has slaves, but he buys another one, thereafter, on the day after tomorrow the slaves that he owned at the time of the oath are emancipated. The reason is that his words, “I own,” apply to the present in reality like his saying, “I own so and so,” and he means thereby at present. Likewise such a statement is employed without context and for the future by associating it with the literal forms used for the future. The unqualified statement applies to the present, thus, the consequence is the freedom of the slave at present in association with the day after tomorrow, therefore, it does not include the slave he bought after the oath.

If he says, “Each slave that I own,” or says, “Each slave that I have, is free after my death,” and he has slaves, but he buys another slave, then the one who was in his ownership at the time of the oath will be a mudhabbar, but the one bought later is not a mudhabbar and when he dies he is emancipated from a third of his estate. Abū Yūsuf (God bless him) said in \textit{al-Nawādir} that the one in his ownership on the day of the oath is emancipated, but the one acquired after his oath is not emancipated. On the same lines if he says, “Each slave that I have, when I die he is free,” then he argues that the statement is applied in reality to the present, in accordance with our elaboration. Consequently, those whom he will own in the future are not emancipated, therefore, the first becomes a mudhabbar, but not the other. The two jurists (Abū Hanīfah and Muhammad) maintain that this statement gives rise to emancipation and bequest and he will be accommodated within one-third of the estate. In bequests the state is awaited and the present circumstances are taken into account. Is it not noticed that he participates in the bequest on the basis of wealth that is acquired by the master after making the bequest, and in a bequest for the children of so and so is the participation of children who are born after the making of the bequest. The obligation is valid when it is associated with ownership or with its cause. Insofar as it gives rise to emancipation, it includes the owned slave taking into account the present situation, thus, he becomes a mudhabbar so that his sale is not valid. Insofar as it is a bequest, it includes the slave he buys taking into account the state that is awaited, and this is the state of death. Prior to death, the state of acquisition of ownership is merely the awaited future, therefore, it does not come within the meaning of the statement. At the time of death, it is as if he said: “Each slave that I have or each slave that I own is free.” This is different from his saying “after tomorrow,” in accordance with what has preceded. The reason is that it is a single transaction, which is the obligation of emancipation, and it does not include a bequest. The state is merely that of waiting for the future, thus, they are distinguished. It cannot be said that “you have combined the present and the future,” because we would say, “Yes, but due to two separate causes: the obligation of emancipation and bequest.” This, however, is not permitted due to a single cause.
Chapter 81

Emancipation Through *Ju‘ālah*

If a person offers to free his slave in lieu of wealth, and the slave accepts this, he stands emancipated. This is like his saying, "You are a freeman on one thousand *dirhams* of for one thousand *dirhams*." He is emancipated due to his acceptance, because it is an exchange of wealth for what is not wealth, for the slave does not own himself. The legal position of exchange of counter-values is the following of legal effects immediately upon the acceptance of the counter-value, as in a sale. Accordingly, if he accepts he becomes a freeman, and what he has stipulated becomes a debt for him so that providing surety for it is valid. This is different from a counter-value in the contract of *kitābah*, because that is established with a negating factor, which is the existence of bondage, as has been explained. The unqualified use of the term wealth (*māl*) includes its various types like cash, goods, and animals without identifying the animals. The reason is that it is an exchange of wealth with what is not wealth, therefore, it resembles marriage, divorce, and settlement (*ṣulḥ*) for intentional homicide. The same applies to food and things measured and weighed when their species are known. It is not affected by uncertainty of description, because it is trivial.

If he makes his emancipation contingent on the payment of wealth, it is valid and the slave becomes an authorised slave (authorised to earn independently). This is like his saying, "If you pay me one thousand *dirhams* you are a freeman." The meaning of the words "it is valid," means that he will be emancipated on payment of wealth without becoming a *mukātab*, because the statement is explicit in making emancipation contingent upon payment, even though there is found in it a meaning of compensation in the final analysis, as we shall elaborate, God, the Exalted,
willing. He becomes an authorised slave for the master prompted him to earn by demanding payment from him. The meaning is trade and not begging, therefore, it amounts to permission for him by implication.

If he presents wealth for payment, the qādi is to compel him to accept it and declare the slave emancipated. The meaning of compelling here and in all claims is that the claimant comes into possession by the mere surrender of the wealth.' Zufar (God bless him) said that he is not to be compelled to accept it (this way), and this is analogy as it is a transaction based on oath, for it is emancipation made contingent upon the fulfillment of a condition on the basis of a statement. Consequently, it does not depend upon the acceptance of the slave (for it is an oath of emancipation) nor does it accept rescission, and there is no compulsion in furthering the conditions of an oath. The reason is that there is no entitlement prior to the coming into existence of the condition. This is distinguished from kitābah as that is a commutative contract in which giving a counter-value is obligatory. We argue that it is a contingent offer taking into account the statement, while it is a commutative contract taking into account the purpose. The reason is that he has made it contingent only to urge the slave to pay the wealth. The slave in return acquires the dignity of freedom, while the master gets wealth in lieu of it as it is the case in kitābah. It is for this reason that the compensation in case of divorce is given through a similar form so that it becomes irrevocable. Accordingly, we have deemed it a condition from the start by acting upon the form and for repelling injury to the master, so that he is not prevented from selling him and the slave does not become entitled to his earnings. Further, the emancipation does not travel down to the child born prior to payment. We have deemed it a counter-value in the final analysis, at the time of payment, to repel injury to the slave so that the master is compelled to accept payment. It is this on which issues of fiqh turn and rules are derived, and its precedent is a gift with the stipulation of compensation. If he makes part payment, the master is compelled to accept it, however, he is not emancipated until the entire amount is paid, because the condition has not been fulfilled. It is as if he (the master) has reduced part of the payment and paid the rest. Thereafter, if he pays one thousand that he earned the master has recourse to him (for another thousand) and he is emancipated on the basis of that amount. If he earns it after the stipulation, the master does not have recourse to him, because he is an authorised slave appointed by him for the purpose of payment. Finally, the word “pay” within his statement “if you pay” is confined to the session as it is the granting of an option, but in his statement “when you pay” is not confined to it, because the word “when” here is used in the meaning of “whenever.”

If a person says to his slave, “You are free after my death for one thousand dirhams,” then acceptance is (exercised) after death, due to the association of the offer with the time after death. It is as if he said, “You are free tomorrow for one thousand dirhams.” This is different from his statement, “You are a mudābar for one thousand dirhams,” insofar as acceptance has to be immediate, because the offer of tadbīr is immediate, except that the payment of wealth does not become obligatory due to the existence of slavery. The later jurists said that he is not to be emancipated on this account in the issue stated in the Book even if he accepts after the death of the master, unless the heir emancipates him. The reason is that a dead person does not have the legal capacity to emancipate. This is correct.

He said: If a person emancipates his slave in lieu of service for four years and the slave accepts, he is emancipated. He then dies immediately thereafter. According to Abū Ḥanīfah and Abū Yūsuf (God bless them), he is liable for his value. Muḥammad (God bless him) said that he is liable for the four year value of his services. As for emancipation, the reason is that he deemed service for a determined period to be the counter-value, therefore, emancipation is associated with acceptance, which is found and service for four years becomes binding upon him as it is a valid counter-value. It is as if he emancipated him for a thousand dirhams. Thereafter if the slave dies then the disputed issue is based upon another disputed case, which is that if he sells the same slave for a female slave after which the female slave is claimed by a third party or dies (prior to delivery), the master has the right of recourse to the slave for the slave’s value, according to the two jurists, and for the value of the slave girl according to him (Muḥammad). This issue is well known and the reason for basing the current issue on it is that just like delivery of the slave girl has become obstructed due to death or a third-party claim, obtaining the services for four years is also obstructed with the death of the slave and likewise the death of the master, therefore, it becomes a precedent for this case.
If a person says to another, “Emancipate your slave girl for a thousand on the condition that you give her to me in marriage,” and the man emancipates her, but she refuses to marry him, then the emancipation is valid and the one making the request is not liable for anything. The reason is that if a person says to another, “Emancipate your slave for one thousand dirhams to be paid by me,” and he does that then there is no liability for payment and the emancipation is on account of the one ordered. This is distinguished from the case where a man says to another, “Divorce your wife for one thousand dirhams to be paid by me,” and he does that then in this case one thousand dirhams are due from the person giving the order, because stipulation of a counter-value for a stranger is valid in the case of divorce, but in emancipation it is not valid. We have recorded this earlier.

If he says, “Emancipate your female slave on my account for one thousand dirhams,” while the issue is the same, then the one thousand are divided over her value and her reasonable dower. What is allocated to the value is to be paid by the one ordering, and what is allocated to the dower is deemed void. The reason is that when he said, “On my account,” it includes purchase by legal requirement as is known. When this is the case, then the one thousand is compensation for purchase of the slave and for marital benefits through nikāh, therefore, it is divided over them. The part that represents what has been delivered to him, which is the slave, becomes due, but what has not been delivered to him becomes a nullity, which is the benefits of marriage. In the case where she marries him is not mentioned (in al-Jāmi` al-Saghīr). The response is that what is allocated to her value is dropped in the first case (where he did not say “on my account”), but it belongs to the master in the second case. What is allocated to her reasonable dower becomes her dower in both cases.

Chapter 82

Emancipation Upon Death of Owner (Tadbīr)

If the master says to his owned slave, “When I die you are free,” or “You are free when I turn my back (die),” or “You are a mudabbar,” or “I have made you a mudabbar,” then he becomes a mudabbar. The reason is that all these expressions are explicit for purposes of tadbīr for they establish emancipation upon death.

Thereafter it is not permitted to sell this slave nor gift him nor transfer him from his ownership, except for freedom, as is the case with kitābah. Al-Shāfī`i (God bless him) said that it is permitted, because it is emancipation made contingent upon the fulfilment of a condition, therefore, sale and gift are not prevented due to it, as in all contingent stipulations, and also in the case of the restricted mudabbar, because tadbīr is a bequest and it does not prevent all this. We rely upon the words of the Prophet (God bless him and grant him peace), “The mudabbar is not to be sold, nor gifted, nor inherited, and he is free from the third.” The reason is that it is the cause of freedom, because freedom is established with death and there is no other cause besides it. Thereafter deeming it a cause in the present is better, due to its existence in the present, and treating it as absent after death, because what happens after death is the extinction of the legal capacity to undertake transactions, thus, it is not proper to delay the causation till the time of extinction of legal capacity. This is distinguished from all other contingent transactions, because the obstacle for the causation subsists prior to the fulfilment of the condition. The reason is that it is an oath and the oath is an obstacle, while prevention is the purpose (of this oath). Further, it is contrary to the occurrence of divorce

1al-Dār`qūnī, Al-Zayla`i, vol. 3, 284.
2Al-Shāfī`i claims that there is no distinction.
and emancipation, as it is possible to delay the causation (in the latter) up to the time of the occurrence due to the existence of legal capacity at the time. The transactions are, thus, distinguished. In addition to this, it is a bequest of succession like inheritance, and declaring its cause as void is not permitted. This is what sale and things similar to it attempt to do.

He said: The master has the right to utilise his services or to let them out on hire, and if it is a slave woman he has the right to cohabit with her and he also has the right to give her away in marriage to another, because his ownership in the slave is established for him from which he derives the authority for these transactions.

When the master dies, the slave is emancipated from one third of his wealth, on the basis of the tradition we have narrated. The reason is that tadbir is a bequest as it is an act of donation associated with the time of death. The act is not given legal effects at once, therefore, it is executed from a third (of the estate), thus, if he does not have wealth other than the slave, the slave is to earn the other two-thirds. If there is a debt claim against the master, then he works for his entire value due to the precedence that a debt has over a bequest. It is not possible to reject the emancipation, therefore, returning the value becomes obligatory.

The child of a mudabbarah is deemed a mudabbar. The consensus of the Companions (God be pleased with them) is recorded on this.

If he qualifies tadbir with a stipulation, like his saying, "If I die from this illness of mine, or from my journey, or such and such illness," then he is not a mudabbar and his sale is permitted. The reason is that the cause has not come into operation at present due its vacillation because of the stipulation, as distinguished from the unqualified mudabbar as his emancipation is related to death in the absolute meaning, which is bound to come into existence.

If the master dies in the manner stipulated and mentioned, he is emancipated just like a mudabbar is emancipated, which means from a third. The reason is that the legal effects of tadbir come into being in the last of the segments of his life for the realisation of this qualification. Accordingly, it is taken into account from a third. Among the qualifications is his saying, "If I die within a year or in ten years," as distinguished from his saying, "One hundred years," for no one usually lives that long. The reason is that the shorter period is bound to come.

Chapter 83

Emancipating the Slave Mother

If a slave woman gives birth to the child of her master she becomes his umm walad. It is not permitted to sell her or to transfer her ownership. This is based upon the saying of the Prophet (God bless him and grant him peace), "Her child has emancipated her." He (God bless him and grant him peace) elaborated her emancipation with which some of the legal implications were established, which include the prohibition of sale. The reason is that physical participation has resulted between the two cohabiting persons through the child, because fluids of the two mixed together so that it is not possible to distinguish between them, as was known in the discussion of prohibition for purposes of marriage. Total participation, however, remains in the legal sense not in reality. This results in the weakening of the cause (of emancipation) and it is delayed and made legally obligatory after death. The remaining physical participation in the legal sense is in consideration of paternity that is found from the side of men. Likewise freedom is established in their favour and not in favour of women. Thus, if a freewoman comes to own her husband, when she has given birth to his child, the slave whom she has come to own is not emancipated due to her death. The proof of delayed emancipation establishes the right to freedom immediately, therefore, it prevents the validity of sale or moving her out of his ownership other than freedom in the present, and it gives rise to her freedom after his death. Likewise if she was owned in part by him, because istilad is not divisible; it is a sub-rule of paternity, therefore, it will be analysed on the basis of the governing principle.

Response to al-Shafi'i, who permits sale or gift of a mudabbar.
He said: He has the right to have intercourse with her, to utilise her services, make her work for wages and to give her away in marriage. The reason is that he continues to own her, therefore, she resembles the mud. abbarah.

The paternity of her child is not established unless he acknowledges it. Al-Shāfi‘ī (God bless him) said that the paternity of the child from him is established even if he does not claim it legally. The reason is that if paternity can be established through contract, it should certainly be established through intercourse, and that birth is more likely through it. Our argument is that having intercourse with the slave woman is for the satisfaction of carnal desire, and not procreation for which a prevention exists (as birth is not desired). It is, therefore, necessary to make a claim for the same legal grounds as is done for milk yamin without intercourse. This is distinguished from the contract of marriage, because a child is desired as the primary purpose, therefore, there is no need for filing a claim.

If she brings forth another child after this, the paternity of this child is established without acknowledgement. This means after acknowledgement by him about the paternity of the first child. The reason is that through the first claim it is determined that the purpose is to produce children with her. She now becomes someone with legal access for sexual intercourse like a woman with whom marriage is contracted. If, however, he denies the paternity (of the later child) it stands negated through his declaration, because the physical relationship here is weak insofar as he possesses the right to transfer it through marriage to another. This is distinguished from the lawfully wedded wife as paternity cannot be negated by his denial, except through li‘ān because of the strength of the marital bond, and he does not possess the right to annul it by giving her away in marriage. This situation that we have mentioned is on the basis of the legal rule. As for the moral rule (between him and his Creator), if he has had intercourse with her and has given her protection2 and has not been ejaculating outside the vagina, it is binding on him to acknowledge the child and file a claim for it, because it is obvious that it is his child. If he has ejaculated outside or has not been protecting her, it is permitted that he deny the paternity of the child, because one obvious state is opposed by another. This is how it has been transmitted from Abū Ḥanīfah (God bless him). There are two other narrations about it from Abū Yūsuf (God bless him) as well as from Muhammad (God bless him), and we have mentioned both in Kāfayat al-Muntahi.

If he gives her away in marriage, and she brings forth a child, the child has the same status as the mother, because the right to freedom passes on to the child as in taḍbir. Do you not see that the child of a freewoman is free, while the child of a slave woman is a slave.

Paternity is established through the father. The reason is that the right of legal access for cohabitation belongs to him, even if the marriage is irregular, because irregularity in this case is linked to validity in conformity with the legal rules. If the master claims it as his child, paternity is not established through him, because the child's paternity is already established from another. The child, however, stands emancipated and the mother becomes his umm walad due to his acknowledgement.

When the master dies, the umm walad will be emancipated from his entire estate (not a third). This is based on the tradition of Sa‘īd ibn al-Musayyab (God be pleased with him) “that the Prophet (God bless him and grant him peace) ordered that the ummahat al-awlad be emancipated and not sold in lieu of a debt, and that they should not be emancipated from a third.” The reason is that the need for offspring is primary, therefore, she will have priority over the rights of the heirs and debts like burial, as distinguished from taḍbir, because that is a bequest and that is over and above the primary needs.

There is no labour for her in lieu of a debt of the master owed to the creditors, due to what we have related. The reason is that she is not marketable wealth, therefore, her compensation cannot be paid as a consequence of abduction, according to Abū Ḥanīfah (God bless him). Accordingly, the right of the creditors is not linked to her as in the case of qīsās and as distinguished from the mudabbar for he is marketable wealth.

If a Christian umm walad (owned by a Dhimmi) converts to Islam, then she is obliged to work for her value, and she has the status of the mukātabah, who is not emancipated until she pays the earned value. Zufar (God bless him) said that she is to be emancipated at once and the earned value is treated as a debt to be paid by her. The same disagreement applies to the case where Islam is offered to the master and he refuses

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2That is, he has not permitted her to go out and so on.
to convert. In such a case if the umm walad converts she will remain in the same status. Zufar (God bless him) maintains that removing degradation from her after she has converted is obligatory, and this can take place through sale or emancipation. Sale becomes difficult, therefore, emancipation is selected. We maintain that the welfare of both sides is affirmed by considering her a mukātabah, as this removes humiliation for her by her becoming free immediately, while injury to the Dhimmi with her compulsion to work for acquiring the dignity of freedom; thus, the Dhimmi will obtain the counter-value of his ownership. If she is emancipated, while she is insolvent, she will be reluctant to work. The umm walad owned by a Dhimmi is marketable according to his belief, therefore, he is to be left to his rules, but even if she is not marketable wealth she is protected, which gives rise to the liability for compensation as in the case with a joint claim of qisās where one of the heirs has forgiven the offender and the rest are entitled to financial compensation. If her master dies, she is emancipated without the obligation of earning, because she is his umm walad. If she is unable to pay during his lifetime she does not revert to slavery. The reason is that if she does revert she becomes a mukātabah due to the existence of the obligating cause (for the sake of Islam of her child).

If a man has children through marriage with a slave girl of another and thereafter comes to own her, she becomes his umm walad. Al-Shafi'i (God bless him) said that she does not become his umm walad. If a man has a child through a slave girl that he owns after which she is claimed by a third party following which he comes to own her again, even then she will be his umm walad, in our view. He has two views on this, and the child is of a person deceived. He (al-Shafi'i) argues that she conceived a slave, therefore, she cannot be his umm walad; it is as if she conceived as a result of zinā and then the zinā comes to own her. The reason is that becoming an umm walad depends upon conceiving a free child, for he is part of the mother in that state, and a part is not incompatible with the whole. In our view, the cause is being a part (of the master), as we have mentioned earlier, and such participation is established between them with reference to a single child being attributed completely to both. As paternity has been established participation is also established through this connection. This is distinguished from zinā, because in that there is no paternity for the child that is attributed to the fornicating father, but the child is emancipated if such a father comes to own him, for he is part of him in reality without a legal connection. A parallel case is that of a person who buys his brother, who was born as a result of zinā, and who is not emancipated. The reason is that he is attributed to him through the relationship with the father, and that is not established.4

If a man has intercourse with a slave girl owned by his son, and she gives birth to a child, after which he claims it as his own, the paternity is established, while the woman becomes his umm walad. He is liable for her value, but is liable neither for 'ugr nor for the value of the child. We have mentioned the issue along with its evidences in the Book of Nikāh within this book. He is not liable for the value of the child as it was conceived in a state of freedom, due to the association of ownership with him prior to intercourse causing birth. If the father's father had intercourse, while the father was alive, paternity is not established. The reason is that the grandfather does not have wilayah while the father is still alive. If the father is dead, it is established for the grandfather just as it is established for the father, because of the emergence of his legal authority (wilayah) after the loss of the father. The kufr (Unbelief) of the father or his enslavement is the same as his death for it cuts off legal authority.

If a slave girl is owned jointly by two co-owners and she gives birth to a child with one of them claiming it as his own, paternity is established for him. The reason is that when paternity is established for his half claim it is established for the remaining due to necessity, as paternity cannot be divided for its cause cannot be divided, which is conception. The reason is that one child cannot be conceived from two different sperms. She becomes his umm walad, because producing a child is not divisible according to the two jurists. According to Abu Hanifah (God bless him) she becomes an umm walad to the extent of his share, thereafter he comes to acquire the share of his co-owner as that can be owned and he is liable for half her value. The reason is that he comes to own the share of his co-owner insofar as he is completely responsible for the birth. He is liable to one-half of her 'ugr (compensation for unlawful intercourse), because he had intercourse with a jointly owned slave woman. Ownership is established legally due to the birth and leads consequentially to the ownership of the share of his companion. This is distinguished from the case of the father who causes birth through the slave girl of his son,

4The slave is his brother through his father. If he was his brother through his mother, he would be emancipated. Al-'Ayni, vol. 6, 103.
because the ownership in that case is established upon the condition of birth, therefore, it is established prior to it, thus, he had intercourse with one in his ownership. He is not liable for the value of her child, because paternity was established by relying upon the time of conception, thus, the conception did not take place through the ownership of his co-owner.

If both claim ownership at once, paternity is established for both. This means that if she became pregnant within their ownership, Al-Sha'ībānī (God bless him) said that recourse is to be had to physiognomists. The reason is that the establishing of paternity for two persons together, is despite our knowledge that the creation of a child from two different sperms is not possible, therefore, we acted upon physical resemblance. The Prophet (God bless him and grant him peace), was happy with the statement of the physiognomist in the case of Usāmah (God be pleased with him).

A similar decision is reported from 'All (God bless him). The reason is that both are equal in establishing their entitlement, therefore, they are equal in paternity. Even though paternity is not divisible, yet divisible rules are related to it, thus, whatever accepts divisibility is established as a right for both, and what does not accept divisibility is established for each one of them completely as if the other does not exist. The exception is where one of the co-owners is the father of the other co-owner or one of them is a Muslim and the other is a Dhimmi, due to the existence of a basis for preference, which is Islam, while in the case of the father it is his wealth on the basis of his right in the share of his son. The happiness of the Prophet (God bless him and grant him peace) in what is related was due to the reason that the unbelievers used to doubt the paternity of Usāmah (God be pleased with him), and the statement of the physiognomist put an end to this dispute, therefore, he was happy about it.

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1. It has been recorded by the six Imāms in their sound compilations: Al-Zayla'i, vol. 3, 290.
# Al-Hidāyah

## BOOK TEN

### Aymān

(*Vows/Oaths*)

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Chapter 84

The Legal Status of Vows/Oaths

He said: Oaths are of three kinds: *yamin ghamūs*, *yamin mun‘aqidah* and *yanīn laqhw*. *Ghamūs* is an oath based on a past event by which falsehood is intended. Through this oath, the one who takes it commits a sin. This is based on the words of the Prophet (God bless him and grant him peace), “One who make false oath, will be thrust by Allah into the fire.”

There is no expiation for such an oath, except repentance and the seeking of Allah’s forgiveness. Al-Shāfi‘ī (God bless him) said that there is expiation in it, for expiation has been stipulated for the removal of sin and for violating the sanctity of the name of Allah, the Exalted. Such violation has been established by the use of the name of Allah for a falsehood. Thus, it resembles the *yamin ma‘qūdah* in form. We rely on the argument that it is a pure *kabīrah* (grave sin), while expiation is an act of worship that is rendered with fasting and for which forming and intention is stipulated, therefore, a grave sin is not to be linked to expiation. This is distinguished from the *ma‘qūdah* for that is permitted, and though even there is an element of sin in it, the sin is subsequent to the oath and is linked to a new exercise of the will (for breaking the oath). The sin in the *qhamus* oath is directly associated with a grave sin, therefore, it prevents its linkage with expiation.

The *mun‘aqidah* is an oath taken to undertake or not to undertake an act in the future. If he breaks such an oath he is liable for expiation. This is due to the words of the Exalted, “Allah will not call you to account

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1 *Yamin ghamūs* in simple terms is swearing to cover up falsehood.
2 It is *gharib* in this version. The meaning, however, is recorded in other traditions reported by al-Ṭabarānī and others. Al-Zayla‘ī, vol. 3, 292.
for what is void in your oaths, but He will call you to account for your deliberate oaths, and that is what we have mentioned.

The yamin laghw is an oath taken about a past fact under the belief that it is the truth, but the truth is different from what it was. The legal basis of this is the words of the Exalted, “Allah will not call you to account for thoughtlessness in your oaths, but for the intention in your hearts; and He is Oft-Forgiving, Most Forbearing.” He (Muhammad (God bless him)) has, however, associated it with hope due to the disagreement about its interpretation.

He said: The persons making a vow intentionally, under coercion or out of forgetfulness are all equal, so that expiation becomes obligatory (for its violation). This is based upon the words of the Prophet (God bless him and grant him peace), “Three things if intended seriously are taken seriously and if said in jest are still taken seriously: marriage, divorce and yamin.” Al-Shafi`i (God bless him) opposes us in this. We will elaborate the distinction under the topic of coercion, Allah, the Exalted, willing.

If the person undertakes the act mentioned in the oath (thus violating it) under coercion or out of forgetfulness, it is the same (as if the violating act was intended). The reason is that a real act is not made nonexistent due to coercion, and the bringing about of the (violating) act is a condition. Likewise if he brings about the (violating) act in a fit of fainting or insanity, because of the fulfillment of the condition (of violation) in reality. If the rationale behind the rule (of expiation) is the removal of blame, then the legal rule turns upon its evidence, which is its violation, and not on actual blame. Allah, the Exalted, knows what is correct.

Chapter 85

Valid and Invalid Vows/Oaths

He said: An oath is taken in the name of Allah, or in another name from among the names of Allah, the Exalted, like al-Rahman or al-Rahim, or by mentioning one of His attributes that are used for oaths in practice, like the Might of Allah, His Majesty or His Greatness. The reason is that a vow by naming the attributes is known in practice, and the meaning of the oath reflects the power that is obtained, for he believes in the Glory of Allah and His attributes, therefore, the mentioning of Allah’s name and His attributes is suitable for urging him to act or to prevent him from doing so.

Except that if he uses the words “By the knowledge of Allah,” then this will not amount to a vow, because these words are not used in practice. The reason is that he uses them and means thereby what is known. It is said: “O Lord, forgive us what is in Your knowledge of our sins,” that is, what exists in Your knowledge.

If he says, “By the wrath of Allah and His displeasure,” then he has not made a vow. Likewise “By His mercy,” because a vow with the use of these words is not known in practice. Further, by His mercy is sometimes meant its effect, like rain or heaven, while wrath and displeasure are intended to mean punishment.

If a person uses words meant for someone other than Allah, like “Prophet” or “ka`bah,” he has not made a vow, due to the words of the Prophet (God bless him and grant him peace), “When one of you makes a vow, he should make it in the name of Allah or abstain from making a vow by naming the Qur’an, because this is not done in practice. The Author (God be pleased with him) said: This means that he says, “Wa-al-Nabi, wa-al-Qur’an.” If, however, he says, “I am free...
of both (the Prophet and the Qur'an)," then this will amount to a vow, because being free of both amounts to *kufr* (unbelief).

He said: The oath employs the character used for the *gassam* (oath). These characters are the "waw," as in his statement "wallah," the character "bā," as in "billahī," and the "tā," as in "tallahī." The reason is that all these are already known to be used for oaths, and are mentioned in the Qur'an.

The character is sometimes concealed through the personal pronoun in which case he is making a valid oath, like his statement, "Allāh, I will not do such and such," because omitting the character is among the usage of the Arabs by way of eloquence. It is also said that while omitting the character, the noun is in the accusative, and it is also said that it is in the genitive with the lowered vowel point indicating the omission of the character. Likewise if he says, "billahī" (for Allāh), according to the authentic view, because it has taken the place of the character "bā." Allāh, the Exalted has said: "Āmantum lahu (literally, 'Ye believed for Him')," that is, "Ye believed in Him."

Abū Ḥanīfah (God bless him) said: If he says, "wa-haqqillahī," then he has not made a valid oath. It is also the view of Muḥammad (God bless him), and one of the views of Abū Yūsuf (God bless him), but in another narration from him it amounts to a valid oath, because *Haqq* is one of the attributes of Allāh, the Exalted, and it is as if he said, "Wallahī al-`aqqqī," and an oath by this word is known in practice. In the opinion of the two jurists, he intends thereby obedience to Allāh, and obedience is one of His rights, therefore, it is not a vow in the name of Allāh. The Mashā'īkh (jurists) have said that if he says, "wa-al-`aqqqī," it amounts to a valid oath, but if he says, "`aqqqī," it is not a vow. The reason is that *al-Haqq* is one of the names of Allāh, while with the indeterminate he tries to affirm his statement of promise.

If he says, "I swear," "I swear by Allāh," "I vow," "I vow in the name of Allāh," "I bear witness," or "I bear witness by Allāh," then he has made an oath. The reason is that these words are used for making vows, and this form is for the present, but it is employed for the future through the accompanying evidences, therefore, he is deemed to make a vow in the present. Further, bearing witness is an oath. Allāh, the Exalted, has said, "When the Hypocrites come to thee, they say, 'We bear witness that thou art indeed the Messenger of Allāh,'" and thereafter He said, "They have made their oaths a screen (for their misdeeds)." A vow in the name of Allāh is well known and legal, and without His name it is prohibited and will be construed to mean this. It is for this reason that it is said that it does not need *nīyyah* (intention), while it is also said that it is necessary due to the probability of it being a promise or an oath in the name of someone other than Allāh.

If he says in Farsi, "Sawand mikhuram ba-khūdā," it amounts to an oath. The reason is that it is for the present. If he says, "Sawand khurum," then it is said that it does not amount to an oath. If he says in Farsi, "Sawand khurum ba-talaq zamān (I swear by the divorce of my wife)," it does not amount to an oath, because it is not well known.

Likewise his statement *la-`amrullāhī wa-aymullāhī* (I swear by God) because *`amrullāh* implies that Allāh remains, while *aymullāh* means *aymunnālāhī,* which is the plural of *yamin.* It is also said that it means *wallah* (I swear by Allāh). The word *aym* is a link like the character *waw,* and an oath with both is well known. So also if he says, "The covenant of Allāh and His compact." The reason is that compact is an oath. Allāh, the Exalted, has said, "Fulfil the Covenant of Allāh," while the term *mithaq* (compact) is an expression used to mean *`ahl* (covenant).

Likewise if he says I am obliged by a *nadhr* (vow of consecration) or *nadhrullah.* This is based upon the words of the Prophet (God bless him and grant him peace), "One who makes a vow of consecration (nadhr) without naming the object, is liable for the expiation of an oath." If he says, "If I do such and such thing then I will be Jew or a Christian or an unbeliever," then it amounts to an oath. The reason is that when he deemed the condition a sign of unbelief, he believed that it was obligatory to prevent its occurrence. The statement by its creating an obligation of avoiding it without the condition makes it an oath, just as you would say in the prohibition of the permitted. If he says this about an act that he committed in the past then it will amount to a *yamin* (oath), and he will not fall into unbelief taking into account its operation in the

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1*Qur’ān* 63: 1
2*Qur’ān* 58: 16.
3*Qur’ān* 16: 91.

The tradition is recorded by Abū Dāwūd and Ibn Mājah, Al-Zayla`ī, vol. 3, 294.

"Like saying, 'Each permitted thing is forbidden for me.'" This will be considered an oath, Al-Aynī, vol. 6, 131.
future. It is said that it will amount to unbelief because of its immediate implication, and it is as if he said that he was a Jew. The correct view, however, is that he does not move over to unbelief in both cases if he knows that it is an oath. If he believes that he will move to unbelief through the oath, then he will become an unbeliever in both cases, because he consented to being an unbeliever insofar as he went ahead with the act.

If he says, “If I do such and such an act then upon me is the wrath of Allah or His displeasure,” then he has not made an oath. The reason is that it is a supplication for himself and is not related to conditions. Further, it is not well known. Likewise if he says, “If I do such and such a thing, I am a fornicator or a thief or one who drinks wine or one who consumes ribā.” The reason is that the prohibition of these things admit of abrogation and amendment, therefore, they are not in the meaning of the sacredness of the name of Allah. Further, this form is not known in practice.

85.1 **Kaffārah (Expiation)**

Expiation for an oath is the emancipation of a slave, with the same types deserving reward as they do in the case of zihār, and if he likes he can clothe ten needy persons with one dress for each person or what is more than that. The shortest dress is one in which prayer can be offered. If he likes he can feed ten needy persons like the feeding in the expiation of zihār. The legal basis for this are the words of the Exalted, “The expiation for it is the feeding of ten indigent persons on a scale of the average for the food of your families; or clothe them; or give a slave his freedom. If that is beyond your means, fast for three days.” The word “aw (or)” in the verse is for choice, thus, the obligation is for one of the three things mentioned.

He said: If he is not able to undertake any one of the three things, he should fast for three consecutive days. Al-Shafi`i (God bless him) said that he is to be given a choice (in the days) due to the unqualified meaning of the text. We rely on the recitation of Ibn Mas`udi (God be pleased with him), “The fasting of three consecutive days,” and this is like a mashhur tradition. Thereafter, the elaboration of the shortest length of the clothing mentioned in the Qur'an is narrated from Muhammad (God bless him).

It is narrated from Abu Hanifah and Abu Yusuf (God bless them) that it is the minimum that will cover most of his body, so that it is not permitted to give just trousers (sarāwil), and that is correct, because one who wears minimum length it will be deemed rewarded if its value is equal to the food that is deemed sufficient.

If his expiation precedes the violation of the oath, it is not rewarded. Al-Shafi`i (God bless him) said that he is to be rewarded for expiation on the basis of wealth for he paid it subsequent to the arising of the cause, which is the oath, therefore, it resembles expiation after causing an injury. We argue that expiation is for covering up the offence, but there is no offence here. Further, the yamin is not the cause for it is an obstacle and does not lead to the rule, as distinguished from injury for that leads to the rule (by causing death).

Thereafter what is paid to the needy person is not taken back from him, because of its incidence as charity.

He said: A person who makes a vow to commit a sin (offence) like saying that he will not pray, or will not speak with his father, or that he will kill so and so, it is necessary that he considers himself to have violated such an oath and is to offer expiation. This is based upon the words of the Prophet (God bless him and grant him peace), “If a person vows to do something and then deems another act better than it, he should commit the better act and thereafter offer expiation for his vow.”

The reason is that in what we have there is a loss of piety (due to not abiding by his vow) and moving towards a compulsory act, which is expiation, and there is no compelling factor, as opposed to this, for committing the offence.

If an unbeliever makes a vow and then violates his vow in a state of unbelief or after converting to Islam, there is no violation for him. The reason is that he does not possess the legal capacity for a yamin for it is made or the Glory of Allah, and with his unbelief he cannot uphold this. Further, he is not eligible for expiation for that is an act of worship.

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Zinā and sarāwil do not admit of abrogation. Al-Aynī, vol. 6, 133.

Qur'ān 5: 89.

That is if it reaches the value of one-half sā' of wheat even if it is not a dress of the minimum required length.

It is recorded by Muslim from Abu Hurayrah (God be pleased with him). Al-Zayla`I, vol. 3, 298.
If a person prohibits for himself something that he possesses, it does not become prohibited, but he is under an obligation, if he makes it lawful for himself, to offer expiation. Al-Shâfi‘i (God bless him) said that there is no expiation for him, because prohibiting the permitted is like inverting what is lawful, therefore, a lawful act, which is the yamin, cannot be the subject-matter of a transaction that is unlawful. We argue that his statement indicates the proof of prohibition and its operation is possible for establishing it through matters external to it leading to the establishing of the consequences of the vow, thus, resulting in its prohibition. Thereafter if he commits an act, partially or completely, from among those that he prohibited, he violates the oath and expiation becomes obligatory. This is the meaning of making it lawful mentioned, because prohibition when established affects each of its constituent.

If a person says, "Each lawful thing is prohibited for me," then it applies to eating and drinking, unless he has formed an intention for other things. Qiyas dictates that he violates the oath the moment he completes his pronouncement, because he has committed a permissible act, which is breathing and so on. This is the opinion of Zufar (God bless him). The reasoning underlying istihlān is that the purpose is pieti and it is not attained by applying it to the most general meaning. When such application is rejected, the statement applies to eating and drinking in the light of what is customary, as the statement is employed in practice for what is consumed. The statement does not include his wife, except on the basis of intention, due to the non-consideration of the most general meaning. If he intends it, it amounts to iṭā', and the vow will not move away from eating and drinking. All this is the response on the basis of the authentic narration (zāhir al-rīwāyah). Our Masha'ikh (jurists), God bless them, said that a divorce occurs through it without an intention due to the preponderance of its usage for this, and the juzūr issued on this view. Likewise, if he says (in Farsi), "Halâl is ḥawām for me," and this on the basis of custom. They differed about the statement (in Farsi), "Anything I take in my right hand is prohibited for me," as to whether intention is to be stipulated for this. The more authentic view is that without intention it is to be deemed divorce on the basis of what is customary.

If a person makes a vow of consecration (nadhîr) in absolute terms, then he is under an obligation to fulfil it. This is based on the words of the Prophet (God bless him and grant him peace), "If a person makes a vow of consecration and names the object, he should fulfil what he names."

If he links the vow of consecration to a condition, and the condition is found, then he must fulfil the vow itself, due to the absolute terms of the tradition, because what is suspended on a condition is one that requires immediate performance in his view. It is narrated from Abu Hamîf (God bless him) that he withdrew that opinion and said: If he says, "If I do such and such thing then I am under an obligation to perform ḥajj or to fast for a year or give in charity what I own," it is to be deemed compensated through expiation for the vow. This is also the view of Muhammad (God bless him). He also moves out of the undertaking by fulfilling what he mentioned in the vow. This is the case when it is a condition that he does not desire for itself, for it contains the meaning of prevention in it in the sense of yamin. It is on the face of it a vow of consecration, therefore, he is given a choice between choosing any of the two options that he likes. This is distinguished from the case where it is a condition that he desires for itself, like saying, "If Allâh gives health to my sick," because in this there is an absence of the meaning of a yamin, that is, prevention. This detail is correct.

He said: If a person makes a vow and says, "If Allâh wills," linking it with his vow, then there is no violation of the vow. This is based on the words of the Prophet (God bless him and grant him peace), "If a person makes a vow and says, "If Allâh wills," then he is absolved of his vow." It must, however, be linked with the vow, because after having made the complete statement it is followed by retraction and there is no retraction in a vow. Allâh, the Exalted, knows best.

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BOOK X: VOWS/OATHS

If a person prohibits for himself something that he possesses, it does not become prohibited, but he is under an obligation, if he makes it lawful for himself, to offer expiation. Al-Shâfi‘i (God bless him) said that there is no expiation for him, because prohibiting the permitted is like inverting what is lawful, therefore, a lawful act, which is the yamin, cannot be the subject-matter of a transaction that is unlawful. We argue that his statement indicates the proof of prohibition and its operation is possible for establishing it through matters external to it leading to the establishing of the consequences of the vow, thus, resulting in its prohibition. Thereafter if he commits an act, partially or completely, from among those that he prohibited, he violates the oath and expiation becomes obligatory. This is the meaning of making it lawful mentioned, because prohibition when established affects each of its constituent.

If a person says, “Each lawful thing is prohibited for me,” then it applies to eating and drinking, unless he has formed an intention for other things. Qiyas dictates that he violates the oath the moment he completes his pronouncement, because he has committed a permissible act, which is breathing and so on. This is the opinion of Zufar (God bless him). The reasoning underlying istihlān is that the purpose is pieti and it is not attained by applying it to the most general meaning. When such application is rejected, the statement applies to eating and drinking in the light of what is customary, as the statement is employed in practice for what is consumed. The statement does not include his wife, except on the basis of intention, due to the non-consideration of the most general meaning. If he intends it, it amounts to iṭā’, and the vow will not move away from eating and drinking. All this is the response on the basis of the authentic narration (zāhir al-rīwāyah). Our Masha'ikh (jurists), God bless them, said that a divorce occurs through it without an intention due to the preponderance of its usage for this, and the juzūr issued on this view. Likewise, if he says (in Farsi), “Halâl is ḥawām for me,” and this on the basis of custom. They differed about the statement (in Farsi), “Anything I take in my right hand is prohibited for me,” as to whether intention is to be stipulated for this. The more authentic view is that without intention it is to be deemed divorce on the basis of what is customary.

If a person makes a vow of consecration (nadhîr) in absolute terms, then he is under an obligation to fulfil it. This is based on the words of the Prophet (God bless him and grant him peace), “If a person makes a vow of consecration and names the object, he should fulfil what he names.”

If he links the vow of consecration to a condition, and the condition is found, then he must fulfil the vow itself, due to the absolute terms of the tradition, because what is suspended on a condition is one that requires immediate performance in his view. It is narrated from Abu Hamîf (God bless him) that he withdrew that opinion and said: If he says, “If I do such and such thing then I am under an obligation to perform ḥajj or to fast for a year or give in charity what I own,” it is to be deemed compensated through expiation for the vow. This is also the view of Muhammad (God bless him). He also moves out of the undertaking by fulfilling what he mentioned in the vow. This is the case when it is a condition that he does not desire for itself, for it contains the meaning of prevention in it in the sense of yamin. It is on the face of it a vow of consecration, therefore, he is given a choice between choosing any of the two options that he likes. This is distinguished from the case where it is a condition that he desires for itself, like saying, “If Allâh gives health to my sick,” because in this there is an absence of the meaning of a yamin, that is, prevention. This detail is correct.

He said: If a person makes a vow and says, “If Allâh wills,” linking it with his vow, then there is no violation of the vow. This is based on the words of the Prophet (God bless him and grant him peace), “If a person makes a vow and says, "If Allâh wills," then he is absolved of his vow.” It must, however, be linked with the vow, because after having made the complete statement it is followed by retraction and there is no retraction in a vow. Allâh, the Exalted, knows best.

1It is gharrîh, however, there are other traditions about the fulfilment of nadhr that have been recorded by al-Bukhari. Al-Zayla'i, vol. 3, 300.

2He cannot opt for expiation due to the absolute meaning of the above tradition. Al-Ayni, vol. 6, 143.

3Like drinking khamr.

4It is gharrîh in these words. There are, however, other traditions recorded by the Authors of the four Sunan that convey the same meaning. Al-Zayla'i, vol. 3, 301.
Chapter 86

Vows About Entering Houses and Residing There

If a person makes a vow that he will not enter a room, but then enters the Ka'bah, or a mosque, or a church or a synagogue, then he has not violated his oath. The reason is that rooms are those that are built for spending the night there, and these structures are not built for this purpose.

Likewise if he is on the entrance of the room or under the awning over the main door, due to what we have mentioned. The awning is usually over the side street. It is said that if the entrance is such that he will be inside the room if the door is closed and it has a roof over it, then he has violated his vow, because this is a place where one usually sleeps.

If he enters the ledge, he has violated his oath. The reason is that it is built for sleeping in sometimes, therefore, it becomes like the winter and summer enclosures. It is said that this is the case when the ledge has enclosing walls for their ledges were made like this. It is also said that the response is meant for the unqualified meaning, and this is correct.

If a person makes a vow that he will not enter a house, and he enters a house that is in ruins, he does not violate his oath. If, however, he makes a vow that he will not enter a particular house and he enters is after it is razed to the ground and has become an open space, he violates his oath. The reason is that the term dār is used for the courtyard of the house both by Arabs and non-Arabs. It is said: dār ʿāmirah and dār ghāmirah (for built and unbuilt houses). The poetry of the Arabs supports this meaning (of courtyard). The structure is an additional description for it (in the vow), except that it is redundant where the structure is present, but taken into account where it is absent.
If he makes a vow that he will not enter this particular dar, and it turns into ruins and then another is built there, he violates his vow when he enters it, on the basis of what we have said, because the name lingers on after its collapse.

If the lot is turned into a mosque or a bath or a garden or a room, and he enters it, he does not violate his vow. The reason is that it is no longer a dar due to the imposition of another name on it. Likewise if he enters it after the razing of the bath or other structure, because it does not revert to the name of dar.

If he makes a vow that he will not enter this particular room, and he does so when it is demolished and the lot has become an open space, he does not violate his vow, because of the removal of the name room from it, as it cannot be used for spending the night. If the walls are standing and the roof is missing he will violate his oath as nights can be spent there, while the roof is an additional attribute for it. Likewise if another room is built there, he does not violate his oath upon entry. The reason is that the name did not survive after it was demolished.

If a person makes a vow that he will not enter this particular dar and he stays on its roof, he violates his vow. The reason is that the roof is part of the dar. Do you not see that a person in i’tikāf does not invalidate it if he goes to the roof of the mosque, therefore, it is said that he does not violate his vow, and this is the view preferred by the faqih Abū al-Layth.

He said: Likewise if he comes into the entrance of the house. This should be understood in terms of the detail given earlier.

If he stands in the window of the house so that if it is closed he will not be inside, he does not violate his vow. The reason is that the door is for enclosing the house, therefore, what is within it is not outside the house.

If a person makes a vow that he will not enter this particular house, and he is inside the house, he will not violate his vow by getting up, but he will by moving out and reentering, on the basis of istiḥsān. Qūfā dictates that he has violated his vow, because staying on is assigned the rule of commencement. The reasoning underlying istiḥsān is that entry does not have the meaning of staying on, because it is separate entry from outside into the house.

If he makes a vow that he will never wear this particular dress when he is wearing it, and he takes it off at once, he does not violate his vow. Likewise if he makes a vow that he will not ride this particular animal, when he is riding it, and then dismounts at once, he does not violate his vow.

Similarly, if he makes a vow that he will not reside in this particular house when he is living in it, and begins to vacate it immediately, Zufār (God bless him) said that he violates his vow due to the existence of the condition even if it is partial. We argue that a yamin is made for its completion, therefore, the period of its realisation is exempted.

If he continues to wear the dress for some time, he violates his vow. The reason is that all these acts are presumed to exist till a similar act is undertaken. Do you not see that a duration is fixed for them. It is said, “I rode for a day,” and “I wore it for a day,” as distinguished from entry for it is not said, “I continued to enter for a year,” in order to indicate duration and limitation. If he resolves a pure initial wearing, he is to be deemed truthful, because his statement probably implies this.

He said: If a person makes a vow that he will not reside in this particular house, and he then moves out without returning, while his assets and his family are still inside, he has violated his vow. The reason is that he will deemed to be residing in it with his assets and his family still in it, according to custom, thus, a person operating in the market will say, “I live in such and such street.” The house and courtyard have the same status as a house. If the vow pertains to a city, completion does not depend upon moving assets and family according to what is narrated from Abū Yūṣuf (God bless him), because according to custom he is not counted a resident of a city from which he has moved, as distinguished from the first case (of the house). A village has the same status as the city (for this purpose) according to the sound response. Thereafter, Abū Ḥanīfah (God bless him) said that it is necessary that he move all his assets, because their remaining behind leads to violation of the vow. The reason is that residence is established by all these things, and such residence remains as long as any part of these remains behind. Abū Yūṣuf (God bless him) said that the major portion is taken into account, because moving everything may sometimes be difficult. Muhammad (God bless him) said that things that constitute his ka’idhūdha’i (Farsi: family and servants) are taken into account, because what is beyond this is not part of his residence. The jurists said that this is the best view and most compassionate for the people. It is necessary that he move to another house without delay so that the vow is completed. If he moves out to the street or to the mosque, they say it is not completed. The dalil (evidence) in al-Ziyādat is that a person who moves from a city with his family is deemed to be the resident of that
land for purposes of prayer until he takes up residence in another land. Likewise here. Allah knows best.

Chapter 87

Entering and Leaving Buildings, and Other Matters

He said: If a person makes a vow that he will not leave the mosque, but he then orders someone who carries him out, then he has violated his vow. The reason is that the act of the person ordered is attributed to the one giving the order. It is as if he mounted an animal and moved out. If he is moved out under duress he has not violated his vow, because the act is not transferred to him due to the absence of an order. If he is carries out with his consent, but not his order, he does not violate his oath, according to the authentic narration, because transferring of the act to him is through a command and not mere consent.

If he makes a vow that he will not leave his house except for a funeral, and then he goes out for a funeral, but thereafter he attends to another need (while he is out), he does not violate his vow by doing so. The reason is that the present going out is exempted and going to a place after that does not amount to going out.

If he makes a vow that he will not go out to Makkah after which he goes out intending to go there, but turns back, he has violated his vow, as he has gone out with the intention of going to Makkah, which is the condition, because exit means moving from within and going out.

If he makes a vow that he will not visit Makkah, he will not violate his vow unless he enters Makkah. The reason is that this is an expression for reaching. Allah, the Exalted, has said, "So come, both of you, to Pharaoh, and say:" Qur'an 26:16. If he makes a vow that he will not go to it, then it is said that
If a person makes a vow that he will certainly visit Basrah, but he does not do so till he dies, then he has violated his vow in the last moment of his life for it was possible to fulfil it prior to this.

If he says to another, "I will certainly visit you tomorrow if I am able to," then this is to be construed to mean ability with respect to health and not normal ability. It has been elaborated in al-Jami' al-Saghir, where he (Muhammad) said: If he is not unwell, or the sultan has not prevented him, or some other event has not taken place that deprives him of the ability to visit him, he has violated his vow. If he intended the ability of qada' (that is, if destined to come) then the matter is between him and Allah, the Exalted. This is so as the reality of ability accompanies the act. The unqualified term includes the safety of limbs and the soundness of means that are so in practice. Thus, an unqualified use of the term will be interpreted in this meaning. Intending the first then the term will be interpreted in this meaning. Intending the first then the term will be interpreted in this meaning. This is correct as it is an expression for leaving.

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If he says (in the previous statement), "Unless I permit you," and then permits her once and she goes out, but thereafter goes out again without his permission, he has violated his vow. The reason is that the exempted exit is linked with permission and what is beyond that is covered by general prohibition. If he intended permission just once, he is to be deemed truthful morally, but not legally, because it probably includes this meaning, nevertheless it goes against the apparent meaning.

If the wife of a person intends to go out, but he says to her, "If you go out you are divorced," after which she sits down for a while, and then goes out, then he has not violated his vow. Likewise where a person decides to beat his slave, and another person says to him, "If you beat him, then my slave is a freeman." He holds back for a while after which he beats him. This type of vow is known as a yamin fawr. It was Abu Hanifah (God bless him) alone who gave expression to it. The underlying reasoning is that in practice the intention of the person making the intervening statement is to prevent the beating and going out, and (statements of) oaths/vows are based on practice.

If a man says to another, "Sit down and have lunch with me," and the other says, "If I have lunch my slave is a freeman," after which he goes out and returns to have lunch, he has not violated his vow. The reason is that his statement was made in response to the invitation, therefore, it will be construed for that invitation and applied to the lunch to which he was invited. This is distinguished from the case where he says, "If I have lunch today," as in this he has gone beyond the response, therefore, it will be considered as an independent statement.

If a person vows not to ride an animal of such and such person, but then rides an animal belonging to the authorised slave (of such person), whether or not this man is indebted, he has not broken his vow, according to Abu Hanifah (God bless him). He does not violate his vow when the debt exceeds assets even when he included the animal owned by his slave in his intention as this person does not have any ownership in the slave. If, however, the debt does not exceed the assets or he does not have any debt, then he does not break his vow as long he does not include the slave's animal in his intention as his ownership in the slave subsists, however, it is customary to attribute ownership to the slave, therefore, it is done legally as well. The Prophet (God bless him and grant him peace) said, "If a person buys a slave and he has wealth, then it belongs to the buyer." Consequently, attributing ownership to the master becomes doubtful, therefore, it is necessary to stipulate intention. Abu Yusuf (God bless him) said that in all these situations he breaks his vow if he did not have such intention due to the ambiguity in attributing ownership. Muhammad (God bless him) said that he breaks his vow even if he did not have such intention taking into account the reality of the ownership. The reason is that a debt does not eliminate ownership in the option of the two jurists.

\[\text{It is recorded by all the six sound compilations. Al-Zayla'i, vol. 3, 304.}\]
Chapter 88

Vows About Eating and Drinking

He said: If a person makes a vow not to eat of a particular date palm, then his statement applies to its fruit. The reason is that he associated his vow with something that is not eaten, therefore, it is construed to apply to what grows out of it, that is, its fruit, because the tree is the cause for it. Accordingly, it is the figurative meaning that is suitably used for it, however, the condition is that the fruit is not altered into something new so that he does not break his vow by using mead, vinegar and what is cooked.

If he makes a vow that he will not eat these unripe dates, but he eats them when they ripen, he will not be breaking his vow. Likewise if he says that he will not eat from these ripe dates or drink this milk and the dates turn into dry dates, the milk into thick paste, he will not violate his vow. The reason is that the qualities of being unripe and ripe are the basis of the vow, likewise its existence as milk, therefore, it will be restricted to them. The reason is that milk is consumable, therefore, the vow will not be interpreted to apply to what is extracted from it. This is distinguished from the case where he vows that he will not speak to this minor or this young man, but he does speak to him after he grows old (he will break his vow), because cutting off relations with a Muslim by ceasing to speak to him is prohibited according to the shari'ah, therefore, the cause will not be deemed a cause according to the shari'ah.

If he vows not to eat the meat of this very young lamb, but he eats of it when it becomes a ram, he will be breaking his vow, because the attribute of being small is not the basis of the vow. The reason is that the prohibition of what is prohibited is greater than the prohibition of ram meat.
He said: If a person vows not to eat unripe dates and eats ripe dates, he has not broken his vow, because they are not unripe.

If a person vows not to eat unripe dates or ripe dates, or he vows to eat neither unripe dates nor ripe dates, but then eats partially ripe (two coloured) dates, he breaks his vow according to Abū Hanifah (God bless him). The two jurists said that he does not break his vow by eating ripe dates, that is, by saying ripe and eating partially ripe dates and by saying unripe and eating partially unripe dates. The reason is that partially unripe dates are called ripe and partially ripe dates are called unripe dates. It is as if the vow was about buying such dates. He (Abū Hanifah (God bless him)) argues that partially unripe dates are those that have a small unripe part at the tail, while partially ripe dates are those that are the opposite, thus, one who eats them has eaten unripe and ripe dates, and each of these is intended for consumption, as distinguished from buying as that applies generally and the partially follows the fully ripe.

If he makes a vow not to buy ripe dates, but he buys a bunch of dates in which there are ripe dates, he has not broken his vow. The reason is that purchase applies to the whole and the predominant prevails. If the vow pertained to eating, he would have broken his oath, because eating applies gradually to small parts, therefore, the dates in their entirety are intended. It becomes as if he vowed not to buy barley or not to consume it, and he buys wheat in which their are grains of barley and he consumes it, he breaks the vow with respect to eating but not buying, on the basis of what we said.

He said: If a person makes a vow that he will not eat meat, but then eats fish meat, he does not break his vow. Analogy dictates that he does break it, because it has been called meat in the Qur'ān. The basis for istihsān is that this use of the term is figurative as lahm is produced from blood and there is no blood in them due to their existence in water. If he consumes swine flesh or human flesh, he breaks his vow, because it is lahm in reality except that it is forbidden, and an oath is constituted validly for avoiding something that is prohibited. Likewise if he consumes liver or tripe. The reason is that it is lahm in reality and grows through blood. Further, it is used in the place of meat. It is said that he will not break his vow as in our custom it is not treated as meat.

He said: If he makes a vow that he will not eat or buy fat, he will not break his vow except in the case of fat around the stomach (of the animal), according to Abū Hanifah (God bless him). The two jurists said that he will break it due to the fat from the animal's back. It is fatty meat due to the existence of fat in it, which melts over fire. The Imam argues that it is meat in reality. Do you not see that it grows through blood and is used as meat for deriving strength from it. Consequently, he breaks his vow by eating it with respect to a vow about meat, but he does not violate his vow by selling it in a vow about selling meat. It is said that this is based upon the Arabic language, but in Farsi the word peh does not apply in any way to the fat in the back of the animal.

If he makes a vow that he will not buy, or not eat, meat or fat, but then buys the fat tail of a sheep, or eats it, he does not break his vow, because it is a third type and is not used as a substitute for meat or fat.

If he makes a vow not to eat from a particular lot of wheat, he will not break his vow until he chews the wheat. If he eats bread made of this wheat, he will not break his vow, according to Abū Hanifah (God bless him). The two jurists said that he will break his vow even if he eats bread made of the wheat, because it falls within its comprehended meaning in practice. According to Abū Hanifah (God bless him) it has an independent reality in use for it is boiled and roasted and chewed, and this meaning governs the figurative customary meaning on the basis of the rule preferred by him. If he chews it, he breaks his vow according to the two jurists, and this is correct due to the generality of the figurative meaning. It is just as if he says that he will not put a foot in the house of so and so. It is this (general meaning) towards which the opinion points when it says that he will break his vow if he eats its bread.

If he makes a vow that he will not eat of this flour, but he eats of its bread, he breaks his vow, because the flour itself cannot be eaten, therefore, it applies to what is derived from it. If he swallows the flour as it is, he will not break his oath, which is correct, as it gives way to the figurative meaning.

If he makes a vow not to eat bread, then his vow will apply to what the residents of the city, according to their custom, consider eating bread. This is bread made of wheat and barely as that is what is customary in most lands. If he eats bread of qaṭa'īf (triangular doughnuts made in butter), he does not break his vow, as they are included in the meaning of bread in its broad meaning, unless he included them in his intention, for his statement probably implies this. Likewise if he eats rice bread in Iraq, he will not violate his vow, because it is not part of their practice,
but if he was in Šabiristan or another land where it is consumed as bread, he will violate it.

If he makes a vow that he will not eat grilled food it will apply to meat and not to eggplant or carrots. The reason is that in its unqualified meaning it applies to grilled meat, unless he includes in his intention all things that can be roasted like eggs and other things so that the true meaning of his statement is given effect.

If he vows not to eat cooked food, then this applies to meat that is cooked. This is based upon istihās keeping customary practice into account. The reason is that giving it a very general meaning is difficult, therefore, it will be applied to what is specific and well known, which is food cooked in water. The exception is where he includes other things in his intention for it amounts to going to extremes. If he consumes the curry or gravy of this meat even then he will be violating his vow inssofar as it contains constituents of meat, it is called cooked food.

If a person makes a vow that he will not eat heads (skulls), his vow will be applied to those that are buried in clay ovens and sold in the market. These are called yūknas. In al-Jāmi' al-Sāghir the statement is that if a person vows that he will not eat a head (skull), it will be applied to heads of cows and goats, according to Abū Ḥanīfah (God bless him). Abū Yusuf and Muhammad (God bless them) said that it applies only to sheep. This is a difference of periods and times, and the customary practice in his times was for the two types, while in their period it applied to sheep alone. In our times, the fatwā is to be issued in accordance with practice, as is mentioned in al-Mukhtasar.

He said: If a person makes a vow that he will not eat fakihāh (fruit), but he eats grapes or pomegranates or moist dates or cucumbers, he does not violate his vow. If he eats apples or melon or apricots, he does violate it. This is the view according to Abū Ḥanīfah (God bless him). Abū Yusuf and Muhammad (God bless them) said that he does violate it by also eating grapes, moist dates and pomegranates. The basis is that the term fakihāh is applied to what is enjoyed before a meal and after it, that is, it is consumed in excess of the normal meal by way of appetisers. In this dry and fresh things are equal after having enjoyed them in the usual manner, thus, by having dried melon, he does not violate his vow. This meaning is present in an apple and its species, therefore, he violates his vow by eating them. The meaning is not found in a watremelon and cucumber, as these are more like vegetables with respect to sale and consumption, thus, he does not break his vow with them.

In the case of grapes, moist dates and pomegranates, the two jurists say that the meaning of additional enjoyment is present in them as these are the most sought after fruits and enjoyed more than other fruits. Abū Ḥanīfah (God bless him) says that these are things that provide nutrition and are used as medicines. It leads to deficiency in the meaning of enjoyment through their use in one’s need for survival. Consequently, the dried fruits from among them are used as condiments or basic food.

He said: If a person makes a vow that he will not eat idām (anything eaten with bread) then each thing that alters the colour of bread is idām, but roasted meat is not idām, while salt is idām. This is the view according to Abū Ḥanīfah and Abū Yusuf (God bless them). Muhammad (God bless him) said that each thing usually eaten with bread is idām. This is also a narration from Abū Yusuf (God bless him). The reason (according to Muhammad) is that the term idām is from muwādāmah, which means compatibility. Each thing that is eaten with bread is compatible with it, like meat and eggs and the like. The two jurists argue that idām is something that is eaten as a secondary item, and the meaning of being secondary in a mixed form is found in reality in these, and when consumed independently the meaning is found in the legal sense. Complete compatibility depends upon absorption as well. Vinegar and other liquids are not eaten alone but are drunk, while salt is not eaten separately in practice as it dissolves, therefore, it is secondary. This is different from meat and other similar things for these are eaten separately. The exception is where he includes them in his intention inssofar as this would be an extreme case. Grapes and melon are not idām, which is the correct view (out of different views).

If a person vows not to have ghādā' (breakfast/lunch), then ghādā' is between the morning prayer up to zuhr prayers, while 'aṣhā' (dinner/supper) is between the zuhr prayer up to midnight. The reason is that the meal after the declining of the sun is 'aṣhā'. It is for this reason that the zuhr prayer is referred to in a tradition as one of the two prayers of 'aṣhā'. Šuhūr is between midnight and the rising of the sun. As it is derived from the word sahr and is applied to what is close to it. Therefore ghādā' and 'aṣhā' are meals that are intended to satisfy appetite. The

*The word idām has a very wide meaning. It includes things like vinegar, oil, honey, butter, milk, salt and curry.*
practice of the residents of each land is taken into account for them, but it is stipulated that the meal satisfy at least one-half of the appetite.

If a person says, “If I wear, eat or drink, then my slave is free,” but then adds, “I meant some things and not others.” He is not to be deemed truthful legally or otherwise. The reason is that intention is valid in association with the expression, when a dress or other things are not mentioned. A thing implied has no generality, therefore, an intention making it specific becomes redundant. If he says, “If I wear a dress or eat or drink a beverage (liquid),” he is not to be deemed truthful adjudication alone. The reason is that it is an indefinite noun used for a condition, therefore, it becomes general and the restrictive intention operates on it, except that it goes against the apparent meaning, thus, it will not be deemed true for adjudication.

If he makes a vow that he will not drink from the Dijlah (Tigris) River, but he drinks its water in a utensil, he has not broken his vow, until he sips water from the river, according to Abū Hanīfah (God bless him). The two jurists said that if he drinks from it with the help of a utensil he has broken his vow as that is the commonly understood meaning. The Imam argues that the word ṭīn is used for divisibility and the true meaning here is in sipping and this is the usage. Accordingly, he breaks his vow on the basis of consensus, and transferring the meaning to its figurative sense is prevented even if it is well known.

If he says that he will not drink of the water of the Tigris, but then drinks from its water with the help of a utensil, he breaks his vow. The reason is that even after scooping up the water it remains attributed to the river, and that is the condition. It is as if he has drunk from a canal that has been taken out from the river.

If a person says, “If I do not drink today the water that is in this jar, then my wife is divorced,” but there is no water in the jar, then he does not violate the vow. If there is water in the jar, but it is split prior to the arrival of the night, he does not violate his vow. This is the view according to Abū Hanīfah and Muhammad (God bless them). Abū Yūsuf (God bless him) says that he breaks his vow in both cases, that is, after the day is over. On the same disagreement is analysed the case where the vow is sworn in the name of Allah, the Exalted. The basis is that a condition of the vow becoming effective and its continuance is the concept of completion in the opinion of the two jurists, with Abū Yūsuf (God bless him) disagreeing. The reason is that a yāmin is formulated for completion; therefore, such completion must be found in order to give effect to it. He (Abū Yūsuf) argues that it is possible to say that it is effective leading to completion in a manner that affects the substitutary duty, which is expiation. We would say that it is necessary that the original duty be accomplished so that it can operate on the substitutary duty. It is for this reason that the yāmin ghamis does not become effective for purposes of expiation.

If the vow was absolute, then in the first situation, he does not break his vow in the opinion of the two jurists, but according to Abū Yūsuf (God bless him) he violates it immediately. In the second case he breaks his vow in the opinion of all three jurists. Abū Yūsuf (God bless him) makes a difference between the absolute and one limited by time. The reasoning underlying the distinction is that limitation of time is to provide space, thus, the act does not become obligatory except in the last segment of the time. Accordingly, he does not break the vow prior to this. In the case of the absolute vow it is necessary to fulfil it as soon as he is free of the pronouncement. In this case he is unable to do so, therefore, he breaks the vow at once. The two jurists also distinguish between the cases and the reasoning for the distinction is that in the absolute vow he is required to fulfil it as soon as he ends the statement, but as the fulfilment is lost due to the loss of the object of the vow, he breaks his vow as if the person making the vow dies while the water remains. As for the vow limited by time, fulfilment is obligatory in the last segment of the time and at this time the object of completion does not remain due to the absence of its conception, therefore, fulfilment is no longer obligatory in it, and the vow is annulled. It was as if he made the vow initially in this state.

He said: if a person makes a vow that he will rise up into the sky or to convert this stone into gold, his vow has become effective and he breaks it immediately thereafter. Zufar (God bless him) said that it does not become effective for it pertains to what is usually impossible, therefore, it is the same as what is impossible in reality. Thus, it does not become effective. We argue that fulfilment is possible in reality, because rising into the sky is possible in reality. Do you not see that the angels rise up into the sky, likewise a stone is turned into gold when converted by Allâh, the Exalted. If it can be conceived it becomes effective for purposes of the

1Because it pertains to an act in the future.
substitutory duty. Thereafter, he breaks it through the ruling of inability that is established in practice, like the person making the vow dying, for he breaks his vow despite the possibility of life returning. This is different from the issue of the jar (stated above), because the drinking of water at the time of making the vow, when there is no water in it, cannot be conceived and thus cannot become effective.

Chapter 89

Vows About Speaking

He said: If a person makes a vow that he will not speak with so and so, then he speaks to him in a manner that the person can hear him though he is asleep, he has broken his vow. The reason is that he spoke to him and his voice reached him, but he did not understand due to sleep. It is as if he called out to him so that he could hear him, but he did not understand due to inattention. In some versions of al-Mabsūf the condition is stipulated that he wake him up. The majority of our Masha‘īkh (jurists) uphold this. The reason is that if he does not draw his attention it will be as if he called out to him from a distance and he is in a situation where he cannot hear him.

If he makes a vow that he will not speak to him except with his permission, and he permits him, but he is not aware of his permission till he speaks with him, he has broken his vow. The reason is that the term idhn is derived from adhān, which is a notification or it is derived “from falling into the ears,” and all this is not realised without hearing. Abū Yūsuf (God bless him) said that he has not broken his vow, because permission is release, and it is complete with permission like consent. We say that consent is an inner act, but permission is different from this as has preceded.

He said: If he makes a vow that he will not speak with him for a month, then the time begins from the time of the vow. The reason is that if he does not mention the month, the vow will become perpetual. The mentioning of the month is for excluding what is beyond the month. What remains following his vow is within it taking into account the state he is in (possible anger). This is distinguished from the situation where he says, “By Allāh, I will fast for a month.” The reason is that if he does
not mention the month, the vow will not become perpetual. Mentioning it will be for determining the fasts through it. As it is indefinite, the determination is left to him.

If a person makes a vow that he will not speak, but then he recites the Qur'an in his prayer, he does not break his vow, however, by reciting it outside the prayer he will break his vow. The same rule applies to tasbih, tahlii and takbir. Analogy dictates that he breaks the vow in both cases, which is also the view of al-Shafi'i (God bless him), because recitation is speech in reality. We argue that in prayer it is not treated as speech. The Prophet (God bless him and grant him peace) said, "For this prayer of ours no part of human speech is valid for it is glorification, the proclamation of God's greatness and the recitation of the Qur'an." It is recorded by Muslim in his Sahih, and other versions by al-Bukhari and al-Darimi. Al-Zayla'i, vol. 2, 66.

If he says, "The day I speak to so and so, my wife stands divorced," then the day will mean day and night. The reason is that in the term "day" when it is associated with an act that does not extend over time, the intention is that it is unqualified. Allâh, the Exalted, has said, "If any of you turns back to them on such a day," the speech is not extended either. If he had formed an intention that it pertains to the day alone, then he will be deemed truthful for adjudication. The reason is that the statement is used to mean this as well. It is narrated from Abu Yûsuf (God bless him) that he is not to be deemed truthful as it goes against the well-known meaning. If he says, "The night I speak to him, ..." then it is construed to mean night specifically. The reason is that it is the true meaning for the darkness of the night just as brightness is for the day specifically. The word night is not used in the absolute sense so as to be independent of time.

If a person says, "If I speak with so and so, my wife is divorced, unless so and so comes or until so and so comes, or unless so and so gives permission or until so and so gives permission," following which he speaks with him prior to the person's arrival and permission, then he breaks his vow if he speaks with him after his arrival and permission, he does not break his vow, because that is the limit, and the oath continues prior to the limit and ends after it. Thus, he does not violate the vow after the termination of the yamin. If the person named (so and so) dies, the vow lapses. Abu Yûsuf (God bless him) disagrees with this. The reason is that the prohibited thing is speech, which ends with permission and arrival, and after death such termination cannot be conceived to exist, therefore, the yamin lapses. According to his view such conception is not a condition, therefore, upon the cessation of the limit the yamin becomes perpetual.

If a person makes a vow that he will not speak to some other person's slave, but he does not identify a specific slave in his intention, He may also say he will not speak to some other person's wife, or friend. Therefore, after such other person sells his slave, or irrevocably divorces his wife or develops enmity with his friend, and he speaks to one of them, he has not broken his vow. The reason is that his vow has been made with respect to an act that operates on a subject-matter that is attributed to another person, either to his ownership, or to his relations, and such an act is not found, therefore, he does not break his vow. The Author (God be pleased with him) said: There is agreement when the act is attributed to his ownership, but where it is attributed to his relations then according to Muhammad (God bless him) he breaks his vow, that is, in the case of the wife and friend. He says in al-Ziyadât that this association is merely for identification, because the purpose is not to speak to his wife or friend, therefore, the permanent association is not stipulated. Thus, the hukm will apply to their persons as if he had pointed towards them. The basis for what is mentioned here (in the matn) is the narration in al-Jami' al-Saghir, and the reasoning is that it is probable that the cessation of speech was intended for this man himself, therefore, he did not identify a specific slave. Consequently, he does not break his vow after the elimination of such association on the basis of doubt.

If his vow pertains to a specific slave, that is, if he says, "Such and such slave," or "Such and such wife," or "Such and such friend," he does not break his vow in the case of the slave, but he does break his vow in the case of the wife and the friend. This is the opinion of Abû Hanîfah and Abû Yûsuf (God bless them). Muhammad (God bless him) said that he breaks his vow with respect to the slave as well. This is the view of Zufar

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1 The tradition has preceded in the topic of factors annulling prayer. Al-Zayla'i, vol. 3, 304. The words there were: "In this prayer of ours no part of human speech is valid for it is glorification, the proclamation of God's greatness and the recitation of the Qur'an." It is recorded by Muslim in his Sahih, and other versions by al-Bukhari and al-Darimi.
as well (God bless him). If he makes a vow that he will not enter this house of so and so, and that person sells it, after which he enters it, then it is governed by the same disagreement. The reasoning for the view of Muhammad and Zufar (God bless them) is that attributing things to him here is for identification. Pointing out, however, is more explicit here for it cuts of participation of other persons, as distinguished from for it. Likewise the slave due to his reduced status. In truth it is for a meaning found in one who owns them, therefore, the vow is qualified with the state of existence of ownership. This is distinguished from the case where the reference is to an association of relationship like the friend and wife. The two jurists (Abū Ḥanīfah and Abū Yusuf (God bless them)) argue that the reason for the vow is something that is found in the person mentioned, because avoidance and rejection of these things (animals, houses and so on) is not undertaken for their own attributes. Likewise the slave due to his reduced status. In truth it is for a meaning found in one who owns them, therefore, the vow is qualified with the state of existence of ownership. This is distinguished from the case where the reference is to an association of relationship like the friend and wife for enmity may be for their own persons in which case the association is for identification and the underlying reason for the vow being as distinguished from what has preceded. Asmā'ī's view below.

89.1 ON DURATION

He said: If a person makes a vow saying, “I will not speak with him for a time (hin),” or “I will not speak with him for some time (zaman),” or “I

will not speak with him for a time or some time,” then it is construed to mean six months. The reason is that the word hin is sometimes applied to a short period, and sometimes it means forty years. Allah, the Exalted, has said, “Has there not been over Man a long period of Time (hin),” which could mean six months (gestation), and Allah, the Exalted, has said, “It brings forth its fruit at all times (hin).” This (six months) is the middle period, therefore, the meaning is directed towards it. The reason is that a very small period is not intended for prevention, because such prevention may exist under normal circumstances. A perpetual period is not usually intended, because that implies forever, and had he not mentioned it, it would have meant forever. Accordingly, the period we have mentioned is identified. Likewise the words zaman is used in the meaning of hin. It is said, “I have not seen you for a hin or for some time” in the same meaning. All this applies when he has not formed an intention. If he did intend something then the period is as he intended for he meant what he said in reality.

Likewise if he uses the word dahr (time), according to the two jurists. Abū Ḥanīfah (God bless him) said: Dahr, I do not know what that means. This disagreement lies in using it as an indefinite noun, which is incorrect. If it is made definite by the use of alif and lam (al-), then it means eternity according to the customary meaning. The two jurists maintain that the word dahr is used in the meaning of hin. It is said, “I have not seen you since a hin or dahr,” to imply the same meaning. Abū Ḥanīfah (God bless him) suspended his judgement in determining a period for it, because languages are not understood on the basis of analogy. Further, usage does not last long enough due to its changing meaning.

If he makes a vow that he will not speak to him for days, then it will be construed to mean three days. The reason is that it is a plural used as an indefinite noun, therefore, it includes the minimum used for the plural and that is three. If he makes a vow that he will not speak to him for al-ayyam, then it is taken to mean ten days, according to Abū Ḥanīfah (God bless him). The two jurists said that it will be taken to mean the days of the week. If he makes a vow that he will not speak to him for months, then it is taken to mean ten months in his view, but in their

3That is, the probability of some other slave, wife, friend or house.

4Qur'an 14:25

5Some commentators have said it means forty years. Al-'Ayni, vol. 6, 204. But see Abū Ḥanīfah's view below.

6Qur'an 14:25
opinion it is twelve months, because the character لام is meant for what is previously known, and that is what we mentioned for the issue turns on it. According to him it is a definite plural and will be applied to the maximum that is included in the plural, and that is ten. The reply is the same in his view for the plural “years.” According to the two jurists it will apply to his entire life, because there is no previously familiar period other than this.

If a person says to his slave, “If you serve me for a large number of days, then you are free,” then “large number of days,” according to Abu Hanifah (God bless him) are ten days. The reason is that this is the maximum implied by the word “days (al-ayyam).” The two jurists say that it means seven days, because what exceeds this is repetition. It is said that if the vow is in Farsi, it is taken to mean seven days, because it is mentioned with a singular and not a plural. Allah knows what is correct.

Chapter 90

Vows About Emancipation and Divorce

If a person says to his wife, “If you give birth to a child, you are divorced,” and she does give birth to a dead child, then she is divorced. Likewise if he says to his slave woman, “If you give birth to a child, you are free.” The reason is that what exists is a child born in fact, and is called by this name in common usage. Further, it is considered a child in the law (shar) insofar as `iddah is terminated by its birth, the bleeding following birth is called nifas, and the mother (if she is a slave) is called an umm walad. Thus, the condition is complete, which is the birth of the child. If he says to her, “When you give birth to a child, the child is free,” then she gives birth to a stillborn child followed by another who is alive. The one alive is alone deemed free, according to Abu Hanifah (God bless him). The two jurists said that none of them is free, because the condition is fulfilled by the birth of the dead child, as we have explained. The yumin, thus, lapses without the effect of its consequences upon the subject-matter. The dead child is not a subject-matter of freedom, and the child is the consequence. Abu Hanifah (God bless him) argues that the unqualified use of the term is qualified with the attribute of life, because the person making the vow intended the establishment of freedom as a consequence, which is a legal power that emerges for repelling the authority of another person. This cannot be established in a corpse, therefore, it is qualified with the attribute of life. It is as if he had said, “If you give birth to a living child, it is free.” This is distinguished from divorce and freedom of the mother as consequences, because these cannot be qualified.

When he says, “The first slave I buy is free,” then he buys a slave; the slave is free, because the word “first” is a term for the individual who
comes first. If he buys two slaves together, and thereafter another, none of them is emancipated, due to the absence of individuality in the first two and the absence of not coming first in the third, thus, the attribute of being first is missing. If he says, "The first slave I buy separately is free," then the third slave is emancipated, because he intended individuality in the state of purchase by his statement. The reason is that being separate is an attribute of a certain state, and the third slave is the first with this attribute.

If he says, "The last (next) slave I buy is free," but he buys a slave and dies thereafter, the slave is not emancipated. The reason is that being the term "last" is a term for an individual who had to come next and there is none before him, therefore, he is not the next. If he buys a slave and then another and dies thereafter, the next (last) slave is free, because he is the next individual, therefore, the attribute of being next is affirmed. He stands emancipated the day he bought him, according to Abū Ḥanīfa (God bless him), so that his freedom is worked out from the entire estate. The two jurists say that he is emancipated the day the master dies, so that his freedom is worked out from a third of the estate, because being last is not established without the absence of purchase of another slave after him, and this is realised after death. Thus, the condition is found upon death and is restricted to death. According to Abū Ḥanīfa (God bless him), death is merely an identifier (and not a condition), and as for the attribute of being last it is established from the time of purchase, therefore, it is established by reliance on the moment following it. The same disagreement governs the making of three repudiations contingent upon it. The effect is seen in the operation of prohibition of inheritance and its absence.

If a person says, "Each slave who gives me the good news about a child born to such and such woman, is free," then three slaves separately give him such news, the first one bearing the news is emancipated. The reason is that bashārah is that news about another which reflects happiness on the face, and it is stipulated that it be a news of happiness according to common usage. This is realised in the news given by the first. If they all give him the news at the same time, they stand emancipated, because it is realised due to all.

If a person says, "If I buy so and so, he is free," then he buys him with the intention of the emancipation being expiation for his vow, he is not rewarded, because the condition is that intention coincide with the cause of emancipation, which is the oath. As for purchase, it is the condition for emancipation. If he buys his father with the intention of the emancipation being expiation for his oath, he is deemed rewarded in our view. Zufar and al-Ṣāḥī (God bless them) disagree. They argue that the purchase is the condition for emancipation, while the 'ilah is kinship. The reason is that purchase is establishing of ownership, while emancipation is its extinction and between them there is contradiction (purchase is not emancipation). We argue that the purchase of a close relative amounts to emancipation, due to the words of the Prophet (God bless him and grant him peace), "A child can never be rewarded through his father, unless he finds him in bondage and buys him, thus, emancipating him." Here he deemed the purchase itself as emancipation, and did not stipulate anything else besides it, and it is a parallel for the saying, "He watered it and irrigated it."

If he buys his umm walad, he is not rewarded. The explanation of this issue is that he says to his umm walad through marriage, "If I buy you, you are free as expiation for my oath," and thereafter he buys her. She stands emancipated due to the fulfillment of the condition, but he is not rewarded on account of his expiation, because she is entitled to freedom on account of bearing his child, therefore, such freedom cannot be associated with the oath in all respects. This is distinguished from the case where he says to another slave woman, "If I buy you, you are free on account of the expiation of my oath." Here, if he buys her, he is rewarded, because her freedom is not a matter of entitlement from another perspective. Accordingly, associating it with the oath does not cause any disturbance (of the rules) when intention accompanies it.

If a person says, "If I take a slave woman as my mistress, she is free," then when he does take one whom he owns as a mistress, she is free. The reason is that the vow has been concluded for her benefit due to the existence of ownership. Further, the word jāriyah is indefinite, therefore, it includes each slave woman individually. If he buys a slave woman and turns her into his mistress, she is not emancipated through this vow. Zufar (God bless him) disagrees. He says that making a slave woman a mistress is not valid unless there is ownership, and mentioning it means mentioning ownership. It is as if he said to a strange woman, "If I divorce
you, my slave is free," then marriage here is implied. We argue that ownership is mentioned by necessity for the validity of making her a mistress, and it is a condition, therefore, it is limited to the extent of need. It is not effective for the validity of the consequence, which is freedom. In the case of divorce, it is effective with respect to the condition and not the consequence. Thus, if he says to her, "If I divorce you, then you stand divorced thrice," then he marries her and divorces her with a single repudiation, she is divorced thrice. This acts as the standard for our issue here.

If a person says, "Each slave that I own is free," then his 'ummahat al-awlâd, mudabbars, and slaves are all free, due to the unqualified association with all of them, because ownership is established in them both as ownership of the corpus and possession. His mukâtab slaves are not free unless he includes them in his intention, because he does not have possession over them, therefore, he does not own their incomes nor does he have a right to have intercourse with his mukâtabah. This is distinguished from the umm al-walad and mudabbarah. Thus, the association is improper and niyyah is necessary.

If a person says to his wives, "This one is divorced or this one and this one," then the last one is divorced, while he has an option with respect to the first two. The reason is that the word "ow" is for establishing of one of the two things mentioned. He included her in the first two and then added a third to the divorced woman. The reason is that the conjunction is for participation in the rule, therefore, it is confined to the subject-matter. It is as if he said, "One out of you two is divorced and this one." Likewise if he says to his slaves, "This one is free or this one and this one," then the last one is emancipated. He has an option with respect to the first two, as we explained. Allâh knows what is correct.

Chapter 91

Vows About Sale, Purchase and Marriage

If a person makes a vow that he will not buy or sell or take on hire, then appoints an agent who undertakes all this, he has not violated his vow. The reason is that the contract is concluded by the contracting party and he owns the rights of performance (huquq). Accordingly, if the contracting party had made the vow, he would have violated his oath. The act that is a condition is, therefore, not found, and that is the contract on the part of the one giving the order (principal), for what is established for him is the hukm of the contract. Unless, he includes this in his intention, for this appears extreme or the person making a vow is one in authority, who does not undertake contracts on his own, because he prevented himself from undertaking something that is normally done.

If a person makes a vow that he will not marry, or divorce, or emancipate, but then appoints an agent to do so, he has broken his vow. The reason is that an agent in all this is like an emissary and a messenger. He does not attribute these acts to himself, but to the person giving the order, and the rights of performance revert to the one giving the order and not to him. If he says that he formed the intention of not speaking about these things, he is not to be deemed truthful for adjudication alone. We shall be pointing out the meaning of this in the explanation of the difference, God, the Exalted, willing.

If he makes a vow that he will not beat his slave and will not slaughter his goat, but he orders another who does it, then he has violated his vow. The reason is that the owner has the authority of beating his slave and of slaughtering his goat, therefore, he possesses the right to delegate

1The Hanafis make a distinction between the hukm and huquq in the contract of agency.
the authority to another. Further, the benefit of doing so reverts to the owner, therefore, he is deemed the direct actor as there are no rights that go to the person ordered. If he says, "I intended not to undertake these acts myself," he is to be deemed truthful for purposes of adjudication, as distinguished from what has preceded about divorce. The underlying reasoning for the distinction is that divorce is nothing but the expression of words that lead to the occurrence of divorce for her. Ordering such an act is like expressing those words, and the word "divorce" includes both, therefore, if he intended their expression then he intended one particular meaning out of a general meaning. Accordingly, he is to be deemed truthful morally not legally. As for beating and slaughter, they are physical acts that are recognised by their effects, and attributing them to the person ordering are by way of causation in the figurative sense. Thus, if he intended to undertake the act himself, then he intended what is true in fact, therefore, he is to be deemed truthful morally and legally.

If a person makes a vow that he will not beat his child, but orders another person to do so and he does beat him, he has not violated his vow. The reason is that the benefit of beating the child will revert to the child, which is disciplining and refinement, therefore, his act will not be attributed to the person ordering. This is distinguished from the order to beat the slave, because the benefit of obedience through his order will go to the person ordering. Consequently, the act is attributed to him.

If a person says to another, "If I sell this dress for you, then my wife is divorced," after which the person who is the object of the vow conceals this dress within the dresses of the person making the vow, who sells them without knowing of such concealment, then he has not broken his vow. The reason is that the character َلَم precedes the word sale and this requires that it be specific to him, and this means that he sell under his orders, because sale accepts delegation, but this is not found here. This is different from the case where he says, "If I sell a dress that you own..." for here he will violate his vow as he will be selling a dress owned by him, whether or not it is under his order, and whether or not he is aware of it. The reason is that the character َلَم precedes the subject-matter as it is proximate to it, therefore, it requires that it be specific to him. This is true if the dress is owned by him. Cases parallel to this are of dyeing and stitching and each act that accepts delegation of authority, as distinguished from eating, drinking and beating the slave, as these acts do not accept delegation, therefore, the rule will not be separate in both cases.

If a person says, "This slave is free if I sell him," and he sells him on the condition that he has an option, the slave is emancipated, due to the existence of the condition, which is sale, and ownership in the slave continues, therefore, it is converted to its consequence, which is freedom. Likewise if the buyer says, "If I buy him he is free," and he buys him on the condition that he has an option, the slave is emancipated, as well. The reason is that the condition is fulfilled, and that is purchase, and ownership is established in him. This is obvious on the basis of the rule upheld by the two jurists as well as on the rule upheld by the Imam, because this emancipation depends on its condition, and what is contingent is like the immediate. If emancipation is given effect immediately, prior ownership is established for him, likewise in this case.

If a person says, "If I do not sell this male slave or this female slave, then my wife is divorced," following which he emancipates them or gives them the status of madabbar, his wife is divorced. The reason is that the condition stands fulfilled, which is the absence of sale due to the loss of the subject-matter of sale.

If a woman says to her husband, "What if you bring another wife?" and he replies, "Each wife that I have will stand divorced thrice," then this wife who took the vow from him stands divorced (too) for purposes of adjudication. According to Abū Yūsuf (God bless him), "This wife is not divorced for he excluded her through his response," therefore, the decision will be accordingly. Further, his intention is to please her and that is by divorcing others besides her, thus, it will be qualified accordingly. The reasoning underlying the authentic narration is based on the generality of the statement, and he went beyond the context of the response, therefore, the statement will be treated as an independent statement. Further, his purpose could have been to point to a grave action when she raised an objection about what the shari'a (law) has deemed lawful for him, and with such vacillation of the issue it is not suitable for restriction. If he intended wives other than her, then he is to be deemed truthful morally, but not legally, as it amounts to the restriction of the general meaning. Allah knows what is correct.

1Khiyār of the buyer does not prevent the passing of title to him.
Chapter 92

Vows About *Hajj*, Prayer and Fasting

He said: If a person, while in the Ka'bah or in another place says, “I am under an obligation to walk to the House of Allāh, the Exalted or to the Ka'bah,” then he is under an obligation to perform *hajj* or *'umrah* on foot. If he likes he may ride, but then he has to offer a sacrifice (*dam*). Analogy dictates that he is not obliged to do anything, because he made obligatory upon himself what is not an obligatory means of seeking nearness to Allāh or is intended essentially. Our opinion has been transmitted down to us from ‘Ali (God be pleased with him). Further, the people were accustomed to make *hajj* and *'umrah* obligatory through such vows. Thus, it is as if he had said, “It is obligatory upon me to visit the House on foot.” This makes it obligatory for him to go on foot, but if he likes he can take a ride and make an offering. We have already mentioned this in the topic on religious rites.

If he says, “It is obligatory upon me to go out or to move towards the House of Allāh, the Exalted,” then there is no such obligation upon him. The reason is that acquiring the obligation to perform *hajj* or *'umrah* through such expression is not part of the common usage.

If he says, “I am under an obligation to walk to the Haram or to al-Safā wa-al-Marwah,” then there is no such obligation for him. This is the view according to Abū Ḥanīfah (God bless him). Abū Yūsuf and Muḥammad (God bless them) said that because of his statement, “I am under an obligation to walk,” he is obliged to perform *hajj* or *'umrah*. If he had said, “Up to al-Masjid al-Ḥarām,” then the same disagreement of views applies. The two jurists are of the view that the Haram is included in the House being adjacent to it. Likewise, al-Masjid al-Ḥarām is included in the House, therefore, mentioning one amounts to mentioning the
other. This is distinguished from the case where he mentions al-Safa and al-Marwah, because they are separated from the House. According to the Imam, the creation of the obligation of ihram through such expressions is not part of the common usage, and it is not possible to create an obligation through the use of the word “walking” in its actual meaning, therefore, the obligation is prevented.

If a person says, “My slave is free if I do not perform this year,” and thereafter he says that he has performed the hajj with two witnesses testifying that he offered a sacrifice this year at Kufah, then his slave will not be emancipated. This is the view according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muhammad (God bless him) said that this is emancipated, because this testimony is about an act that is known, which is sacrifice. This act necessarily indicates the negation of the performance of hajj, therefore, the condition (of the vow) stands fulfilled. The two jurists maintain that it is the negation of hajj, because the purpose is to establish the negation of hajj and not the offering of the sacrifice (therefore it is not admissible as testimony), because there is no demand for such negation (on the part of the public). It is as if they rendered testimony that he did not perform hajj this year. The utmost that can be said is that this negation is within the knowledge of the witnesses, but we cannot distinguish one form of adjudication from the other (for purposes of adjudication).

If a person makes a vow that he will not fast, but he forms the intention of a fast and fasts for a moment then breaks it, he has violated his vow, because fasting is abstaining from acts leading to the breaking of the fast with the intention of seeking nearness to Allāh.

If he makes a vow that he will not fast for one day or keep one fast, but fasts for a moment and then breaks it, he has not broken his vow. The reason is that by this is meant a complete fast that is considered so by the law (sharî'ah), and this occurs by terminating it at the end of the day, and the day is explicitly mentioned in determining its duration.

If he makes a vow that he will not pray, but he performs the qiyam, ruku', then he does not break his vow. If, however, he also performs the prostration and then terminates it, he breaks his vow. Analogy dictates that he has violated his oath by commencement taking into account the ruling for the commencement of fasting. The basis for istihlān is that prayer is an expression for various elements (arkan). Thus, as long as he
Chapter 93

Vows About Dresses and Jewellery

If a person says to his wife, “If I wear cloth made of the yarn you spin, then it is hady,” and he then buys cotton that she spins and weaves after which he wears it, it is a hady according to Abū Ḥanīfah (God bless him). The two jurists say that he is not obliged to treat it as hady, unless she spins yarn from the cotton owned by him on the day of the vow. The meaning of hady is charity that is to be given at Makkah, because it is the name of the charity made for it. The two jurists argue that a nadhr (vow) is valid in the case of a thing owned or when it is associated with the cause of ownership, which is not found here. The reason is that clothing and spinning by a woman are not causes of ownership. The imām argues that spinning by a woman is usually from the yarn owned by the husband, and it is the usual that is intended, and this is the cause of ownership. It is for this reason that he will break his vow if she spins from the cotton owned by him at the time of the vow, because cotton is not mentioned in the statement of the vow.

If a person vows that he will not wear jewellery, but he wears a silver ring, he has not broken his vow, because it is not considered jewellery according to custom or law, therefore, its use is allowed for men and as a seal for sealing things. If it is made of gold, he has broken his vow, because it is jewellery, therefore, its use is not allowed for men.

If he wears a string of pearls that are not inlaid, he does not break his vow according to Abū Ḥanīfah (God be pleased with him). The two jurists said that he has broken his vow, because it is jewellery in reality insofar as even the Qur’ān has called it as such. The Imām argues that it is deemed jewellery according to custom, unless it is not inlaid, and the basis of vows is custom. It is said that this a disagreement arising from
differences of time and age. The fatwā is issued according to the view of the two jurists, because wearing pearls as jewellery by themselves is customary.

If a person vows that he will not sleep on a bed, but he sleeps on it when on top of it is a blanket (qirām), then he has broken his vow, because it is a constituent part of the bed, therefore, he will be considered to have slept on it. If he places another bed on it and sleeps on it, he does not break his vow. The reason is that something similar to it is not part of it and the reference to the first stands terminated.

If he makes a vow that he will not sit on the ground, but then he sits on a rug or mat, he has not broken his vow, because this cannot be termed as sitting on the ground. This is distinguished from the case where between the ground and his body is his dress, because that is deemed a subsidiary part of him and cannot be considered a barrier.

If he makes a vow that he will not sit on a cot, but then he sits on a cot upon which is a rug or a mat, he has broken his vow, because he is considered to be sitting on the cot. Sitting on a cot in practice is usually in this way. This is different from the situation where he places another cot on top of it, because it is similar, and reference to the first is terminated. Allāh knows what is correct.

Chapter 94

Vows About Homicide and Causing Injury

If a person says to another, “If I strike you then my slave is free,” and he strikes him after he is dead, then this statement will be construed “while he is alive.” The reason is that striking (hitting) is a term for an act that is painful and establishes contact with the body. Pain is not realised in the case of a corpse. A person who will be tormented in the grave will be brought to life, according to the view of most scholars. The same is the case with the giving of clothing, because the meaning is the passing of ownership when used in an unqualified sense. Clothing by way of expiation belongs to this category, and it is not realised in the case of a corpse, unless he intends thereby a covering. It is said that in Farsi it is construed to mean clothing. Likewise speech and entering upon someone. The reason is that the purpose of speech is to make the other person understand and death negates this. The meaning of entering upon is visiting a person and after death it is his grave that is visited, not the person.

If he says, “If I give you a bath, my slave is free,” and he gives him a bath after his death, he has broken his vow. The reason is that bathing means causing the water to flow and its purpose is purification. This stands realised in the case of a corpse.

If a man says that he will not beat his wife, but then pulls her hair, tries to strangle her, or bites her, then he has broken his vow, because beating is a term for a painful act, and pain stands realised. It is said that he will not break his vow in case of play for it amounts to enjoyment and not beating.\footnote{That would mean that if he beats her during play he does not break his vow.}

If a man says, “If I do not kill so and so then my wife is divorced,” when this so and so is dead and he is aware of it, he breaks his vow. The
reason is that he formed his vow on the basis of life that Allāh renews for him, and that is conceivable, therefore, the vow takes effect and he breaks it due to normal inability. If he is not aware of his death, he does not break his vow. The reason is that he based his vow on life that was running through him, in which case completion is not conceivable. The issue becomes analogous to the issue of the jar along with the disagreement over it. In that issue there is no detail about having knowledge, which is correct.

Chapter 95

Vows About the Demand of Dirhams

If a person says that he will definitely repay his debt soon, then it means a period that is less than a month. If he says after an extended period then it extends beyond a month. The reason is that what is less than it is considered a short period and what is more than that is an extended period. It is for this reason that it is said after a long period, “I have not seen for more than a month.”

If a person says, “I will pay the debt of so and so today,” then he pays him, but that person finds that the coins are demonetised, or counterfeit, or they belong to a third party, then the person making the vow has not broken his vow. The reason is that demonetisation is a defect, but a defect does not eliminate the species, therefore, if he permits repayment in such coins the debt will be satisfied and the condition of fulfilment of the vow will be found. Taking possession of coins claimed by a third party is valid, and returning these does not eliminate the fulfilment that is realised.

If he finds them alloyed with copper or bronze, he breaks his vow, because these are not from the species of dirhams so it is not permitted to use them in transactions of sarf (currency transactions) and salam (advance payment). If he sells him a slave in lieu of the claim and the creditor takes possession, he has fulfilled his vow. The reason is that the satisfaction of the debt claim is by way of swapping. The condition was realised by the mere sale of the slave, but possession has been stipulated to affirm it. If he makes a gift of it to him, that is, of the debt claim the vow is not fulfilled, due to the lack of swapping, because satisfaction is his act, while gift is the extinction of the debt on the part of the creditor.

If a person vows that he will not take possession of his debt claim in parts (some dirhams and not others), and he takes possession of part of

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If I do not drink from this jar, .... As discussed earlier.
it, he has not broken his vow until he takes possession of the entire debt in parts. The reason is that the condition is possession of the entire debt, but has been qualified by instalments. Note that he spelled out possession with respect to the debt that was identified, therefore, it applies to the entire debt, and he does not break his vow before it. If he takes possession of his debt in two types of measures of weight, and is not occupied with anything but the process of weighing in between the two processes, he does not break his vow and it is not separate possession. The reason is that sometimes it is usually not possible to take possession all at once in a single act, therefore, this discrepancy is exempted.

If a person says, “If I have any amount except one hundred dirhams, my wife is divorced,” but he has only fifty dirhams, he does not break his vow. The reason is that the purpose of such statement in common usage is to deny any amount in excess of one hundred. Further, the exemption of one hundred is the exemption of its constituent parts. Likewise if he says other than one hundred or besides one hundred, because all these are instruments of exemption. Allāh knows what is correct.

Chapter 96

Scattered Issues

If he makes a vow that he will not do such and such act, he has to give it up forever, because he negated the act in absolute terms, therefore, the prevention became general and acted as a general negation. If he makes a vow that he will definitely do such and such act, then if he does it once he has fulfilled his vow, because what is binding is the commission of the act once without being specified. This is the situation of positive action, therefore, he fulfils it by commission of the act once. He will break his vow when he gives up hope of committing the act, and this will take place due to his death or by the destruction of the object of the act.

If a ruler takes a vow from a person that he will definitely inform him about the entry of each mischiefmonger into the land, then this vow continues till the authority of such ruler exclusively. The reason is that the purpose is to repel his mischief or the mischief of another through deterrence. Consequently, there is no benefit of this after the termination of his authority, and such termination is through death or by his removal according to the authentic narration (zāhir al-riwāyah).

If a person makes a vow that he will gift his slave to so and so, but that person does not accept the gift, then he has fulfilled his oath, with Zufar (God bless him) disagreeing. He compares it to sale, because it is the passing of ownership for something similar. We maintain that it is donation, and is completed by action on the part of the donor. It is for this reason that he said in the statement that he made a gift, but the donee did not accept. Further, the purpose is the expression of counter-values, which requires action from both sides.
If a person makes a vow that he will not smell aromatic plants, but he smells rose or jasmine, he does not break his vow, because it is a name for a thing that does not have a stem, while these two have a stem.

If he makes a vow that he will not buy violets, and he has no particular intention, then it will be construed to mean its oil, on the basis of customary usage. It is for this reason that one who sells such oil is said to be a seller of violets, and purchase is based upon this as well. It is said that in our usage the term is applied to its petals. If he makes this vow with respect to a rose, then it will apply to its petals, because the actual application (not figurative) is this, and usage affirms this. In the case of violets usage is predominant. Allāh knows what is correct.
Al-Hidāyah

BOOK ELEVEN

Hudūd
(Fixed Penalties)

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Chapter 97

The Meaning and Proof of Hadd

He said: Hadd literally means prevention. In this sense, the word haddād is applied to mean a guard. In the shari'ah (technical sense), it is a penalty that is predetermined (fixed) as a right of Allāh. Consequently, qīṣāṣ (retaliation) is not called hadd as it is a right of the individual, nor is ta'zīr called hadd as it is not predetermined. The primary purpose in promulgating it as law is deterrence from acts that are harmful for subjects. Purification (from sin) is not the primary purpose in hadd, on the evidence that it is ordained for the unbeliever as well.

He said: Zinā (unlawful sexual intercourse) is proved through testimony and confession. The meaning here is proof presented before the imām (qādī). The reason is that testimony is a manifest evidence and likewise confession, because the truth in it is predominant, especially when it concerns the proof of injury and incrimination. As arriving at certain knowledge is difficult, manifest evidence is deemed sufficient.

He said: Testimony is found where four witnesses testify against a man or a woman that they have committed zinā. This is based on the words of the Exalted, “If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them, or Allah ordain for them some (other) way.”1 Allāh, the Exalted, has also said: “And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressors.”2 The Prophet (God bless him and grant him peace) said to

1Qur'ān 4:15
2Qur'ān 24:4

`Alì Zahla said that the tradition is gharib with these words, however, Abi Ya`la al-Mawsilì has recorded a tradition in the same meaning in his Musnad. "Four witnesses in the hadar on your back." Al-Zayla`l then records a large number of traditions that convey similar meanings. Al-Zayla`l, vol. 3, 306.

The underlying hikmah mentioned by the Author is extremely important for understanding the nature of the offence of zina and how it is treated in Islamic law. In our view, unless the factor of concealment is appreciated, the nature of the offences of zina and qadhf cannot be understood.

It is recorded by Abi Dawud and Al-Imam al-Tirmidhi. Al-Zayla`l, vol. 3, 308.

It is recorded in different versions from A`ishah, `Ali and Abi Hurayrah, God be pleased with them all. The versions are recorded by al-Tirmidhi, al-Hakam, al-Darqunin and Abi Ya`la al-Mawsilì. Al-Zayla`l, vol. 3, 309.

When they (the witnesses) testify, the imām asks them about zina as to what it is and how it is committed, where did the person commit zina, when did he commit zina, and with whom did he commit zina? The reason is that the Prophet (God bless him and grant him peace) sought an elaboration from Mā`ız about the mode of commission and about the woman with whom it was committed. The reason is that precaution in such a case is obligatory, because it is possible that he committed the act, but not through the vagina even if intended, or that he committed the act in the dār al-ḥarb, or he committed an act that is barred by time; or there is a shubhah or doubt in it that is not known to him or to the witnesses. Accordingly, an exhaustive investigation is to be made to find a way for waiving the hadd.

Thus, when they have testified to this effect, and said, "We saw him having intercourse with her through her vagina, like the kohl stick inside the container," the qādi has enquired about them and they are found to be `adl, both through secret and public inquiry, he is to give a ruling on the basis of their testimony. He is not to deem sufficient a public enquiry about their adālah, and this to find a way out for waiving the penalty. The Prophet (God bless him and grant him peace) has said, "Waive the hudud penalties as far as you can." This is different from all other rights accorded to Abū Hanifah (God bless him). We will elaborate the meaning of establishing adālah, both public and secret, in the Book of Testimony, Allāh, the Exalted willing.

He (Muhammad al-Shaybānî) said in al-Asl that he is to restrain him till he has asked about the (moral probity of) witnesses who are making the allegation of the offence. The Messenger of Allāh (God bless him and grant him peace) restrained a man on the basis of an accusation. This is different from debts where there is no imprisonment prior to the manifestation of adālah. The distinction will be made evident for you, Allāh, the Exalted, willing.

He (al-Qudūrī) said: Confession is where a major and sane person confesses to the commission of zina. He does this four times in four (different) sessions, with the qādi rejecting his confession each time he makes it. Majority and sanity have been stipulated, because the statements of the minor and insane are not considered (are inadmissible), or because they are not liable for ḥadd. The stipulation of four (confessions) is our view. According to al-Shāfì a single confession is sufficient, on the analogy of the remaining rights. The reason is that it (a single confession) manifests the truth, and the repetition of the confession does not enhance the manifestation of the truth, as distinguished from increase in the number of witnesses (to four).

We rely on the tradition of Mā`ız (God be pleased with him). The Prophet (God bless him and grant him peace) delayed the implementation of the ḥadd till the confession was completed by him four times in four sessions. If what is less than this was sufficient to bring out the truth, he would not have delayed the matter for the proof of the obligation (of implementation). Further, the testimony was made exclusive by increasing the number of witnesses, likewise the confession. This was done due to the gravity of the offence of zina and to realise the meaning of concealment. It is necessary to have different sessions, on the basis of what we have related, because the unity of session affects the establishing of the different elements that need to be proved, and in case of a single session it gives rise to the possibility of focusing on a single element. Confession depends upon the person confessing, therefore, it is his sessions that are taken into account and not those of the qādi. Separate sessions mean that the qādi sends him out each time he confesses so that when he goes out the qādi can no longer see him and he then returns and confesses again. This is reported as an opinion of Abū Hanifah (God bless him),
because the Prophet (God bless him and grant him peace) rejected Ma‘rif at each time and he went out disappearing behind the walls of Madinah.

He said: When his confession four times is complete, he is to ask him about *zinā*, as to what it is, how it is committed, where he committed it and with whom? If he elaborates all this, imposition of *hadd* becomes binding, due to the completion of proof. The rationale underlying these questions we have elaborated in the topic of *shahādah* (testimony). He did not mention here the question about time, but he did mention it in the topic of *shahādah*, because limitation of time prevents the rendering of testimony though not a confession. It is said that if he did question him about it, it would be valid due to the possibility of his having committed it during his minority.

If the person confessing retracts his confession prior to the execution of the *hadd* or during it, his retraction is to be accepted and he is released. Al-Shafi‘i (God bless him), and this is also the view of Ibn Abi Layla (God bless him), the *hadd* is to be implemented for it became obligatory through his confession, therefore, it is not annulled due to his retraction or his denial, just as if it had become obligatory through testimony and stood proved like *qisāṣ* (retaliation) and the *hadd* of *qadhf* (false accusation of unlawful sexual intercourse). We argue that retraction is a report that is probably true and is just like confession, and there is no one who holds him to be lying, therefore, a *shubhah* is established in his confession. This is distinguished from the cases where the rights of the individual are involved, which are *qisāṣ* and the *hadd* of *qadhf*, due to the existence of those who hold him to be lying. This is not the case with what is purely the right of Allāh.

Chapter 98

The Nature of Intercourse That Gives Rise to Hadd

He said: Intercourse that gives rise to *hadd* is *zinā*. In technical legal language and in usage it is sexual intercourse of a man with a woman through the vagina without lawful ownership (of such access) and without the *shubhah* (justified yet erroneous belief) of ownership (of such access). The reason is that it is an act that is prohibited and the prohibition is absolute when it is devoid of ownership or its justified but erroneous belief. This is supported by the words of the Prophet (God bless him and grant him peace), "Waive the *hudud* in case of justified yet erroneous belief (*shubhah)*."

Thereafter, *shubhah* is of two types. The first is called *shubhah fi al-fi‘l* (doubt in the act) also called the doubt of ambiguity (*ishtībāh*). The second is called *shubhah fi al-mahall* (doubt in the subject-matter) also called legal doubt (*ti‘ulaniyyah*). The first is realised in the case of a person for whom it has become ambiguous, because the meaning is that he considers an evidence that is not really the proper evidence. In this probability is essential for the realisation of ambiguity. The second arises by adding evidence that negates the prohibition itself, but it does not depend upon the conjecture of the offender or his belief.

*Hadd* is not enforced in both cases, due to the absolute meaning of the tradition. Paternity is established in the second type of *shubhah* if he claims it, but it is not established in the first type even if he claims it. The reason is that in the first type the act is purely *zinā*, but the *hadd* is enforced in both cases due to the absolute meaning of the tradition.
not enforced due to a factor that is referred back to the actor, and this is the ambiguity created in his mind. In the second it is not treated purely as zinā. Shubhah fi al-fi’l is committed with eight types of persons: the slave girl of the offender’s father, of his mother, and of his wife; the wife divorced thrice while she is in her waiting period; the woman divorced irrevocably in lieu of wealth while she is in her ‘iddah; the umm al-walad whom the master has emancipated and she is in her waiting period; the slave girl of the master with respect to the slave; and the pledged slave girl with respect to the mortgagee, according to the narration in the Book of Al-Hidayah. In all these cases there is no hadd for the offender if he claims that he thought she was permissible for him. If, however, he says that he knew that she was prohibited for him, he is to be awarded hadd.

Shubhah fi al-mahall occurs in six cases: the slave girl of his son; the woman divorced irrevocably through figurative expressions; the slave woman sold to buyer prior to delivery with respect to the buyer; the woman entitled to dower prior to its possession by her with respect to the husband; a slave girl owned jointly with respect to one co-owner; the pledged slave girl with respect to the mortgagee, according the narration from the Book of Rahn. In these six cases hadd is not enforced, even if he says I knew that she was prohibited for me. Thereafter, doubt is established, according to Abū Hanifah (God bless him) on the basis of ‘aqd (contract), even if it is agreed upon for its prohibition and he knows about it. According to the rest, shubhah is not established if he had knowledge of the prohibition. This will be obvious in the case of the marriage within the prohibited degrees, as will be coming up, God, the Exalted, willing.

Now that we have understood this (we say:)

If a person divorces his wife thrice and then has intercourse with her during her ‘iddah following which he says that he knew that she was prohibited for him, he is to be subjected to hadd, due to the extinction, from all aspects, of ownership that legalises access. In this case shubhah is negated. The Qur’an stated the negation of permissibility here and on this there is ijmā’ as well. The opinion of one who opposes this is not taken into account for waiving the hadd. The umm al-walad emancipated by the master, a woman who has obtained khul’ and the one who has been divorced in lieu of wealth are in the position of the woman divorced thrice, due to the prohibition based upon consensus and the continuity of some effects during ‘iddah.

If he says to her, “You are free,” or “You are absolved,” or “Your affair is in your hands,” and she chooses herself, after which he has intercourse with her during her ‘iddah and says that he knew she was prohibited for him, he is to be subjected to hadd, due to the disagreement about this divorce among the Companions (God be pleased with them). It was the opinion of ‘Umar (God be pleased with him) that this amounts to a single revocable repudiation. Likewise the response in the remaining cases of repudiation through figurative expressions. Likewise if he intended three repudiations (in figurative expressions) due to the existence of disagreement (of the Companions) along with this.

If a woman, other than his wife, is brought to him on his wedding night, and the women bringing her say, “She is married to you,” following which he has intercourse with her, he is not to be subjected to hadd. He is liable for her dower. ‘Umar (God be pleased with him) gave the decision in such a case. She also has to undergo ‘iddah. The reason is that he relied upon an evidence and there was a report about the subject-matter of ambiguity. The reason is that one does not distinguish between one’s wife and another woman on the first meeting. Consequently, he is like one who has been deceived. The person who commits qadhf against him (on this account) is not to be awarded the hadd, except according to one narration from Abū Yusuf (God bless him), because ownership (of legal access) is absent in reality.

If a man finds a woman on his wife’s bed and has intercourse with her, he is to be subjected to hadd. The reason is that there is no ambiguity here due to the long association (with his wife). The ambiguity is not based upon a da’il here. The reason is that some women in the prohibited degree, who are present in her room, may sleep on her bed. Likewise if he is blind, because it is possible for him to distinguish through questioning and other means, unless he calls out to the stranger and she responds saying that she is his wife, and he has intercourse with her, because a report is valid evidence.
If a person marries a woman with whom his nikāh is not lawful, and he has intercourse with her, he is not to be subjected to ḥadd, according to Abū Ḥanīfah (God bless him). He, however, liable to some penalty if he knows about such prohibition. Abū Yūsuf, Muhammad and al-Shafī (God bless them) said that he is to be subjected to ḥadd if he was aware of the prohibition, because it is a contract that has not been concluded for its subject-matter, therefore, it is meaningless, as if it had been associated with males. The reason here is that the subject-matter of the transaction should be the subject-matter for its legal effects, when the legal effect is permissibility, while the woman here is in the prohibited degree. Abū Ḥanīfah (God bless him) relies on the argument that the contract has been concluded in conformity with its subject-matter, because the subject-matter of the transaction is one that suits its purpose for females are the daughters of Adam who are meant for procreation, which is the purpose. Thus, it is necessary that the contract be concluded for all its legal effects, except that this contract fell short of full permissibility (due to the text), therefore, it gives rise to shubhah. The reason is that shubhah is something that resembles what is established, and is not the exact thing that is established. He has, however, committed an offence, and as there is not fixed penalty for it he is to be awarded taʿzīr.

If a man has intercourse with a strange woman through locations other than the vagina, he is to be awarded taʿzīr, because it is an offence for which there is no fixed penalty.

If a man has intercourse with his wife through a location that is makrūh (rectum), or commits an act similar to the acts of the People of Lot, there is no ḥadd for him according to Abū Ḥanīfah (God bless him), rather he is to be awarded taʿzīr. The addition in al-Jāmiʿ al-Ṣaghīr is that he is to be imprisoned. The two jurists maintain that it is like zinā, therefore, he is to be subjected to ḥadd, which is also one opinion from al-Shafī (God bless him). The two jurists argue that it carries the meaning of zinā, because it is the satisfaction of lust through a location that is aroused in a manner that is completely a sexual act and invokes pure prohibition due to the intention of unlawfully spilling sperm. The Imam argues that it is not zinā due to the disagreement of the Companions (God be pleased with them) about the obligation of burning with fire, making a wall fall on them, and dropping from a high place face downwards followed by the raining of stones on them. Further, it is not in the meaning of zinā for it does not amount to the wasting of children nor

confusion about parentage. Likewise it is a lesser offence as the desire is from one side while the desire in zinā is from both sides. In addition to this, what has been related by way of traditions is to be construed as a penalty to be awarded by way of siyyasah or is to be awarded to one who considers homosexuality as lawful. The act, however, is to be punished with taʿzīr in his view, as we have elaborated.

There is no ḥadd for a person who commits bestiality, because it does not convey the meaning of zinā insofar as it is an offence, and also with respect to desire as a normal person is repelled by it. The cause for it is uncontrolled sexuality and extreme lewdness, therefore, this offence is not to be concealed, however, the offender is to be subjected to taʿzīr. The report that the animal is "to be slaughtered and burned"3 is for ending a discussion about it, and that too is not obligatory.

If a person commits zinā in enemy territory or in an area controlled by rebels and then moves over to us (dar al-Īslām), he is not to be subjected to the ḥadd. Al-Shafī (God bless him) said that he is to be awarded ḥadd. The reason is that by professing the Islamic faith he has chosen to be bound by its akhām wherever he is located. We rely on the saying of the Prophet (God bless him and grant him peace), "The ḥudūd are not to be implemented in the dār al-ḥarb."4 The purpose is deterrence and the authority of the imām is cut off in these territories, therefore, the obligation becomes devoid of any purpose. The ḥadd is not to be implemented after he has moved out of these territories, because it was not obligatory initially and cannot be converted into an obligation now. If the person who has such authority to implement the ḥadd takes part in the battle himself, like the khālifah or the governor of a city, he is to implement the ḥadd in the case of a person who commits zinā in his military camp, because he is under his authority. This is distinguished from the military commander or the commander of a detachment, because the authority to implement the ḥudūd is not delegated to them.

If an enemy male enters our territory on amān (safe-custody) and commits zinā with a Dhimmīyyah, or a Dhimmī with an enemy woman,

3It is gharīb in these words, however, a similar tradition is recorded by the compilers of the four Sunan. Al-Zayla'i, vol. 3, 342.
4It is gharīb in these words, but it is recorded by al-Bayhaqi from al-Shafī from Abū Yūsuf (God bless him). Al-Zayla'i, vol. 3, 343. There are athār conveying the same meaning. Ibid.
the Dhimmi and the Dhimmiyyah are to be awarded the ḥadd according to Abū Ḥanīfah (God bless him), while the enemy, male or female, are not to be subjected to ḥadd. This is also the opinion of Muhammad (God bless him) in the case of a Dhimmi, that is, when he has intercourse with an enemy woman. If, however, an enemy male has intercourse with a Dhimmiyyah, they are not to be subjected to ḥadd according to Muhammad (God bless him), which is the earlier opinion of Abū Yūsuf (God bless him). Abū Yūsuf (God bless him) said that they are all to be subjected to the hadd, which is his second opinion. Abū Yūsuf (God bless him) argues that the person entering our territory on safe-conduct (musta‘min) has agreed to make our alhkām pertaining to the mu‘āmalāt binding on himself during the period of his stay, just as the Dhimmi has agreed to abide by them for his entire life. Consequently, he is to be awarded the ḥadd of qadhf and is to be subjected to qisas (retaliation), as distinguished from the offence of drinking khamsr, because its permissibility is part of his faith. The two jurists argue that he has not entered for taking up residence, but for a need like trade and so on, therefore, he does not become a resident of our territory, due to which reason he is facilitated in returning to the dar al-harb. For the same reason a Dhimmi or a Muslim are not subjected to qisas if they kill him. He has agreed to abide by the laws that help him attain his purpose, and these are the rights of individuals. If he has agreed to seek justice then he must give justice too and qisas and the hadd of qadhf are the rights of these individuals. As for zinā it is purely a right of the shar‘ (law). For the distinction drawn by Muhammad (God bless him), he argues that the basis in the category of zinā is the act of the male, while a woman is in a secondary position, as we will be mentioning, God, the Exalted, willing. Consequently, prevention of the hadd in the case of the primary actor requires that it be prevented in the case of the secondary actor as well. As for prevention in the case of the secondary actor, it does not lead to prevention in the case of the primary actor. The parallel for this is where a major male has intercourse with a minor girl or with an insane woman, or where a major female facilitates the minor or an insane male.

Abū Ḥanīfah (God bless him) argues that the act of the enemy musta‘min is zinā, because the prohibitions in the divine communication are addressed to him, even though he is not an addressee for all our laws, according to the authentic narration, in the light of the principle followed by our School. Facilitating is an act that amounts to zinā, and it gives rise to the obligation of ḥadd for her, as distinguished from the minor and the insane as they are not addressees of the communication. The parallel of this disagreement is where a person is coerced by one willing, where the willing woman is awarded the ḥadd, but not the man coerced, in his view. According to Muhammad (God bless him), she is not subjected to ḥadd.

He said: If a minor male or an insane man commits zinā with a woman who made him yield, then there is no hadd for him nor for her. Zufar and al-Shafi‘i (God bless them) said that ḥadd is obligatory for her. This is also one narration from Abū Yūsuf (God bless him). If a person who mentally sound has intercourse with an insane woman or a minor girl (who is usually considered of age for sex), the man alone is to be subjected to ḥadd. This is based upon consensus (ijmā‘). The two jurists (Zufar and al-Shafi‘i) argue that the obstacle from her side does not prevent the awarding of ḥadd to him, so also an obstacle from his side. The reason is that each one of them is to be held accountable for his or her act. We argue that the act of zinā is realised on his part, while she is merely the subject-matter of the act. It is for this reason that it is he who is the one committing intercourse and zinā. The woman is the passive party and she is the one whom zinā is committed, except that she has been called a zāniyyah in the figurative sense, using the act of the active party for the passive, like saying pleased for pleasing. Another reason is that she is causing it through facilitation, therefore, the ḥadd is linked to her for facilitating the evil of zinā. The act of zinā is the act of one who has been commanded to avoid it and he has sinned by undertaking it, but the act of the minor is not of this nature, therefore, ḥadd is not suspended on it.

He said: If a person is coerced by the sultan to commit zinā and he does it, there is no hadd for him. Abū Ḥanīfah (God bless him) used to say earlier that he is to be awarded hadd, and this is the view of Zufar (God bless him) as well. The reason is that intercourse on the part of the male is not possible without erection of the penis, and erection is an evidence of consent. Thereafter he retracted this opinion and said that there is no hadd for him as the cause of duress is apparently in existence. Further, erection is a vacillating evidence as it sometimes occurs without intention, as it occurs on the basis of nature not voluntarily, like in the

1 In other words, as the act of the minor is not zinā, her act cannot be called zinā either, as distinguished from the act of the male in this case when he has intercourse with a minor.
case of the person sleeping, therefore, it gives rise to shubhah. If someone
other than the sultan were to compel him, he is to be subjected to hadd
according to Abû Hanîfah (God bless him). The two jurists say that he is
not to be awarded hadd in this case either as coercion is realised from a
person other than the sultan. The reason is that the effective factor is the
fear of death and that is possible on the part of another person too. In the
Imâm's opinion coercion on the part of another person is not persistent,
except rarely, for he is able to seek help from the sultan or from a
group of Muslims, and it is also possible for him to repel it himself by the use
of weapons. Something that is rare is not assigned a general rule, therefore,
hadd is not to be waived on account of this. This is distinguished from
the case of the sultan, because in this case he is not able to seek help from
another quarter nor is he able to revolt against him through the use of
weapons, therefore, the two cases are different.

A person who confesses four times in different sessions that he had
unlawful sexual intercourse with such and such woman, but she claims
that he married her or she confesses and the man says that he married
her, then there is no hadd for him and he is liable for the payment of
dower in this case. The reason is that the claim of nikâh is probably true
and it takes place between two parties, therefore, it gives rise to shubhah.
Consequently, when the hadd is dropped dower becomes obligatory due
to the sanctity of the prohibition of having sex.

He said: Each act that the imâm, who does not have another imâm
above him, commits, there is no hadd for him, except qisas, for which
he is liable, and he is also liable for financial claims. The reason is that
the hudûd are rights of Allâh and their implementation falls within his
authority and of no other person, and it is not possible for him to imple-
ment the hadd against himself, for there is no benefit of doing so. This
is distinguished from the rights of individuals, because these are claimed
by the authorised heir either due to his own ability or through coopera-
tion and the force of the Muslims, and qisas as well as financial claims
are within these rights. As for the hadd of qadhf, the jurists said that the
predominant right in it is the right of the law (sharî`), therefore, the rule
for it is the same as the rule for the remaining hudûd, which are the rights
of Allâh. Allâh, the Exalted, knows what is correct.

Chapter 99

Testimony of Hadd and its Retraction

He said: If witnesses testify with respect to a hadd that is time barred,
when they were not prevented from rendering it due to their great dis-
tance from the imâm, their testimony will not be accepted for cases other
than qadhf. It is stated in al-Jâmi` al-Saghir: If witnesses testify against
the accused for theft or drinking of khâmîr or zinâ after the passage of
duration, it is not to be accepted, and the offender will be liable for
compensating the stolen goods. The principle in this is that the hudûd
are purely rights of Allâh, the Exalted, and lapse on account of the limi-
tation of time, with al-Shafi`î (God bless him) disagreeing with this. He
considers them the rights of individuals. Nor is the confession annulled
in his view on account of time, and it is one of the two methods of proof.
Our view is that the witness has an option of taking up two kinds of con-
sequences: rendering of testimony or concealing the offence. If the delay
is on account of concealment then coming forth with testimony after this
is due to their awakened malice or enmity that has brought them into
action, therefore, they are to be accused of this. If the delay was not due
to concealment, he has become a fâsiq who has sinned, and we are certain
of treating this as a prevention. This is distinguished from a confession,
because a person usually does not incriminate himself. The hudûd of zinâ,
drinking of wine and suriqah are pure rights of Allâh, due to which reason
it is valid to retract the confession in them after having made it, therefore,
time acts as limitation in these hudûd. As far as the hadd of qadhf is con-
cerned, there is a right of the individual in it insofar as it involves the
repelling of injury from him. Consequently, it is not permitted to retract
a confession in this offence after such confession has been made. Time
does not act as a limitation in cases involving the rights of the individuals. Further, the lodging of a complaint is a condition for it, therefore, delay on the part of the witnesses can be construed to mean the absence of a complaint. Consequently, it is not permitted to declare them falsifiers in this case as distinguished from the hadd of sariqah, because making a complaint is not a condition for this hadd as it is a pure right of Allah, the Exalted, as has preceded. It is only stipulated for the financial claim within it. Further, as the hukm revolves around the hadd being the right of Allah, the Exalted, the proving of the allegation is not taken into consideration in each individual case. In addition to this, the theft is undertaken in stealth at a time of inattention on the part of the owner, therefore, it is imperative for the witness to identify him at once, and by concealing it he becomes a sinful falsifier. Thereafter, the limitation of time, just as it prevents testimony at the initial stage, it prevents the implementation after the decision of the qadi, in our view, with Zufar (God bless him) disagreeing. Thus, if he runs away after part of the hadd has been implemented (like stripes) and is captured after the passage of the time of limitation, he is not to be subjected to hadd (again). The reason is that the passage of time with respect to adjudication is also part of the hadd.

The jurists disagreed about the duration of time for purposes of limitation. Muhammed (God bless him) indicated in al-Jami` al-Saghir that it was six months, for he said it is after a hina. This is what al-Tahawi too has indicated. Abu Hanifah (God bless him) did not fix a period for this and left it to the discretion of the qadi in each age. It is also reported from Muhammad (God bless him) that he determined it to be one month, because what is less than this amounts to acting swiftly. This is also one narration from Abu Hanifah and Abu Yusuf (God bless them), which is correct. This is the position when between them and the qadi the distance is not that of one month of travel. If it is such a distance then their testimony is accepted, therefore, what was preventing them was the distance from the intama. As such, the allegation of malice is not established. Taqaddum (limitation) in the case of the hadd of drinking is the same according to Muhammad (God bless him), and according to the two jurists it is to be determined on the basis of disappearance of smell, as will be coming up in its chapter, God, the Exalted, willing.

If the witnesses testify against a man that he had intercourse with such and such woman who is not present, he is to be subjected to hadd, but if they testify that he stole from so and so and he is not present, he is not to be subjected to hadd. The reason is that by absence, the complaint becomes infructuous, and it is a condition in the case of theft, but not zina. By her presence there is a likelihood that a shubhah may arise, but such probabilities are not taken into account in this case.

If they testify that he had intercourse with a woman whom they do not know, he is not to be subjected to hadd, due to the probability that he might have done so with his wife or his slave girl. In fact, there is a higher probability of this. If he confesses having done so (with an unknown woman), he is to be subjected to hadd, for he is supposed to know his wife or slave girl.

If two witnesses testify that he had intercourse with so and so and coerced her, while two others testify that she submitted voluntarily, the hadd is to be waived from both, according to Abu Hanifah (God bless him), which is also the opinion of Zufar (God bless him). The two jurists said that it is only the man who is to be subjected to hadd, because of their agreement about the obligation in which one of them has committed an additional offence, which is coercion. This is not so in her case, because her consent is the condition for the proof of the obligation as far as she is concerned, and this is not established due to their disagreement. The Imam argues that zina is a single act that is relevant to both, however, the two witnesses claiming consent have committed qadhf against them. The hadd is waived for both due to the two witnesses of coercion, because zina on her part is under coercion, while qadhf tries to do away with the presumption of chastity in her case, thus, the two witnesses of consent become litigants with respect to them.

If two witnesses testify that he committed zina with a woman at Kufah, while two others testify that he did so with her at Basrah, the hadd is waived for all. The reason is that the act witnessed is the act of zina and it differs with a difference in location and the nisab of witnesses (four) is not complete for either. The witnesses are not to be awarded the hadd (of qadhf), with Zufar (God bless him) disagreeing, because there is a probability (shubhah) of the unity of the offence taking into account the form and the woman.

If the witnesses differ about the location within a single room, the man and woman are both to be awarded the hadd. The meaning is that

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1For she might claim that she is married to him or is his slave girl.
2For the presumption is that a Muslim does not commit zina.
3Consequently, their testimony against them is not admissible.
each set of two witnesses testify about a different location within the room. This is based on *istihsān*, while analogy dictates that *ḥadd* does not become obligatory, because of the difference in location in reality. The basis for *istihsān* is that the two locations can be not become obligatory, because of the difference in location in reality. In the alternative, the act was committed in the middle of the room, but those who were in front treated it as one location and those at the back another.

If four witnesses testify that the man committed *zina* with a woman at Nukhaylah⁴ at sunrise, while four others testify that he committed *zina* with the woman at Dayr Hind, the *ḥadd* is to be waived for all. As for the man and woman, because we are certain that one unascertained group of witnesses is lying, and as for the witnesses due to the probability of one of the groups being truthful.

If four witnesses testify against a woman about *zina* and she is a virgin, the *ḥadd* is waived from the two accused and from the witnesses as well. The reason is that *zina* is not established with the existence of virginity. The meaning of the issue is that women examine her and when they say that she is a virgin, then their testimony is proof for the waiving of *zina*. It is for this reason that the *ḥadd* is waived in her case, and in their case it does not become obligatory.

If four witnesses testify that a man has committed *zina* when these witnesses are blind or have been awarded *ḥadd* for *qadhf* or one of them is a slave or has been awarded *ḥadd* for *qadhf*, then all of them are to be subjected to the *ḥadd* of *qadhf*, but the person against whom they rendered testimony is not to be awarded *ḥadd*. The reason is that even a financial claim is not established through their testimony so how can *ḥadd* be established, for they are not eligible to render testimony. The slave is not eligible for witnessing or rendering testimony, therefore, even the probability of *zina* is not established here as *zina* is established through the rendering of testimony.

If they render such testimony and they are *fāsiq* or it is discovered that they are *fāsiq*, they are not to be awarded the *ḥadd*. The reason is that a *fāsiq* can bear and render testimony even though in the rendering of testimony there is a type of shortcoming due to the allegation of *fāsiq*.

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⁴A place near Kufah.
is obligatory is the implementation of stripes, which amounts to painful strokes, but not wounding or causing fatal injury. Thus, such stripes do not injure, unless it is due to the executioner because of lack of training. Therefore, the error is to be confined to him. It is, however, not proper to make compensation obligatory for him, according to the sound opinion, so that the people are not prevented from implementing the hadd out of fear of financial penalties.

If four persons testify by transmitting the testimony of four witnesses (hearsay), he is not to be subjected to hadd, insofar as there is an increase in the shubhah and there is no necessity of bearing such shubhah. If the original witnesses then come and testify that they saw the offence at that location, even then he is not to be subjected to hadd. The meaning is that they testify that they saw the actual crime themselves. The reason is that their testimony has been rejected in some respects by the rejection of the testimony of the secondary witnesses with respect to this offence itself, for they were standing in their place with respect to the command and bearing of testimony. The witnesses are not to be subjected to hadd either, because their number is complete and the prevention of the hadd, with respect to the accused, was due to a type of shubhah, and this is sufficient for the waiving of hadd, but not its imposition.

If four witnesses testify against a man about the offence of zina and he is subjected to rajm, then each time a witness retracts he is to be subjected to hadd and is made liable for one-fourth of the diyah (blood-money). As for the compensation, the reason is that the witnesses whose testimony still remains unretracted owe three-fourths of the amount due. Therefore, the one retracting is required to pay one-fourth of the amount due. Al-Shafi`i (God bless him) said that what is obligatory is execution and not wealth. This is based on his principle upheld for qisas, and we shall elaborate it in the topic of Diyyah, God, the Exalted, willing. As for the hadd, it is the opinion of our three jurists (God bless them). Zufar (God bless him) said that he is not to be subjected to hadd. The reason is that if the retracting accuser (qadhf) is alive, then his qadhf is annulled by the death of the person stoned, and if he is dead then the offender was stoned through the judgement of the qadi, and this gives rise to shubhah. We argue that the testimony is converted into qadhf due to retraction, because by retraction his testimony is vitiated and in such a state it is deemed as qadhf of a dead man. As the proof is vitiated, what is based upon it is also vitiated, and that is the judgement against him, therefore.

It does not give rise to shubhah. This is distinguished from the case where another person commits qadhf against him, because he is not a muhsan with reference to another due to the existence of the judgement against him.

If the hadd is still not implemented when one of the witnesses retracts his testimony, all of the witnesses are to be subjected to hadd and the hadd awarded to the accused is not enforced. Muhammad (God bless him) said that the one retracting is to be awarded hadd exclusively, because the testimony has been strengthened through the judgement, therefore, it is not vitiated except in the case of the retracting witness. Likewise if he retracts after the implementation of the judgement. The two jurists argue that the implementation is on the part of the judicial authority, therefore, it is as if one of them retracted prior to the delivery of the judgement, therefore, the hadd was not enforced against the convicted person. When one of them retracts his testimony before the judgement is handed down, all of the witnesses are subjected to hadd. Zufar (God bless him) said that the witness retracting is alone to be subjected to hadd, because his retraction is evidence of falsehood against himself and not the others. We argue that their statements amount to qadhf ab initio, and they become testimony when linked with the judgement. Thus, when such testimony is not linked with the judgement it remains qadhf; thus, they are subjected to hadd.

If there were five witnesses and one of them retracts he is not liable for anything. The reason is that the entire claim is to be linked to the testimony of witnesses who remain, which is the testimony of four witnesses. If another witness retracts, he is to be subjected to hadd and is liable for one-fourth of the diyah. As for the hadd, we have already mentioned that. As for the financial penalty, three-fourths of it remains linked to the witnesses who have not retracted, and what is taken into account is what still remains and not the retraction of the witness who has retracted, as is known.

If four witnesses testify against a man about the commission of zina, after clearing the process of tazkiyat al-shuhud, and he is stoned to death, but it turns out that the witnesses were Magians or slaves, then the diyah is to be paid by the muazzakkis (who cleared them), according to Abū Hanifah (God bless him). This means if they take back their tazkiyah (in the meaning of admitting that they intentionally cleared them). Abū Yūsuf and Muḥammad (God bless them) said that the diyah is to be paid
by the treasury. It is said that this is the case when they say that we intentionally approved the tazkiyah despite knowing who they were. The two jurists argue that they praised the witnesses and deemed them good, and that amounted to deeming the accused as good. It is as if they rendered testimony about his chastity. The Imam argues that testimony becomes effective through tazkiyah, therefore, tazkiyah assumes the meaning of 'illat al-'illah (the cause of the underlying cause), therefore, the hukm is attributed to it. This is distinguished from the witnesses of ilisan, because that is merely a condition. There is no difference between their clearing them with the word "testimony" or that of a report, that is, if they are reporting on freedom and Islam. If, however, they say, "They are 'adl (morally upright)," but it turns out that they are slaves, the muzakkis are not to be held liable, because even a slave can be morally upright. And there is no liability for the witnesses. The reason is that their statements did not have the effect of testimony. Further, they are not to be subjected to the hadd of qadhf for they committed qadhf against a living person and he is dead; his right cannot be inherited.

If the man is subjected to rajm and then the witnesses are found to be slaves, the diyah is to be paid by the treasury. The reason is that he complied with the command of the imam, therefore his act is transferred to the imam. If, however, the imam undertook the act directly then the diyah is obligatory for the treasury, on the basis of what we mentioned. Likewise in this case. This is distinguished from the case where he executed him, because in this case he was not following his order.

If witnesses testify about zinā against a man and say that they intentionally looked at their private parts, their testimony is to be accepted. The reason is that it is permitted to them to look due to necessity for bearing witness, thus, it is a case similar to that of the physician and the midwife.

If four witnesses render testimony about zinā against a man and he denies that he is a muḥsan, but he has a wife who has given birth to his child, then he is to be subjected to rajm. The meaning here is that he denies consummation after the existence of all the remaining conditions. The reason for the decision is that after paternity is established legally it amounts to attributing intercourse to him, therefore, if he were to divorce her it would be followed up by the rule of retraction. Iḥsān is established on the basis of such facts.

If she has not given birth to his child and a man and two women testify to his Iḥsān, he is to be subjected to rajm. Zufar and Al-Shāfi (God bless him) disagree. Al-Shāfi (God bless him) followed his principle that the testimony of women is not acceptable in matters other than wealth. Zufar (God bless him) says that it is a condition in the meaning of an underlying cause, because the penalty is extreme here in his view. Therefore, the rule is attributed to it and it comes to resemble a real case where two Dhimmis testify against a Dhimmi, whose Muslim slave has committed zinā, that he emancipated him prior to the commission of zinā; such testimony will not be accepted, on the basis of what we mentioned. Our argument is that Iḥsān is the name for virtuous traits and it also prevents one from falling prey to zinā, as we have mentioned, therefore, it does not acquire the meaning of an underlying cause, and it is as if they testified about it in a situation other than this. This is distinguished from what has been mentioned, because emancipation is established by the testimony of the two Dhimmis. It is not established for a prior date, because the Muslim denies it or the Muslim is going to be injured through it.

If the witnesses testifying to Iḥsān retract, they are not held liable, in our view, with Zufar (God bless him) differing, and this is a sub-issue of what has preceded. Allāh, the Exalted, knows best.

Accepting it would double the penalty for the slave.
Chapter 100

The Ḥadd for Drinking Khamr

If a person drinks *khamr* and is caught when the smell is still on him, or they bring him in a drunken state and witnesses testify against him about drinking, then he is to be subjected to Ḥadd. Likewise if he confesses and the smell is still on him. The reason is that the offence of drinking has been proved and the period is not barred by time. The basis for this are the words of the Prophet (God bless him and grant him peace), "If a person drinks *khamr*, subject him to stripes; if he repeats it, subject him to stripes (again)."

If he confesses after the disappearance of smell, he is not to be subjected to Ḥadd according to Abū Hanīfah and Abū Yūṣuf (God bless them). Muḥammad (God bless him) said that he is to be subjected to Ḥadd. Likewise if they bear witness against him after the smell is gone along with the intoxication, he is not to be subjected to Ḥadd according to Abū Hanīfah and Abū Yūṣuf (God bless them). Muḥammad (God bless him) said that he is to be subjected to Ḥadd. *Taqādum* (limitation of time) prevents the acceptance of testimony by agreement, except that it is determined in his view taking into account the Ḥadd of *zinā*. The reason is that delay is realised with the passage of time, while the smell may sometimes exist due to another reason, as it is said: They say to me you have drunk liquor, but I say to them I just had quince. According to the two jurists, the time is determined with the dissipation of the smell, on the basis of the saying of Ibn Masʿūd (God be pleased with him), "If

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¹The tradition has been reported through many channels. The one from Abū Hurayrah (God be pleased with him) has been recorded by the compilers of the four *Sunan*. Al-Zayla'i, vol. 3, 347.
²A fruit similar to a pear.
you find the smell on him, subject him to stripes.’ The reason is that the subsistence of the effect is the strongest evidence of having used it. This is converted to determination on the basis of time when it is difficult to judge by smell. The distinction between smells is possible for one skilled, but it can be confusing for one who is not adept in this.

As for confession, limitation of time does not annul it according to Muhammad (God bless him), as in the case of the hadd of zina, as has preceded in its description. According to the two jurists, the hadd is not to be awarded, except when the smell is found. The reason is that the hadd for drinking is established by the consensus (ijma) of the Companions (God be pleased with them), and there can be no ijma without the opinion of Imam Mas’ud (God be pleased with him), and he stipulated the existence of smell, according to what we have related.

If he is taken into custody by the witnesses and the smell is found on him, or he is intoxicated, but they go from one town to another where the imam is located, but his state changes prior to their reaching the destination, he is to be awarded hadd in the opinion of all the jurists. The reason is that this amounts to an excuse like the distance in the hadd of zina, and the witness is not to be objected to in this.

If a person gets intoxicated by drinking the mead of dates, he is to be subjected to hadd, on the basis of what is related that ‘Umar (God be pleased with him) awarded the hadd to a villager due to intoxication from nabidh (mead of dates). We shall elaborate the discussion about the hadd of intoxication and the extent (number) of the hadd that is to be awarded to the offender. God, the Exalted, willing.

There is no hadd on the person on whom the smell is found or who vomits out khamr (without testimony about actual drinking). The reason is that the smell is subject to interpretation and so is the intoxication, that it may be due to coercion or under duress.

The intoxicated person is not to be awarded the hadd until it is known that he has become intoxicated due to nabidh, and that he drank it voluntarily. The reason is that intoxication from something that is permitted is not liable to hadd like bhang (henbane) and mare’s milk. Likewise, the intoxication resulting from coercion is not liable to hadd.

1It is ghariib in these words, however, ’Abd al-Razzāq has recorded it in the same meaning. Al-Zayla’i, vol. 3, 349.

He is not to be subjected to hadd until the effect of intoxication is gone, so as to realize the purpose of deterrence.

The hadd for drinking khamr (wine) in the case of a freeman is eighty lashes, due to the consensus (ijma) of the Companions (God be pleased with them). The strokes are to be distributed over his body like the hadd of zina, as has preceded. Thereafter his top garment has to be taken off and he is to be subjected to the lighter form of whipping as the text has not laid down the penalty. The basis for the well known view is that we have already lightened the penalty once, therefore, it cannot be done again.4

If the offender is a slave, the hadd for him is forty lashes, because slavery reduces the penalty to one-half, as has been explained.

If a person confesses to drinking khamr (wine) or to intoxication, but then retracts, he is not to be subjected to hadd, because it is purely a right of Allah.

Drinking is established through the testimony of two witnesses, and proof by confession is by confessing once. It is narrated from Abu Yusuf (God bless him) that he stipulated that the confession be twice. It is the parallel of the disagreement in the case of sariqah, and we will explain it there, God willing.

The testimony of women along with men is not to be accepted in this offence, because in this is shubhah badaliyyah and the accusation of wavering and forgetfulness.

The intoxicated person who is awarded hadd is one who (while in that state) does not understand speech, whether less or more, and he cannot distinguish between a man and a woman. This feeble servant says: This is the position according to Abu Hanifah (God bless him). The two jurists said that he is one who speaks irrationally and in a confused manner, because this is the meaning of intoxication in the customary meaning, and it is this that has been favoured by most Mas’ud (jurists) (God bless them). The Imam argues that in hadd the extreme factors are to be given effect so as to increase the possibility of waiving the hadd, and the extreme of intoxication is that it dominate reason completely depriving it of the ability to discriminate between one thing and another. What

4That is, it was fixed at eighty stripes and not one hundred as in the case of zina.
is less than this is likely to be considered sober. What is considered effective in the size of the intoxicating container with respect to prohibition is, by way of precaution, what leads to the state that the two jurists have both held (with respect to irrational speech and confusion). Al-Shâfi’i (God bless him) considers his gait, movements and swaying for purposes of the effect of the liquor, however, these are things that vary from person to person, therefore, there is no point in considering them.

The intoxicated person is not to be awarded hadd on the basis of his confession, due to the greater possibility of his lying in his confession, therefore, it is considered a factor for waiving the punishment. The reason is that this is a pure right of Allâh, as distinguished from the hadd of qadhf, which includes the right of the individual, and an intoxicated person is like a sober person for purposes of punishment as is the case with all his other transactions.

If an intoxicated person becomes an apostate, his wife is not to be separated from him, because kufr is a matter of belief, which is not realised through intoxication. This is the view of Abû Ḥanîfah and Muhammad (God bless them). In the zāhir al-riwayah it is stated that it amounts to apostasy. Allâh knows best.

Chapter 101

The Hadd of Qadhf

If a man commits qadhf (false accusation of unlawful sexual intercourse) against another man, who is a muḥsân, or against a woman, who is a muḥsânah, explicitly about the commission of zînâ, and the person so accused demands the implementation of hadd, then the imâm is to subject him to hadd of eighty lashes, if he is a freeman. This is based on the words of the Exalted, "And those who launch a charge against chaste women, and produce not four witnesses (to support their allegations), flog them with eighty stripes." The meaning here, by consensus (ijmâ‘), is an accusation of zînâ, and in the text there is an indication of this, and that is the stipulation of four witnesses for that is specific to zînâ. The demand (complaint) by the person accused is stipulated, because his individual right is involved in this insofar as it pertains to the repelling of injury to him. The stipulation of iḥsân (chastity) is due to the text that we have recited.

He said: The strokes are to be spread over his limbs, as has preceded in the case of zînâ, and his dress is not to be taken off, because its cause is not definitive (qat‘ī), therefore, it is not to be applied with greater force as distinguished from the hadd of zînâ. Furs and quilted garments, however, are to be removed, because they prevent pain from reaching his body.

If the offender is a slave, he is to be given forty lashes, due to the existence of slavery.

The meaning of iḥsân is that the person accused (of zînâ) be free, sane, major, Muslim and chaste, that is, be free of conviction for the act of zînâ. Freedom is stipulated, because the term iḥsân is used to mean that

\[\text{Qu‘ān 24:4}\]
too. Allâh, the Exalted, has said, "If any of you have not the means where-with to wed muhsanât (free believing women), they may wed believing girls from among those whom your right hands possess;" that is, free women. Reason and puberty are stipulated, because this injury does not affect minors and the insane, because they are not capable of committing the (legal) act of zinâ. Islam is stipulated due to the words of the Prophet (God bless him and grant him peace), “Anyone who associates another with God is not a muhsan.” Chastity is stipulated, because a person who is not chaste is not hurt through the accusation, and the accuser is truth-ful in his accusation.

If a person negates the paternity of another by saying, “You are not your father’s (son),” he is to be subjected to hadd. This is the case when the mother of such person is a freewoman, because he has in reality committed qadhf against his mother. The reason is that paternity is negated with respect to the person who has committed zinâ and no one besides him.

If a person says to another in anger, “You are not the son of so and so,” taking the name by which his father is called, then he is to be subjected to hadd, but if he says it when he is not angry, there is no hadd for him. The reason is that in anger he intended the reality and meant it to be an abuse, while in other cases he intends thereby a reprimand by denying resemblance with his father in terms of manners and behaviour.

If he says, “You are not the son of so and so,” and means thereby his grandfather, he is not to be subjected to hadd, because he is truthful in his statement. If he were to attribute his paternity to his grandfather even then he is not to be awarded hadd, because a grandson is sometimes attributed to him in the figurative meaning.

If he says to him, “O son of a zaniyah,” when his mother is dead and was a chaste woman, after which the son demands that the offender be awarded hadd, he is to be awarded hadd, because he committed qadhf after her death. Only the person who has been directly defamed with respect to his paternity on account of an accusation against a dead person can demand the implementation of hadd, and this person is the child or the parent, because the injury is associated with him due to direct blood relationship (being parts of each other), therefore, the accusation includes these persons in meaning. According to al-Shâfî’i (God bless him) the right to demand prosecution lies with each heir, because the right to claim the hadd of qadhf is inherited in his view, as we will elaborate. In our view, the authority to demand prosecution is not available by way of inheritance, but on the basis we have mentioned. It is for this reason that it is established for one deprived of inheritance through murder, and it is established for the child of a daughter just as it is established for the child of a son with Muhammad (God bless him) disagreeing. It is also established for the child of a child even when the child exists with Zufar (God bless him) disagreeing with this.

If the accused (victim) is a muhsan, it is permissible for his unbelieving son and slave to make a demand for the implementation of hadd. Zufar (God bless him) disagrees with this saying that qadhf either applies to him in meaning alone (when the parent accused is living at the time of qadhf and then dies), and because the defamation reverts to him when the method of acquiring this right is not inherited in our view, therefore, it is as if it includes him in form as well as meaning (that is, as if the qadhf was against him directly, but an unbeliever cannot be a muhsan). In our view, the defamation is by way of qadhf of a muhsan, therefore, he is to be subjected to hadd. The reason is that ihsân, for the person to whom zinâ is attributed, is a condition so that defamation can be complete. Therefore, this defamation passes over in its complete form to the child, and unbelief does not negate the eligibility of acquiring a right. This is different from the case where the child is accused by way of qadhf himself, as in that case the defamation is not complete due to the absence of ihsân in the person to whom zinâ is attributed (being an unbeliever).

The slave does not have the right to demand prosecution of his master with respect to the qadhf of his mother, who is free, nor does the son have the right to demand prosecution of his father for the qadhf of his mother who is free and a Muslim. The reason is that the master is not to be punished on account of his slave and likewise the father on account of his son. It is for this reason that the father is not subjected to retaliation (qadâ) on account of his son nor the master for his slave. If the woman had a son from another man, he would have the right to demand it due to the realisation of the cause and the absence of an obstacle.

\[1\text{Qur’an 4: 25}\]
\[2\text{This has preceded in the chapter on zinâ. Al-Zayla`i, vol. 3. 355.}\]
If a person accuses another by way of qadhf and thereafter the accused person dies, the hadd is annulled. Al-Shafi'i (God bless him) said that it is not annulled. If the accused person dies when part of the hadd has been implemented, the remaining is annulled, in our view with which he also differs based on the rule that it is inherited in his view, while in our view it is not. There is no disagreement that the right includes the right of the law (shar') and the right of the individual. It has been laid down for repelling the injury to the person subjected to qadhf, and it is he who is to avail of this right exclusively, and from this perspective it is the right of the individual. Thereafter the shar' provides for deterrence and for this reason it has been called a hadd. The purpose of the deterrence provided by the shar' (law) is to clear the world of corruption, and this is a sign of the right of the shar'. To all this the akhām stand witness. When the two sides collide, then Al-Shafi'i (God bless him) inclines towards the predominance of the right of the individual preferring it in consideration of the need of the individual and the absence of need from the perspective of the shar'. We incline towards the predominance of the right of the shar', because the right that the individual has is under the authority of his master, thus, the right of the individual is secured through him. The reverse of this is not like this, because the slave has no authority in seeking satisfaction for the rights of the shar', except when deputised to do so. This is the well known principle on the basis of which the various cases that are disputed are settled, and among these is inheritance. The reason is that inheritance applies to the rights of the individuals and not to the rights of the shar'. Among these is also forgiveness ('afw'), because forgiveness by the one accused of qadhf is not valid in our view, but is valid in his view. Among these is also the issue that compensation is not allowed and limitation of time applies to it, but it does not apply according to him. Abū Yusuf (God bless him) according to a narration holds the same view as Al-Shafi'i (God bless him) in the case of forgiveness. Among our jurists are those who said that the right of the individual is predominant and they derive the rules accordingly, but the first is the more authentic opinion.

He said: If a person confesses to the commission of qadhf and thereafter retracts his confession, the retraction is not accepted. The reason is that the person accused by way of qadhf has a right in the claim and he considers the offender to be lying with respect to his retraction. This is different from what is purely a right of Allāh, because no one is there to question his veracity (with respect to the retraction).

If a person says to an Arab, "O Nabaṭi (Nabatean)," he is not to be subjected to hadd, because he intends a comparison with respect to traits or the lack of eloquence. Likewise if he were to say, "You are not an Arab," on the basis of what we said.

If a person says to another, "O son of water from the sky," then he has not committed qadhf, because he intends a simile to show generosity, magnanimity and purity, because water from the sky has been attributed with purity and abundance.

If a person attributes the paternity of another to his paternal or maternal uncle or to the husband of his mother (not his own father), then he has not committed qadhf for each one of them may be described as a father. As for the first, it is due to the words of the Exalted, "We shall worship thy God and the God of thy fathers, of Abraham, Isma'il and Isaac,—the One (True) God," when Ismā'il was his uncle. The second is due to the words of the Prophet (God bless him and grant him peace), "The maternal uncle is a father." The third is considered a father for upbringing.

If a person says to another, "You have committed zina (pronounced with a hamzah) in the mountain," and then maintains that he meant climbing the mountain, he is to be subjected to hadd. This is the view according to Abū Hanifah and Abū Yusuf (God bless them). Muhammad (God bless him) said that he is not to be subjected to hadd. The reason is that the word with a hamzah is for climbing in reality. An Arab poetess said: Rise up to the blessings by climbing the mountain. The mentioning of the mountain emphasises the meaning. The two jurists argue that the word is also used with a hamzah for the shameful act. The reason is that some Arabs use the soft alif as a hamzah and the hamzah as a soft alif. The state of anger and hurling abuses will determine the meaning to be fahishah like the statement, "O Zāīn, or zanāt." The mentioning of the mountain will determine the meaning to be climbing when it is used with 'alā, as it is used in that meaning. It is said that if he had said, "You climbed (zanāt) the mountain," he would not be subjected to

1. Qur'ān 2:133
The reason is that when he declares himself to have lied, back to its basis. In this there is a disagreement that we have mentioned. When mutual imputation of falsehood has been annulled, it is reverted due to his earlier or later acknowledgement. The basis of this is the li`an. The child remains attributed to him, in both cases due to his earlier or later acknowledgement. Li`an is valid without cutting off paternity, just as it is valid without the existence of a child.

If a person acknowledges a child as his and then denies it, then he is to undergo the process of li`an. The reason is that acceptance of paternity has become binding on him due to his acknowledgement, and by negating it later he has committed qadhf. His qadhf gives rise to li`an and her qadhf leads to hadd. Commencing with hadd annuls li`an, because a person who has been convicted for qadhf is not eligible for li`an. The opposite does not lead to annulment (of hadd in her case) and is transferred to the annulment of li`an, because li`an too is in the meaning of hadd. If she were to say, "I committed zina with you," then there is no hadd and no li`an. The reason is that she says this after he has called her a zaniyyah. The reason is the existence of a suspicion in each of the statements. It is possible that she meant the commission of zina prior to marriage in which case hadd becomes obligatory and not li`an due to her confirmation of this and the absence of a statement on his part. It is also probable that she meant, "My zina that was with you, because I did not do it with anyone other than you," and that is the meaning in such a situation. Taking this into account, li`an becomes obligatory and not hadd for the woman, due to the existence of qadhf on his part and its absence on her part, therefore, we arrive at what we said.

If a person acknowledges a child as his and then denies it, then he is to undergo the process of li`an. The reason is that acceptance of paternity has become binding on him due to his acknowledgement, and by negating it later he has committed qadhf. Therefore, he has to undergo li`an. If he negates it first and then acknowledges it, he is to be subjected to hadd. The reason is that when he declares himself to have lied, li`an is annulled, because it is a necessary hadd in which it is imperative to declare each other as indulging in falsehood. The basis of this is the hadd of qadhf. When mutual imputation of falsehood has been annulled, it is reverted back to its basis. In this there is a disagreement that we have mentioned in the topic of Li`an. The child remains attributed to him, in both cases due to his earlier or later acknowledgement. Li`an is valid without cutting off paternity, just as it is valid without the existence of a child.

If he says (to his wife), "He is neither my son nor yours," then there is no hadd and no li`an. The reason is that he is denying the birth, and he does not commit qadhf by doing so.

If a person commits qadhf against a woman, who has children with her whose father is not known, or he commits qadhf against a woman who has undergone li`an due to a child and the child is alive, or he commits qadhf after the death of the child, then there is no hadd for him, because of the existence of the signs of zina with respect to her, and the sign is the birth of a child whose father is not known. This leads to the loss of chastity taking her situation into account, and chastity is a condition of li`an. If he commits qadhf against a woman who has undergone li`an without a child, then he is subjected to hadd, due to the absence of the signs of zina.

He said: If a person has prohibited sexual intercourse without lawful ownership, then a person who commits qadhf against him is not to be subjected to hadd, due to the loss of chastity, which is a condition for li`an. The reason is that the person committing qadhf is truthful. The rule for this is that if a person who commits prohibited sexual intercourse, that is prohibited for itself, such an act does not give rise to hadd due to qadhf. The reason is that zina is sexual intercourse prohibited for itself. If the intercourse is prohibited for some other reason (like that done during menstruation, nifas or with a mukatābah and so on), the person committing qadhf will be subjected to hadd, for that is not zina. Thus, intercourse in other cases complete in all respects or in some respects is prohibited in itself. Likewise in a case of ownership with perpetual prohibition (like intercourse with a slave girl with whom his father has had intercourse), but if the prohibition is temporary then it is intercourse that is prohibited for some external reason. Abū Ḥanifah (God bless him) stipulates that the perpetual prohibition must be one whose rule has been established through consensus or a mashhūr tradition, so that it is established without vacillation. The explanation is that if a person commits qadhf against a man who has had intercourse with a slave girl jointly owned with another, then there is no hadd for him, due to the absence of ownership in some respects. Likewise if a person commits qadhf against a woman who committed zina during the days when she was a Christian, due to the bringing about of zina in the legal sense and with the absence of ownership, therefore, she was liable for hadd.
If he commits qadhf against a Muslim who has had sex with his slave girl or a Magian, or his wife who was menstruating, or his mukātabah, then he is to be subjected to hadd, because the prohibition exists with the subsistence of ownership and it is temporary, therefore, it is probation for an external reason and does not amount to zinā. According to Abu Yūsuf (God bless him) if he has intercourse with his mukātabah, his hadd is annulled. This is also the view of Zufar (God bless him). The reason is that ownership has been removed with respect to intercourse, therefore, he is liable to 'aqr for such intercourse. We say that the ownership of the person subsists and the prohibition is for an external reason, for it is temporary.

If a person commits qadhf against a Muslim who has had intercourse with his slave girl who was his foster sister, then he is not to be subjected to hadd. The reason is that the prohibition is perpetual and this is the authentic view.

If a person commits qadhf against a mukātab slave, who dies and leaves enough wealth for payment of his remaining instalments, then there is no hadd for this person, due to the prohibition of ashr against the individual. Therefore, it is rejected in order to complete his hadd.

If a person commits qadhf against a Magian, who has married his mother and then converted to Islam, he is to be subjected to hadd according to Abi Ḥanifah (God bless him). The two jurists said that he is not to be subjected to hadd. This is based on the issue that the Magians marry relatives in the prohibited degree and marriage is to be assigned to the individual. Therefore, the rejection of his testimony after emancipation is for completion of his hadd.

If an enemy enters our territory on the undertaking of safe-conduct and commits qadhf against a Muslim, he is to be subjected to the hadd. The reason is that this offence involves the right of the individual present in it, and the visitor has undertaken to abide by laws affecting the rights of individuals. Further, he desires that he should not be tormented, therefore, he is bound not to torment others, and the consequence of the injury caused by him is hadd.

If a Muslim is subjected to hadd due to qadhf, his eligibility for giving testimony is annulled, even if he repents. Al-Shāfī’ī (God bless him) said that it is acceptable if he repents, and this issue is discussed in the topic of Shahādat.

If an unbeliever is subjected to hadd for qadhf, he loses the right to testify against the Ahl al-Dhimmah. The reason is that he can testify against his own kind, therefore, it is rejected in order to complete his hadd.

If he converts to Islam, his testimony is acceptable against them and against Muslims. The reason is that this right to testify was acquired after conversion to Islam, therefore, it does not fall under the rule of rejection. This is distinguished from the case of the slave if he is awarded the hadd of qadhf and is emancipated thereafter when he has no right to render testimony. The reason is that he has no right to testify originally in the state of slavery, therefore, the rejection of his testimony after emancipation is for completion of his hadd.

If he has been given one lash on account of the hadd of qadhf, and he converts to Islam, and is then given the remaining lashes, his testimony is acceptable. The reason is that rejection of testimony completes the hadd and becomes an attribute for him, while the hadd awarded after conversion to Islam is part of the hadd, thus, rejection of testimony does not become his attribute. It is narrated from Abu Yūsuf (God bless him) that his testimony is to be rejected, because the smaller part is subservient to the major, however, the first opinion is correct.

He said: If a person commits qadhf or zinā or drinks khamr more than one time, and is awarded hadd, then it is sufficient for all of these offences. As for the first two, the implementation of hadd is undertaken as a right of Allah, the Exalted, for purposes of deterrence. The probability of the purpose being achieved with the first implementation exists, and this gives rise to the shubhah (suspicion) of this purpose being lost in the second implementation.

This is distinguished from the case where he commits zinā, qadhf, theft, and drinks khamr, because the purpose of one category is different from another category, therefore, they cannot be treated as concurrent. As for qadhf, the dominant right in it, in our view, is the right of Allah, therefore, it will be linked with the other two offences. Al-Shāfī’ī (God bless him) says that if the person accused and the act committed, which is zinā, are for different offences they cannot be merged, because the dominant right in qadhf, according to him, is the right of the individual.
If a person commits *qaddf* by accusing a male or female slave, or an *umm al-walad*, or an unbeliever of *zinā*, he is to be subjected to *ta'zīr*. The reason is that it is the offence of seventy-five lashes, but the obligation of *hadd* was prevented due to the absence of *ihlās*, therefore, *ta'zīr* became obligatory.

Likewise if he commits *qaddf* against a Muslim, without the imputation of *zinā*, by saying, "O Fāsiq," or "O unbeliever," or "O khabīth," or "O thief." The reason is that he caused him mental torture and associated dishonour with him, and there is no possibility of using analogy in *hadd*, therefore, *ta'zīr* becomes obligatory, except that *ta'zīr* in the first case (of accusing a non-muḥsān of *zinā*) reaches the maximum level for the offence, because it belongs to the genus in which *hadd* is obligatory, but in the second case it is left to the discretion of the *imām*.

If he calls him, "O donkey," or "O pig," he is not to be subjected to *ta'zīr*. The reason is that he has not associated dishonour with him due to the certainty of the negation (of the name called as he is a human). It is said that according to our custom he is to be subjected to *ta'zīr*, because it is considered an abuse. It is said that if the persons subjected to abuse are respected persons like the *fugāhā* and the elite, he is to be subjected to *ta'zīr*, because they will feel degraded by it. If, however, they are from among the common people, he is not to subject them to *ta'zīr*, and this appears reasonable.

The maximum limit of *ta'zīr* is thirty-nine lashes, while the minimum is three. Abū Yūsuf (God bless him) said that the maximum for *ta'zīr* is seventy-five lashes. The basis for it are the words of the Prophet (God bless him and grant him peace), "One who reaches the level of the *hadd* in matters other than the *hadd* is a transgressor." When enforcement of the *hadd* is obstructed, then Abū Ḥanīfah and Mūhammad (God bless them) take into account the minimum number for the *hadd*, which is the *hadd* for a slave in the case of *qaddf*, and they adopted this. It is forty lashes and they reduced one lash from it. Abū Yūsuf (God bless him) considered the minimum *hadd* for freemen, because the original rule is that of freedom, and then reduced one lash from it, according to one narration from him, which is also the view of Zufar (God bless him), and is based on analogy. In the narration that we have mentioned, he reduced five lashes, and this is reported from 'Ali (God be pleased with him), and five, and he followed his opinion. Thereafter, he determined the minimum in the case of three lashes, as what is less than that does not serve as a deterrent.

Our Mashā`īḥ (jurists) have determined that the minimum is what the *imām* considers to be so, therefore, he determines it to be the minimum that will act as a deterrent, because it differs for different people. It is narrated from Abū Yūsuf (God bless him) that it depends upon the gravity and triviality of the offence. It is also related from him that it is to be treated in relation to each category of offence, thus, fondling and kissing are to be associated with the *hadd* of *zinā*, while *qaddf* without *zinā* is to be related with the *hadd* of *qaddf*.

He said: The *imām* is of the opinion that he should combine with lashes, awarded as *ta'zīr*, imprisonment as well, he may do so, because it is suitable by way of *ta'zīr*. The *shari`ah* has laid it down in general terms, therefore, it is permitted that he deem imprisonment as sufficient or he may combine it with lashes.

He said: The greatest intensity in lashes is in *ta'zīr*, because it has been lightened in terms of number, therefore, it is not to be lessened in terms of intensity so that it does not lead to the loss of purpose (deterrence). Consequently, it is not lightened with respect to spreading it over the different limbs.

This is followed by the *hadd* of *zinā*, because it is established through the *Qur`ān*, while the *hadd* of drinking *khamr* (its number) is established by the opinion of the Companions (God be pleased with them). Further, it is the gravest form of offence so that *rajm* was laid down for it by the law (sharī`ah). Then comes the *hadd* of drinking, because its cause is definitive. Thereafter the *hadd* of *qaddf*, because its cause is probable, due to the possibility of the accuser being truthful. Further, there is enhancement of standards in it due to the rejection of testimony, thus, it is not to be enhanced in terms of intensity.

If a person is subjected to *hadd* or *ta'zīr* by the *imām* and he dies as a result of it, then there is no liability for such death, because he undertook the act under the directives of the law (sharī`ah), and the act of one obeying orders is not restricted by the assurance of safety, as in the case of the cupper or the veterinary, but it is different from the case of the husband.

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7It is recorded by al-Bayhaqi. Al-Zayla`i, vol. 3, 354.

8It is gharib, but al-Baghawi has narrared it from Ibn Abī Layla. Al-Zayla`i, vol. 3, 354.
trying to punish his wife as the permission there is unqualified and as unqualified permission may be restricted with the condition of safety, like walking in the street. Al-Shāfi‘ī (God bless him) said that in this case diyah is imposed upon the treasury, because causing injury amounts to an error in the implementation, because ta‘zīr is for disciplining. Diyah, however, is imposed on the treasury, because the benefit of the act of the person implementing the lashes reverts back to the Muslims generally, thus, the financial burden is placed on their wealth. We say that when the right of Allāh is being exacted from him under His command, it is as if Allāh Himself has caused him to die without any intervening cause, therefore, there is no liability.
The Legal Status of Sariqah

Sariqah in its literal meaning is the taking of something from another by way of concealment and stealth. It is from this that the meaning of eavesdropping is derived. Allah, the Exalted, has said, "But any that gains a hearing by stealth."1 In the technical meaning (in the shari‘ah) some additional stipulations have been added, and the elaboration of these will be coming up before you, God, the Exalted, willing. The literal meaning, however, is observed in it both initially and at the end, or in the beginning and not later. For example, a person breaches a wall by stealth then takes away the wealth of the owner by the use of force and openly. In the major form of this offence (kubrā), I mean, the cutting off of the highway in concealment from the monitoring of the imām for it is he who undertakes the protection of the highway with his security force. In the minor form (ṣughrā) the concealment is from the vision of the owner or of the person who stands in his place.

He said: If a sane and major person steals ten dirhams or a thing that reaches the value of ten minted dirhams from a hirz (place of its safe-custody) in which there is no shubhah, then it is obligatory to subject him to hadd. The basis for this are the words of the Exalted, "As to the thief, male or female, cut off his or her hands: a retribution for their deeds, and exemplary punishment from Allah, and Allah is Exalted in Power, Full of Wisdom."2 It is necessary to take into account aql (reason) and bulūgh (puberty), because the offence is not committed without them. Cutting of the hand is the compensation for the offence, therefore, it is essential that it be of substantial wealth, because the inclination

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1Qur‘ān 15 : 18
2Qur‘ān 5 : 38
to acquire trivial amounts is weak. Likewise the taking of insignificant things is not concealed, thus, the ru'kn (essential element) is not realised nor is there wisdom in deterring it for that is done in what is predominant. Determining it to be ten dirhams is the opinion of our school, but according to al-Shāfī‘ī (God bless him) it is fixed at one-fourth of one dinār. According to Mālik (God bless him) it is fixed at three dirhams. These two jurists maintain that cutting of the hand during the period of the Prophet (God bless him and grant him peace) was not undertaken unless it reached the price of the minted coins, cutting of the hand is the correct opinion keeping in view the completion of the offence. Consequently, if he were to steal ten nuggets whose value is less than ten dirhams, and is the correct opinion keeping in view the completion of the offence, thus, the completion of the offence, and such suspicion leads to the waiving of the ḥadd. The reason is the obligating factor is the theft of the nisāb (minimum amount for theft), and is to be worked out in the case of the hadd. He said: It becomes obligatory by the confession of the offender even if he made once. This is the view according to Abū Ḥanīfah and Muhammad ibn Yūsuf (God bless him) said that cutting is not undertaken except after a confession made twice. It is narrated from him that the sariqah (testimony) is corroborated by the other type, which is testimony. The testimony is not taken into account in this case, because excess in testimony reduces the allegation of falsehood, but in a confession it does not provide such a benefit. He did the same in the case of the ḥadd. The testimony is not sufficient as is the case with qisās and the ḥadd of qadhf. The testimony is not taken into account in this case, because excess in testimony reduces the allegation of falsehood, but in a confession it does not provide such a benefit for there is no cause for suspicion there. Further, the means to retraction of the confession with respect to the ḥadd are not blocked by repetition, while retraction with respect to wealth is not valid at all, because the owner of the wealth deems him to be a liar. The stipulation of additional times in the case of qisās is contrary to analogy, therefore, it is better to confine such repetition to the issue of the text (shari‘ah).

He said: It becomes obligatory with the testimony of two witnesses, due to the manifestation of the proof as is the case with all the remaining rights. It is necessary, however, that the inām ask them about the method of theft, its nature, time and place for additional precaution, as has preceded in the case of the ḥudūd. He is to imprison him until he has made enquiries from the witnesses due to the charge against him.

He said: If a group participates in the theft, and each one of them takes away wealth valued at ten dirhams, they are to be subjected to amputation, but if what they take away individually is less then their hands are not amputated. The reason is the obligating factor is the theft of the nisāb (minimum amount for theft), and is to be worked out for each one of them as a result of their offence, thus, the completion of nisāb for each person is to be taken into account. Allāh knows best.
Chapter 103

Theft That Gives Rise to Punishment of Amputation

There is no cutting of the hand for what is treated as insignificant and free (permissible) in the Dar al-Islām, like wood, grass, cane, fish, birds, game, arsenic, clay and lime. The basis for this is the tradition of 'Ā'ishah (God be pleased with her), who said: "The hand was not cut during the period of the Prophet (God bless him and grant him peace) for insignificant things," that are trivial. Such a thing is one whose original species is found to be free in its own form and is not desired for itself, for it is trivial there being little desire to hoard it or be niggardly with respect to it. Whenever such a thing is taken away without the willingness of the owner there is no need to lay down a deterrent in the law (shar`) for such taking. It is for this reason that the cutting of the hand is not obligatory in the case of things that are below the value of the nisāb. Further, the place of safe-custody (hirz) in such things is deficient. Do you not see that hay is thrown in front of the doors, and it is taken inside the house for construction purposes and not for storing? The birds fly away and game can flee. Likewise things of common ownership in game, as it is of the same nature giving rise to shubhah, and hadd is waived on account of it. Fish includes both salted and fresh, while birds include chicken, ducks, and pigeons due to what we have mentioned, and also because of the unqualified meaning of the words of the Prophet (God bless him and grant him peace), "There is no amputation for birds." It is narrated from

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1It is recorded by Ibn Abī Shaybah. Al-Zayla'i, vol. 3, 360.
2It is gharib, and is recorded by 'Abd al-Razzāq and Ibn Abī Shaybah. Al-Zayla'i, vol. 3, 360.
Abū Yusuf (God bless him) that the punishment of cutting of the hand is to be awarded for all these things except for clay, soil, and dung. This is also the view of al-Shāfī’i (God bless him). The evidence against them is what we have mentioned.

He said: There is no cutting of the hand for things that are prone to decay like milk, meat, and fresh fruit, due to the saying of the Prophet (God bless him and grant him peace), “There is no cutting in thamar (fruit) or kathar,” where kathar is jumār (edible tuber of the palm tree). It is also said that it means wādī (small date palm). The Prophet (God bless him and grant him peace) said, “There is no cutting in food,” and the meaning, God knows best, is what is prone to decay and is ready for eating, or whatever has the same meaning like meat and fruit, because the hand is cut in things like wheat and sugar on the basis of consensus. Al-Shāfī’i (God bless him) said that the hand is to be cut for these things due to the words of the Prophet (God bless him and grant him peace), “There is no cutting in thamar (fruit) or kathar, but when it is stored in a stone basin, the hand is to be cut.” We would say that it is to be construed in conformity with practice for what was preserved in the basin according to their practice was fruit that was dried and in that there is amputation.

Al-Shāfī’i (God bless him) said that the hand is to be cut for these things due to the words of the Prophet (God bless him and grant him peace), “There is no cutting in thamar (fruit) or kathar,” but when it is stored in a stone basin, the hand is to be cut. We would say that it is to be construed in conformity with practice for what was preserved in the basin according to their practice was fruit that was dried and in that there is amputation.

He said: There is no cutting of the hand in fruit that is on the tree and in crop that has not been harvested, due to the lack of preservation for safe-custody.

There is not cutting of the hand in intoxicating beverages, because the act of the thief in acquiring them will be construed to be for spilling. Further, some of these beverages are not deemed wealth, while there is a disagreement about the value of others, thus, the suspicion (shubhah) of the absence of value is created.

There is no cutting for the mandolin, because it is one of the instruments of amusement.

There is no cutting for the mushaf even if it is ornamented with gold. Al-Shāfī’i (God bless him) said that the hand is to be cut as it is marketable wealth and even its sale is permitted. A view similar to this is narrated from Abū Yusuf (God bless him). It is also narrated from him.

He said: There is no cutting for a cross made of gold, nor for chess nor backgammon, because the person who takes them will construe it to be for breaking, in conformity with forbidding the evil. This is different from the dirham with engraving on it, because it has not been prepared for worship, therefore, the doubt of permissibility of destroying it does not arise. It is narrated from Abū Yusuf (God bless him) that if the cross is in a place of worship, there is no cutting of the hand, due to the absence of safe-custody (hirz), but if it is present in another room the hand is to be cut due to the completion of value and existence of hirz.

He said: There is no cutting for the doors of a mosque, due to the lack of custody, and this door becomes like the door of a house in fact better, because things in the house are protected with the door of the house, but the things in the mosque are not protected this way with the door, so much so that there is no cutting for the theft of the assets inside the mosque.

The reasoning underlying the authentic narration (zāhir) is that the person acquiring it is to be construed to do so for recitation and study. The reason is that it has no market value by virtue of its being writing. Its preservation is for itself and not for the leather, pages (paper), or ornamentation, for these are secondary things, and secondary things are not taken into account. It is as if someone stole a utensil in which there is wine when the value of the utensil reaches the nisāb.

There is no cutting for the doors of a mosque, due to the lack of custody, and this door becomes like the door of a house in fact better, because things in the house are protected with the door of the house, but the things in the mosque are not protected this way with the door, so much so that there is no cutting for the theft of the assets inside the mosque.

Further, some of these beverages are not deemed wealth, while there is a disagreement about the value of others, thus, the suspicion (shubhah) of the absence of value is created.

There is no cutting of the hand for abducting a minor (infant) who is a free person even if he is wearing jewellery. The reason is that a free person is not wealth, and the jewellery he is wearing is secondary to his person. Further, the defence can be put up that the minor was taken to pacify him or to carry him to his governess (nanny). Abū Yusuf (God bless him) said that amputation is awarded if the child is wearing ornaments of the value of the nisāb, because cutting will be obligatory by stealing the jewellery separately, so also when taken with another thing (child). The same applies when the thief steals a silver goblet that has meat or broth in it. The disagreement here is about an infant who cannot walk or speak so that he is not under his own control.

There is no cutting of the hand for taking away a grown up slave, for that is treated as ghāsh (misappropriation, abduction) or deception.
The hand is to be cut for taking away a young (minor) slave due to the occurrence of theft in conformity with its hadd, unless he can convey who he is, because then this minor and the major are the same in respect of control over themselves. Abu Yūsuf (God bless him) said that cutting of the hand is not to be awarded even if he is a minor who does not understand or cannot speak on the basis of istihsān, because he is a human being from one aspect and wealth from another. The two jurists argue that he is wealth in the absolute sense due to the benefit to be obtained from him or due to the withheld benefit to be derived from him despite the obstacle (of being human as that does not eliminate his being wealth), except that the attribute of being a human is associated with him (this form of wealth).

There is no cutting of the hand for all kinds of bound books (daftār), because their purpose is what is contained in them and that is not māl (wealth) except for books of accounts, as what is in them is not intended through the taking, and the (real) purpose is (to steal) the paper (kāwāghid).

He said: There is no cutting of the hand for the theft of a dog or a lion, because those who are in the same species are found to exist freely in an original state of permissibility and they are not desired for themselves. Further, the disagreement among the jurists is obvious with respect to ownership, because the corpse has no ownership in reality nor for one who extorts wealth, because he does this openly. The basis is the saying of the Prophet (God bless him and grant him peace), "There is no cutting of the hand for the embleszler, the extorter and the deceiver."7

There is no cutting of the hand for the grave-robber. This is the view according to Abū Hanīfah and Muḥammad (God bless them). Abū Yūsuf and al-Shāfī’ī (God bless them) said that he is liable for cutting of the hand, due to the words of the Prophet (God bless him and grant him peace), "We cut the hand of one who robs a grave."8 The reason is that the shroud is marketable wealth that is preserved in a ḥizār meant for it, therefore, his hand is to be cut. The two jurists rely on the words of the Prophet (God bless him and grant him peace), "There is no cutting of the hand for the grave-robber, male or female, due to the deficiency in ḥizār (place of safe-custody), neither for the embezzler nor for one who extorts wealth, because he does this openly. The basis is the saying of the Prophet (God bless him and grant him peace), "There is no cutting of the hand for the embleszler, the extorter and the deceiver."7

The hand is to be cut for taking teakwood, bamboo, ebony and sandalwood, because these are types of wealth that are protected for they are precious in the eyes of the people, and they are not found in a free form in the Dār al-İslām.

He said: The hand is to be cut for stealing emeralds, rubies and green jewels (from chrysolite), because these are the most sought after and precious forms of wealth and are not found freely in the undesirable original permissible form in the Dār al-İslām, therefore, they are like gold and silver.

4Which gives rise to the waiving of the hadd.
from the coffin while going with a caravan when the corpse is inside it, due to what we said.

The hand of the person who steals from the treasury (bayt al-māl) is not to be cut, because this is public wealth and he is one of them, nor when he steals from wealth in which the thief is a co-owner, due to what we have said.

If a person is owed dirhams by another and he steals from him, his hand is not to be cut, because this amounts to the satisfaction of his claim, and prompt and deferred are in the same position with respect to this, on the basis of istihsān. The reason is that delay is due to the postponement of the demand (for satisfaction). Likewise if he steals in excess of his right, because he becomes a co-owner with him in the stolen amount to the extent of his claim.

If he steals goods from him, his hand is to be cut, because he does not have the authority to seek satisfaction from them, except on the basis of sale by consent. It is narrated from Abū Yūsuf (God bless him) that his hand is not to be cut for he has the right, according to some jurists, to acquire them in satisfaction of his claim or as property pledged with him for his claim. We say that this is a statement that does not rely on an authentic evidence, therefore, it is not to be acknowledged without linking it to a suit filed for it, and if he does so the hadd will be waived. The reason is that it is the case of probability in a matter that is subject to disagreement. If his claim was for dirhams and he stole dinārs from him, it is said that his hand will be cut as he does not have the right to take them. It is also said that his hand is not to be cut as currencies are a single species.

If a person steals some 'ayn (something that can be taken into physical possession) and his hand is cut for it, but thereafter he returns it and then steals it again when this thing is in the same physical state, his foot is not to be cut. Analogy dictates that his hand is to be cut, and it is one narration from Abū Yūsuf (God bless him). It is also the opinion held by al-Shāfi`ī (God bless him), due to the saying of the Prophet (God bless him and grant him peace), "If he repeats it, cut his hand (again)," without going into details. The reason that the second theft is complete like the first. In fact, it is more atrocious due to the implementation of the (first) deterrent punishment, and it is as if the owner had sold it to the thief and then bought it from him after which theft was committed. We maintain that the cutting of the hand led to the elimination of protection for the stolen property, as will be known in what follows, God, the Exalted, willing. By returning the property to the owner the protection returned in reality, but a doubt (shubhah) remained with respect to the existence of protection taking into account the unity of ownership and subject-matter as well as the existence of the cause (of loss of protection), which is cutting of the hand. This is distinguished from what has been said (with respect to sale by abū Yūsuf), because ownership becomes different with a difference in the cause. Further, repetition of the offence by such a person (with respect to the same property) is rare due to his having borne the hardship of the deterrent, therefore, implementation once again becomes devoid of purpose, due to the rare occurrence of the offence. It is as if the person subjected to the hadd of qadhf commits qadhf against the first person again.

If the state of the stolen property changes, for example, it was yarn when he stole it and his hand was cut then he returned it and it was woven, but he repeats the offence and steals the cloth, his foot is to be cut. The reason is that the 'ayn has changed its form, therefore, a person misappropriating the yarn and weaving it will come to own the cloth. This is the sign of alteration in each subject-matter. When it stands altered, shubhah arising from the unity of subject-matter and amputation is negated, thus, cutting of the hand a second time becomes obligatory. Allāh knows what is correct.

\[\text{\textsuperscript{368}}\text{It is recorded by al-Dār'āqūṭnī in his Sunan Al-Zayla'ī, vol. 3, 368.}\]
Chapter 104

Place of Safe Custody (Hirz)

If a person steals from his parents or children or relatives in the prohibited degree, his hand is not to be cut. In the first case, which is relationship by birth, there is free sharing of wealth and entry into the hirz. The second is due to the second meaning (entry into the hirz without permission). It is for this reason that the law (shar') has permitted glancing at visible locations of adornment (parts of the body) as distinguished from friends with whom an enmity is created through theft. In the second case there is a disagreement with al-Shāfi‘ī (God bless him), because he associates them with distant relatives, and we have elaborated this in the topic of emancipation.

If he steals from the house of a relative in the prohibited degree assets belonging to another, his hand is not cut, but if he steals his own assets from the house of another (not a relative) his hand is cut, on the basis of entry into the hirz with and without permission.

If a person steals from his foster mother, his hand is cut. According to Abū Yūsuf (God bless him) his hand is not to be cut, because he enters her house without permission and bashfulness. This is distinguished from the case of the foster sister, due to the absence of such a relationship according to custom. The reasoning underlying the authentic narration is that there is no kinship and the prohibition without kinship is not respected, like the prohibition established due to zinā and kissing with lust. Closer than this is the foster sister. The reason is that fosterage is not publicised, therefore, there is no sharing of wealth or free entry into the hirz in order to avoid allegations of suspicion. This is different from blood kinship.
If one spouse steals from the other spouse or a slave from his master or from the wife of his master or from the husband of his mistress, there is no cutting of the hand, due to the existence usually of permission for entry. If one of the spouses steals exclusively from the place of safe-custody (hirz) of the other spouse when both do not reside in such a place, then the rule is the same in our view. Al-Shafii (God bless him) disagrees. The reason (for our argument) is that there is a free sharing of wealth among them in practice and implication (of the relationship of marriage). This is a parallel case to the disagreement in the case of testimony.

If the master steals from his muktab slave, his hand is not to be cut, because he has a right in his earning.

Likewise a person who steals from the spoils, because he has a share in them and this is related from 'Ali (God be pleased with him) both with respect to the waiving of hadd and the underlying rationale.

He said: hirz is of two types: (1) hirz for the meaning of protection within it, like rooms and houses, and (2) hirz through a guard. This feeble servant (the Author) says: Hirz is essential, because the meaning of stealth is not established without it. Thereafter it sometimes exists through location, and that is the location prepared for guarding assets, like houses, rooms, trunks and shops. At other times it exists through a guard like a person sitting in the street or in a mosque when he has some baggage with him, then he is the guard for these assets. The Prophet (God bless him and grant him peace) ordered the amputation of the hand of the person who stole the cloak of Safwan from under his head when he was sleeping in the mosque.

In a hirz based on location, custody through a guard is not taken into account. This is correct, because it is protected without a guard, and such a hirz is a room even when it does not have a door or has one, but it is open, so that a person stealing from there is subjected to amputation. The reason is that a structure is for purposes of safe-custody, except that there is no cutting of the hand without his bringing the property out of it, because of the existence of prior possession of the owner. This is different from the hirz through a guard insofar as cutting of the hand becomes obligatory as soon as he takes it away from him, due to the elimination of the possession of the owner by the mere act of taking thereby completing the act of theft. There is no difference between the situations where the guard is asleep or is awake and whether the goods are under him or lying next to him. This is the correct view, because the person sleeping next to his goods is considered to be guarding his things in practice. It is for this reason that the custodian and the borrower of goods (sleeping next to his goods) is not held liable for compensation, because in such a case to the goods it is not the loss of goods, as distinguished from what has been preferred for fatwa.

He said: If a person steals from a hirz or from a place other than the hirz when the owner is next to the property guarding it, his hand is to be cut, because he has stolen from one of the two types of hirz.

There is no cutting of the hand for a person who steals wealth from a public bath or a house in which entry to the public is permitted, due to the existence of permission in practice or actual for entry, therefore, the hirz is demolished. This includes the shops of traders and public inns, except when theft is committed there at night, because they are built for custody of assets, and the permission pertains to the day.

If a person steals assets from a mosque when the owner (custodian) is there, his hand is to be cut, because it is protected by a guard. The reason is that a mosque is not built for safe-custody of assets, therefore, the wealth inside is not protected through hirz of location. This is distinguished from a public bath, and a room that is open to the public for entry so that the hand is not cut, because it is built for safe-custody, therefore, the hirz is by location (though undone by free-entry) and hirz by a guard is not taken into account.

There is no cutting of the hand for the guest who steals from his host, because the room (house) is no longer a hirz as far as he is concerned due to the permission given to him for entry. The reason is that he has the same status as the residents of the house, therefore, his act is misappropriation and not theft.

If a person commits theft of something and does not move it out of the hirz, his hand is not to be cut, because the entire house is a single hirz therefore, it is essential to move it out of it. The reason is that the house and what is in it is in the possession of the owner conceptually, therefore, leaving the stolen thing gives rise to a shubhah of not taking.

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1. The Hanafis say that the testimony of one spouse is not accepted in favour of another, but the Shafiis in one view say that it is accepted.

If the house has a number of rooms and the thief brings the stolen goods out into the courtyard, his hand is to be cut, because each room with respect to its occupant is an independent hirz in itself.

If one of the occupants of the rooms in the house enters a room by stealth and steals from it, his hand is to be cut, due to what we have elaborated.

If a thief makes a hole in the wall of a room, enters it, takes wealth and hands it over to another thief outside (while he is still inside), then there is no cutting of the hand for them, because the first one is not found to have come out and thus the protective possession of the owner is acknowledged over the wealth prior to its being brought out. The second is not found to violate the hirz; therefore, the act of sariqah has not been completed by either. It is narrated from Abu Yusuf (God bless him) that if the one inside stretches his hands outside and delivers the goods to the one outside then the cutting of the hand is for the one inside. If the one outside inserted his hands inside and took the goods from the hands of the one inside, then the cutting of the hand is for the one who was outside. This is based on the issue that will be coming up later. God, the Exalted, willing.

If he flings the goods outside and then goes out and picks them up his hand is to be cut. Zufar (God bless him) said that his hand is not to be cut, because throwing the goods outside does not give rise to the obligation of amputation. It is as if he went out and did not pick up the stolen goods. Likewise taking the goods from the street is as if someone else took the goods. We argue that throwing the goods is a device thieves use due to the difficulty of coming out with the goods or because they (some) want to be free to fight with the owner or for running away. His act is not prevented by the possession of the owner, therefore, the entire activity is deemed a single act. If he does not pick up the goods when he comes out then he is a waster and not a thief.

He said: Likewise if he loads them upon a donkey and drives him out, the movement of the donkey is attributed to him as he is driving it.

If a group enters a hirz and some of them commit the taking, the hands of all are to be cut. This feeble servant (Author) says: This is based upon istihšān. Analogy dictates that the one carrying the stolen goods out should alone be subjected to cutting, which is the opinion of Zufar (God bless him). The reason is that he is found to move the goods outside, therefore, the theft is completed by him. We maintain that theft has been committed by all due to collaboration as is the case with sariqah kubřā. The reason is that the practice among them is that some carry the goods and the rest buckle up for defence. If cutting is prevented in this case, it will lead to the blocking of the door of hadd (in this category).

He said: If a person makes a hole in a room and puts his hand inside to take something out, his hand is not to be cut. It is narrated from Abū Yūsuf (God bless him) in al-Imlā' that his hand is to be cut, because he brought out the wealth from the hirz and that is the objective. Thus, entry is not to be stipulated for it as in the case where he inserts his hand into a safe for cash and brings out Ghritri dirhams. We argue that the violation of the hirz is stipulated for the completion of the offence and to eliminate the shubhah of absence of hirz. Completion with respect to entry is where such entry is considered possible. Entry into a house is in the normal way and this is distinguished from opening a trunk, because what is possible there is insertion of the hand and not full entry. It is also distinguished from what has preceded where some thieves are carrying the goods, because that is what is done in practice.

If a person cuts (and takes) a purse that is outside the sleeve, his hand is not to be cut, but if he puts his hand inside the sleeve, it is to be cut. The reason is that in the first case the knot is on the inside, therefore, by cutting the taking occurs on the outside, thus, the violation of the hirz has not occurred. In the second case the knot is on the inside, therefore, by cutting taking from the hirz is realised, and the hirz is the sleeve. If in place of cutting he opens the knot, then, in both situations the response will be reversed, due to the inversion of the underlying cause ('illah). It is narrated from Abū Yūsuf (God bless him) that the hand will be cut in all circumstances, because the purse is protected either by the sleeve or by the owner himself. We say that the hirz is the sleeve for he is relying on it for protection, while his own purpose is to complete the journey or to rest, therefore, it is as if it is the pack on the camel's back.

If he steals a camel from a train of camels or a the load (on the camel), his hand is not to be cut. The reason is that it is intended to be a hirz, therefore, it gives rise to the shubhah of absence of hirz, because the driver, the guide and the rider have as their purpose the undertaking of the journey and the transfer of goods and not protection. Thus, it is said that if there is someone with the loads who is following them to guard them, then the hand is to be cut. If he cuts up the load pack and takes from it, his hand is to be cut, because the bags in such a situation are a
hirz, because by placing the goods in the bags, the intention is to protect them, as in the case of the sleeve. Consequently, the taking is from a hirz, therefore, the hand is to be cut.

If he steals a camel bag, in which there are goods, while the owner is protecting it, but is asleep, his hand is to be cut. The meaning is that if the bag is in a place that is not a hirz, like the highway and so on, so that the hirz is through the presence of the owner due to his being on watch for their protection. This is the case where the consideration is given to the normal watch by sitting next to the bags. Sleep in this situation is reckoned as hirz in practice. Likewise sleeping nearby, according to what we preferred earlier. It is mentioned in some manuscripts that “when he is sleeping on top of the bags or where he is able to protect them,” and this affirms what we have stated about the preferred opinion. Allah knows what is correct.

Chapter 105
Mode of Amputation and its Proof

He said: The right hand of the thief is to be cut from the forearm and is to be singed/cauterised. The cutting is undertaken on the basis of what we recited earlier. The selection of the right hand is based on the recitation of Abū ʿAbd Allāh ibn Masʿūd (God be pleased with him). The selection of the zand (wrist, forearm) is due to the reason that term yad includes the entire arm up to the armpit, and this joint, I mean wrist, is something about which there is certainty. The reason is that there are sound reports about the ordering of the amputation in the case of the hand of the thief from the wrist by the Prophet (God bless him and grant him peace). Cauterisation is undertaken due to the saying of the Prophet (God bless him and grant him peace), “Cut it and cauterise it.” The reason is that if it is not cauterised it can lead to death, and the hadd is a deterrent not a killer.

If he steals a second time, his left foot is to be cut, and if he steals a third time, there is no cutting and he is to be left in the prison till he repents. This is istihsān, and he is to be given taʿzīr as well, as mentioned by the Mashāʾikhs (jurists) (God bless them). Al-Shafīʿī (God bless him) said that on the third offence his left hand is to be cut and on the fourth his right foot is to be cut, due to the saying of the Prophet (God bless him and grant him peace), “If someone steals cut (his hand). If he repeats the offence cut again. If he repeats again cut again.” It is also related with all

1There are traditions about this and one of them is recorded by al-Dārquṭnī. Al-Zaylaʿī, vol. 3, 370.
3It is recorded by Abū Dāwūd. Al-Zaylaʿī, vol. 3, 371.
the details, as is expressed in his opinion. The reason is that the third
effence is just like the first in being an offence. In fact, it is more grievous,
therefore, it calls for laying down the hadd by the law (sharīʿa). We rely
on the saying of 'Ali (God be pleased with him), “I feel afraid of Allah, the
Exalted, if I do not leave him with a hand with which to eat and to per-
form istinjāʿ and a leg on which he can walk.” He then argued with the
rest of the Companions (God be pleased with them) and was able to con-
vince them, therefore, an ijma’ occurred. Further, it amounts to killing
him in meaning for it is the loss of all benefits of being alive, and the hadd
is a deterrent (not a destroyer). In addition to this, it is of rare occurrence
deterrence is stipulated in things that are of widespread occurrence,
as distinguished from qiṣāṣ as that involves the right of the individual,
therefore, retaliation is extracted by force as far as is possible for the satis-
faction of his right. The tradition has been criticised by al-Ṭahāwī (God
bless him) for authenticity, or it is construed to be applicable to

If the thief has a paralysed or amputated left hand or an amputated
right leg, amputation is not to be enforced. The reason is that in doing
so there is a loss of the benefit of grasping or walking. Likewise if his right
leg is paralysed, on the basis of what we said. Likewise if the thumb of his
left hand is cut off or paralysed, or two of the fingers of the hand other
than the thumb, because the strength of grasping comes from the thumb.
If one finger other than the thumb is cut off or paralysed, his hand will
be cut, because the loss of one finger does not create an apparent dys-
function in grasping, as distinguished from two fingers for they assume
the position of the thumb in the loss of grasping.

If the judge says to the executioner cut off the right hand of this man
for a theft that he has committed, and he cuts off his left hand inten-
tionally or by mistake, then he is not liable for anything according to
Abū Ḥanīfah (God bless him). The two jurists said that he is not liable
in case of a mistake, but is liable for the intentional cutting. Zufar (God
bless him) said that he is liable for a mistake as well, and this is based upon
qiṣāṣ (analogy). The meaning of mistake here is a mistake in ijtihād. As
for a mistake in distinguishing the right from the left, it is not deemed
an excuse. It is said that this mistake is to be deemed a justified excuse

4 As the text says, “Cut of their hands.”
demand cutting of the hand. Likewise the person whose property has been usurped. Zufar and al-Shaf’i (God bless them) said that the hand is not to be cut on the complaint of the custodian and the usurper. On the same disagreement are analysed the positions of the borrower (commodate loan), the person who has hired property, the muḍārib, the person who borrows goods for sale, the person taking possession of goods offered for sale, the pledgee and any person, other than the owner, who has custodial possession. The hand is to be cut on the complaint of the owner for theft from any of these persons, except that in the case of the mortgagor it can be cut on his complaint when the property exists and he has paid his debt, because he has no right to initiate a claim for the property without this. Al-Shaf’i (God bless him) based his view on the rule preferred by him that these persons do not have the right to demand the return of the property. Zufar (God bless him) says that the right to initiate litigation for the return of property arises from custodial necessity, but it does not arise for purposes of demanding cutting of the hand, because it leads to the loss of financial protection. We maintain that theft in itself gives rise to cutting of the hand, and it is proved before the qādi through legal proof, which is the testimony of two witnesses following the complaint that is considered in the absolute sense. The consideration is due to the need of these persons for the return of the property, and along with that the cutting of the hand is implemented as well. The purpose of the litigation is the securing of his right, while the loss of financial protection is a necessity for claiming this right, therefore, it is not taken into account. The shubhah that may possibly be raised as an objection that is not taken into account, for example, if the owner is present and the custodian is absent, the cutting will be undertaken on the basis of his (owner’s) litigation, even though the shubhah that the custodian may have given the thief permission to enter the ḥirz exists.

If a thief’s hand is amputated for theft and the property has been stolen from him, neither he nor the owner has the right to demand the cutting of the hand of the second thief. The reason is that the wealth has no marketable value as far as the thief is concerned so that he is not held liable due to the loss of the property, therefore, theft in itself does not give rise to the obligation. The first thief, however, has the authority for the recovery of the property, according to one narration, because the return of the property is obligatory for him.

If the second thief steals prior to the cutting of the hand of the first, the hadd has been waived due to shubhah, his hand is to be cut or after the hadd has been waived due to shubhah, his hand is to be cut on the basis of the first complaint. The reason is that the extinction of marketable value is a necessity of cutting of the hand, and this is not found, therefore, he becomes like a usurper.

If a person steals something and then returns it to the owner before the commencement of proceedings before the judge, his hand is not to be cut. It is narrated from Abū Yūsuf (God bless him) that it is to be cut like the situation where he returns it to the owner after the commencement of the proceedings. The reasoning underlying the authentic narration (zāhir al-ridāyah) is that a complaint (litigation) is a condition for proving theft, because testimony is deemed a necessity for eliminating the dispute and the dispute stands terminated in this case. This is distinguished from the situation where it is returned after the proceedings, where the litigation stands terminated and its purpose has been attained (through prosecution), thus, it remains finally settled.

If a decision has been rendered against a person for cutting of the hand in a case of theft, and the stolen property is gifted to the thief, amputation is not carried out. The meaning is if it is delivered to him. Likewise if the owner sells it to him. Zufar and al-Shaf’i (God bless them) said that his hand is to be cut. It is also one narration from Abū Yūsuf (God bless him), because the theft stands completed both with respect to commission and proof, and this transaction (gift or sale) has not made obvious whether ownership passed to the thief at the time of the commission of the theft, thus, there is no shubhah here (therefore, his hand has to be cut). We argue that execution is a consequence of the judgement in this category (of ḥudūd), for it (judgement) is not sufficient without the satisfaction of the claim through execution, because judgement is for proving the offence, while cutting of the hand is a right of Allah, the Exalted, and this is claimed at the time of cutting. If this is the case, the continuance of prosecution (claim of sariqah) is stipulated up to the time of satisfaction of this right (and this claim has been given up through the gift or sale), thus, it is as if he made him the owner prior to the adjudication.

He said: Likewise if the value of the stolen property decreases and becomes less than the niṣāb, that is, prior to execution and after judgement. It is narrated from Muḥammad (God bless him) that the hand is
to be cut, which is also the opinion of Zufar and al-Shafi’i (God bless them), in the light of the deficiency in the value of the ‘ayn (when partly destroyed or lost by the thief after the theft). We maintain that as the completion of the nisab is a condition that must continue up to the time of execution, due to what we have said, as distinguished from the material loss in the thing for which he is liable to compensation, therefore, the nisab there is complete by way of ‘ayn and dayn (actual material and that to be compensated), even where he destroys the whole of it. As for the loss in price, it is not liable to compensation.

If the thief claims that the thing stolen is owned by him, amputation will be waived, even if he does not come up with testimony, that is, after the witnesses have testified to the theft. Al-Shafi’i (God bless him) said that it is not waived by a mere claim, because the thief is able to do this easily and this will lead to the closing of the door to this type of hadd. We maintain that shubhah has the effect of waiving the penalty and this has been created by the mere claim due to its probability. What he (al-Shafi’i) has said is not valid, due to the validity of retraction after confession by the thief.10

If two persons confess to the commission of theft, and then one of them says that it is his wealth, the hands of both persons are not to be cut, because the retraction is operative with respect to the person retracting and it gives rise to a doubt in the case of the other, because the theft was proved through the confession of both about an offence committed through participation.

If two persons commit a theft and then one of them disappears, while two witnesses testify to the theft committed by both, the hand of the other thief is to be cut, according to Abū Ḥanifah (God bless him) in his second opinion, and this is the opinion of the two jurists. The Imam used to say earlier that it is not to be cut, as the other might appear and come up with a ground for creating shubhah. The reason for his second opinion is that absence prevents the proof of theft against the thief absent, therefore, he remains non-existent and one who is non-existent cannot create a shubhah. There is no validity of the likely shubhah to be created, as has preceded (in the earlier opinion).

10Even when he has not been able to establish a clear title.
11Because the purpose is to create a shubhah, and that is created through his claim which is probably true.
Abū Yusuf (God bless him) argues that he confessed to two things in his confession for purposes of cutting of the hand. The first is against himself and this is valid on the basis of what we have mentioned. The second is with respect to wealth, and this is not valid due to the right of the master in him. Cutting of the hand becomes due without this. It is as if a freeman says, “The dress that is in the possession of Zayd I stole from 'Amr.” Zayd then says, “It is my dress.” The hand of the person confessing will be cut even if he is not correct in identifying the dress, and the dress is not recovered from Zayd.

According to Abū Hanifah (God bless him) the confession with respect to the cutting of the hand is valid on his part, due to what we elaborated, therefore, it is valid with respect to wealth too based on this. The reason is that the confession is compatible with the state of subsistence, and wealth in a state of subsistence is secondary to cutting of the hand insofar as the protection accorded by the law to wealth is extinguished as a result of it, thus, the claim for cutting of the hand is satisfied even after the destruction (consumption) of the property. This is distinguished from the issue about the freeman, because amputation becomes obligatory even by stealing from a custodian, but what does not lead to the obligation through theft by the slave is the wealth of the master. If the master were to deem him truthful his hand would be cut in all the above cases due to the elimination of the obstacle.

He said: If the hand of the thief is cut and the thing (stolen) still exists in his possession, it is to be returned to the owner, due to its (continued) existence in his ownership. If, however, it stands consumed, he is not held liable for compensation. This generality includes consumption and destruction, and it is a narration of Abū Yusuf (God bless him) from Abū Ḥanifah (God bless him) and it is well known. Al-Hasan narrated from him that he is to be held liable in case of consumption. Al-Shāfīʿi (God bless him) said that he is liable for compensation in both cases, because these are two rights with two different causes and they do not preclude each other. Amputation is the right of the law (ṣharʿ), and its cause is the non-avoidance of an act that the law (ṣharʿ) has prohibited, while compensation is the right of an individual and its cause is the taking of wealth. It is as if a person consumes owned game inside the Haram or drinks wine owned by a Dhimmi.

We rely on the saying of the Prophet (God bless him and grant him peace), “There is no financial penalty for the thief after his right hand has been amputated.” The reason is that the obligation of financial liability negates cutting of the hand, because he comes to own the property by payment of compensation right from the time of the taking, which makes it obvious that it falls into his ownership and that negates amputation due to shubhah, and whatever is negated by it (amputation) stands negated (compensation). Further, the subject-matter no longer remains protected as the right of the individual (after theft), for if it did it would be permissible in itself and would negate cutting of the hand due to doubt, therefore, the property becomes prohibited due to the right of Allāh, like carrion in which there is no compensation. The protection, however, is not lost with respect to consumption, because it is an act other than theft and there is no necessity with respect to its consumption. Likewise shubhah is acknowledged in what is the cause and not in other things. The reasoning for the well known view (that includes both consumption and destruction for the absence of compensation) is that consumption is the completion of the purpose (of theft), therefore, shubhah is considered with respect to it. Likewise the loss of protection is established with respect to compensation because it is one of the necessities of its loss with respect to destruction for negating similarity between theft and compensation.

He said: If a person commits theft several times and is subjected to amputation for one of them, it is considered amputation for all of them, and he is not liable for compensating anything according to Abū Ḥanifah (God bless him). The two jurists said that he makes compensation for every property except the one for which his hand is cut. The issue pertains to the case where one of them is present to claim his right, but if all of them are present and his hand is cut due to their prosecution he is not liable for any compensation in any of the cases by agreement of the jurists. The two jurists argue that the person present is not the deputy of all those absent, and prosecution is necessary for establishing the offence of theft. Thus, theft relevant to those absent is not established, and his hand is not cut on account of those thefts, therefore, their stolen properties stand protected. The Imām argues that the obligation for all these thefts is a single amputation as the right of Allāh, the Exalted, because the ḥudūd are based on the rule of merger and concurrence. Prosecution...
before the qādi is a condition for its proof, thus, when the claim is satisfied it is satisfied on account of all the obligations (of amputation). Do you not see that its benefit reverts to all, therefore, it is implemented on behalf of all? On the basis of the same disagreement is analysed the case where all the niṣabs belong to a single individual and he prosecutes him for some. Allāh, the Exalted, knows what is correct.

Chapter 106

Mode of Stealing Property and Related Issues

If a person steals a dress and cuts it into two inside the house and thereafter takes it out so that its value outside is ten dirhams, his hand is to be cut. It is narrated from Abū Yūsuf (God bless him) that his hand is not to be cut as in this there is a basis for his ownership, and that is by tearing that is excessive. He is liable for its value and comes to own the compensated property. He is now like a buyer who steals the sold commodity where the seller has an option.1

The two jurists argue that taking is deemed a cause for compensation, but not for ownership. Ownership is established by way of necessity for facilitating the payment of compensation so that both counter-values do not gather in the same ownership. Such a case does not give rise to shubhah by the taking itself. It is like the seller stealing a defective commodity that he sold,2 as distinguished from what is mentioned (by Abū Yūsuf), because the contract of sale is constituted for the purpose of acquiring ownership. The present disagreement is about the case where he (the owner) chooses compensation of the loss and the taking of the dress, but if he chooses the compensation of value and the leaving of the dress with him (the thief), his hand is not to be cut by agreement, because the dress is in his ownership extending from the time of taking. It is as if he made a gift of the dress to him. All this applies when the loss is excessive. If the loss is minor, his hand is to be cut by agreement, due to the absence of the cause of ownership, for then the owner does not have the option of making him liable for the entire value.

1 Amputation is not awarded in this case.
2 Where the buyer is not aware of the defect. In this case amputation is awarded.
If he steals a goat, slaughters it, and then takes it out, his hand is not to be cut. The reason is that the theft is committed in meat, and there is no amputation for meat.

If a person steals gold or silver for which amputation is awarded, and he moulds them into dirhams and dinars, his hand is to be cut, while the dirhams and dinars are returned to the person from whom the metals were stolen. This is the view according to Abū Ḥanīfah (God bless him). The two jurists said that there is no way for the owner (from whom the metals were stolen) to have access to the coins. The primary offence was usurpation, but this is craftsmanship that has marketable value in their view, with the Imam disagreeing. Thereafter, the implementation of hadd is not difficult according to his view, because the thief did not come to own the coins. It is said that according to the view of the two jurists amputation is not obligatory, because he came to own them prior to cutting of the hand. It is also said that it does become obligatory, because by craftsmanship it became something else, therefore, he did not come to own the substance of the stolen metals.

If he steals a dress and dyes it red, his hand is to be cut and the dress is not to be taken from him, yet he does not compensate the value of the dress. This is the position according to Abū Ḥanīfah and Abū Yusuf (God bless them). Muhammad (God bless them) said that the dress is to be taken from him and the addition made through dyeing is to be paid to him, on the analogy of usurpation (ghasb). The argument that combines the two (the basis of analogy and its extension) is that the primary thing is the existence of the dress and the existence of the dyeing is a secondary thing. The two jurists argue that the dyeing is in existence in both forms (appearance of red colour) and meaning (value) so that if he (the owner) decides to take it in dyed form he compensates the addition due to dyeing. The right of the owner subsists in the dress in form (insofar as he has the right to recover the dress) but not in meaning (value), because the thief is not liable for compensation if it is destroyed, therefore, we inclined towards the situation of the thief. This is distinguished from the case of the usurper, because the right of each one of them continues in both form and meaning, thus, they are equal from this perspective. We preferred the perspective of the owner in what we have said (above about the dress being primary and the dyeing secondary).

If he dyes it black, it is taken from him according to both sides (all three jurists), that is, according to Abū Ḥanīfah, Abū Yusuf and Muhammad (God bless them). According to Abū Yusuf (God bless him), this case and the previous one are the same, because the black colour is an addition in his view just like the red colour. According to Muhammad (God bless him), it is an excess like the red, but it does not sever the right of the owner. According to Abū Ḥanīfah (God bless him), the black colour is a decrease in value, therefore, it does not sever the right of the owner to recover. Allāh knows best.
Chapter 107

Highway Robbery (Qat' al-Tariq)

He said: If an armed group (having the force to resist), or a single armed person able to employ force, come out with the intention of cutting off the highway are apprehended before they have the opportunity to seize wealth or to kill someone, the imām is to imprison them till they repent. If they seize wealth belonging to a Muslim or a Dhimmi, and the wealth so seized when divided among their group comes to ten dirhams or more per person or what reaches such value, the imām is to cut their hands and feet from the opposite sides. If they kill someone without seizing wealth, the imām is to execute them by way of ḥadd. The basis for this are the words of the Exalted, “The punishment of those who wage war against Allah and His Messenger, and strive with might and main for mischief through the land is: execution, or crucifixion, or the cutting off of hands and feet from opposite sides, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the Hereafter.”

The meaning, Allah knows best, is the distribution of the punishments mentioned (in the text) over situations (offences), and these are four: three are mentioned and we shall be mentioning the fourth, God, the Exalted, willing. The reason is that offences change with circumstances, and the punishment is to suit the gravity of the offence.

As for the meaning of imprisonment, it is because of what is meant by the exile mentioned in the text, because it is exile from the face of the

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1Qur'ān 5: 33.
2This is meant to negate the opinion held by Imam Mālik (God bless him) that the imām has a right to choose the punishment he likes.
3The first is attempt; the second is seizing wealth; and the third is killing without taking wealth.
earth to prevent them from doing evil to its inhabitants. They are also to be subjected to ta'zir for undertaking the act of terrorising people. The ability to use force has been stipulated, because the act of muháraba is not realised without force. The second situation (offence) that we have explained is due to the text that we have recited. The stipulation for the wealth taken, that it be the wealth of a Muslim or Dhimmí was due to the reason that its protection be perpetual. Consequently, if they cut off a limb is not obligatory. The completion of the nisab is stipulated with respect to each one of them so that his limbs do not become liable to cutting without having acquired what is substantial. The meaning of cutting is the cutting of the right hand and the left foot so that the benefit of moving around is not completely lost. The third situation (offence) that said that he is to execute them or crucify them, but not to cut off their limbs. The reason is that it is a single offence, therefore, two hadd are not obligatory, because an offence less than homicide is included in homicide with respect to the jurists maintain that this is a single penalty that has been enhanced due to the gravity of its cause, which is the total destruction of peace through killing and snatching of wealth. It is for this reason that the cutting of the hand and the foot together is a single hadd in the major (kubra) form of theft, even though they amount to two hadd in the minor form. Concurrency/merger is operative in several hadd from and not within a single hadd.

Thereafter, he mentioned in the Book a choice between crucifixion and its relinquishment, and this is the authentic statement (zarh al-rwiyah). It is narrated from Abú Yúsuf (God bless him) that it is not to be given up for it is stated in the text (Qur'án), and the purpose is to publicise it so that others learn a lesson from it. We say: the primary form of publicising is through execution, while the extreme form is crucifixion, therefore, a choice has been given with respect to it.

He then said: He is to be crucified while alive and his body is to be notched with a spear until he is dead. A similar view has been narrated from al-Karkhi (God bless him). It is narrated from al-Ṭaháwí that he is to be killed and then crucified in order to avoid mutilation. The reasoning underlying the first view, which is correct, is that the crucifixion in this form is more effective with respect to deterrence and that is its purpose.

He said: He is not to be crucified for more than three days, because he will start decomposing after that and it will be offensive for the people. It is narrated from Abú Yúsuf (God bless him) that he is to be left on the wooden planks till he breaks down into pieces and falls so that others are overawed by it. We say that such a lesson is learnt from what we have said and such extreme measures are not required.

He said: If the highwayman is executed then he is not liable to compensate the wealth that he took, on the analogy of the minor form of theft, and we have elaborated that.

If one of them undertook the killing, the hadd is to be imposed on all of them together, because it is the consequence of muháraba. The offence is realised because some of them are supporting others, and they fall back on their supporters when they retreat. The condition is killing on the part of one of them and this stands fulfilled.

He said: Killing with a stick, or with a stone or with a sword is all the same for this purpose, because it has occurred by cutting off the highway and the waylaying of the travellers.

If the highwayman does not kill nor takes wealth, but wounds someone, he is to be subjected to qisas for injuries in which qisas is applicable, while arsh (compensation) is to be taken in injuries liable to arsh, and this is to be done by the heirs. The reason is that there is no hadd for these offences, therefore, the right of the individual is established, which is what we have mentioned, and this is claimed by the walli.

If he takes wealth and then wounds someone, his hand and foot are to be cut, and the claims for wounds are annulled. The reason is that when hadd is imposed as the right of Allah, the protection of life as the right of the individual is annulled, just as the protection of wealth is annulled.

If he takes wealth after having repented and commits intentional homicide (murder), then the awliya' have the option to kill him by way of retaliation or to forgive him. The reason is that hadd is not applicable in this offence after repentance, due to the exemption mentioned in the
text (Qur'an). The reason is that repentance depends upon the return of wealth, and there is no cutting in such a case, therefore, the right of the individual is established for life and wealth, so that the wali can claim qisas or forgive him. Compensation is imposed if the wealth is destroyed in his possession or he consumes it.

If there is among the highway robbers a minor or an insane person or a relative of the prohibited degree among the waylaid persons, the hadd is waived with respect to the rest. The statement about the minor and the insane is the opinion of Abu Hanifah and Muhammad (God bless them). It is narrated from Abu Yusuf (God bless him) that if the offence is undertaken by sane persons, the rest (other than the insane) are subjected to hadd. The minor form of theft is governed by this rule as well. He argues that the direct actor is the primary actor, while the supporters are secondary. There is no shortcoming in the direct action of the sane, while the shortcoming in the secondary is not taken into account. In the opposite form the meaning as well as the hukm are reversed as well. The two jurists argue that it is a single offence undertaken by all. If the act of some does not raise a liability, the act of the others will be reduced to a partial cause ('illah), and the hukm is not established by it. It will be like a person committing a mistake participating with one undertaking the act intentionally.

As for the relatives of the prohibited degree, it is said in its interpretation that this is the case where wealth is jointly held by the offender and the victim. The correct view, however, is that it is unqualified, because it is a single offence, as we have mentioned, and the use of force against some gives rise to the use of force against the rest. This is distinguished from the case where there is among the victims an enemy on safe-conduct (mustanmin), because the use of force with respect to him is due to the shortcoming in protection, but this is specific to him. As regards the case here, it is due to the shortcoming in the hirz, and a caravan is a single hirz.

When the hadd is waived, the claim of qisas for murder is transferred to the awliya', due to the emergence of the right of the individual as we mentioned. If they like they can claim execution by way of retaliation or if they like they can forgive them.

If some travellers in the caravan waylay the rest, hadd does not become obligatory. The reason is that the hirz is one, therefore, the entire caravan is like a single house.

Where a person cuts off the road, during the day or night, in a city, or between Kufah and Hirah, then he is not a qatt' al-tariq (highway robber) on the basis of istibsan. On the basis of analogy, he would be considered a highway robber, which is the opinion of al-Shafi'i (God bless him), due to its occurrence in reality. It is related from Abu Yusuf (God bless him) that hadd becomes obligatory if the offence is committed outside the city, even if he is very close to it, because help cannot reach due to the calls of the victim. It is also narrated from him that if they take up the offensive during the day with weapons or during the night with weapons or with sticks, then they are highway robbers, because use of weapons is swift and at night help is slow in coming. We say: qatt' al-tariq takes place by the cutting off of the highway for the travellers, and this is not realised within a city or very close to it, because rescue is available in these locations. The reason is that they are taken to task for the return of wealth for securing the right of the person entitled, and they are punished and imprisoned for their offence (inside the city). If they commit murder then the matter is transferred to the awliya', as we have explained.

If a person strangles another thereby killing him, then the diyah is to be paid by the 'aqilah, according to Abu Hanifah (God bless him). This pertains to the issue of killing with a blunt weapon and we shall elaborate it in the chapter on Diyah, God, the Exalted, willing. If he kills more than once by strangulation inside the city, he is to be executed, because he has become one who is spreading terror in the land, therefore, his evil is to be eliminated through execution. Allah, the Exalted, knows best.
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Chapter 108

The Legal Status of Jihād

The word siyar is the plural of sirah, and it is the strategy adopted for managing affairs. In the shari`ah it is applied specifically to the strategy adopted by the Prophet (God bless him and grant him peace) in his military expeditions.

He said: Jihād is a communal obligation. If a group from among the people undertakes it, the obligation is removed from the rest. As for its obligation, the basis is found in the words of the Exalted, “And fight the Pagans all together as they fight you all together. But know that Allah is with those who restrain themselves,” and in the words of the Prophet (God bless him and grant him peace), “Jihād is determined till the Day of Judgement.” He (God bless him and grant him peace) meant thereby a definitive obligation (fard) that will always remain. The reason is that it has not been made a definitive obligation for itself, as in itself it is disruptive. It has been made a definitive obligation for strengthening the Din of Allāh and for driving away evil from His servants. When the purpose is achieved through some, the obligation is removed with respect to the others, like the funeral prayer or returning the salutation.

If no one undertakes it, all the people commit sin by neglecting it, because the obligation is placed upon all, and the occupation of all with

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1 Qur’an 9:36
2 It is recorded by Abū Dāwūd in his Sunan. Al-Zayla’i, vol. 3, 377. A question is raised in al-’Ināyah as to how an obligation has been derived from a khabar wāhid. He replies that if a khabar wāhid is supported by a definitive evidence, obligation may be attributed to it.
3 By bringing desolation to the lands and annihilation of humans. Al-’Inayah.
it would cut off the material for jihad like horses and weapons, therefore, it is made obligatory as a communal obligation.

Unless the call to arms is general, in which case it becomes a universal obligation, due to the words of the Exalted, "Go ye forth, (whether equipped) lightly or heavily, and strive and struggle, with your goods and your persons, in the Cause of Allah. That is best for you, if ye (but) knew." It is stated in al-Jami` al-Saghir: Jihad is obligatory, except that the Muslims have an option until there is need for them. The first part of this statement indicates a communal obligation, while the latter part indicates a general call to arms. The reason for the general call to arms is that the purpose is not being attained without it, except by the participation of all, therefore, it is made a definitive obligation for all.

Jihad is not an obligation for the minor, because minority is an object of compassion, nor is it an obligation for the slave or the woman, due to the precedence accorded to the right of the master and the husband.

It is also not an obligation for the blind, or the invalid, or one whose limbs are amputated. If, however, the enemy attack a land it becomes obligatory upon all the people to defend it. For doing so the woman goes out without the permission of her husband and the slave without the permission of his master, because it has now become a fard `ayn (universal obligation), and lawful ownership and the enslavement of marriage do not stand in front of the universal obligations, as is the case with prayer and fasting. This is distinguished from the situation that is prior to the making of the general call, as before it they are self-sufficient without these two categories, thus, there is no need to annul the right of the master and the husband.

There is no need to impose a cess (on the people to support the army) as long as there is revenue (fay') available. The reason is that it does not resemble wages, and there is no necessity for it, because the wealth in the treasury is intended for the representatives of the Muslims.

He said: If there is nothing available, then there is no harm if some of them strengthen others. The reason is that in this there is repelling of a higher injury by accepting a lower level injury. This is supported by the fact that the Prophet (God bless him and grant him peace) took some coats of mail from Sa`d (God be pleased with him) 5 and `Umar (God be pleased with him) used to send to battle bachelors on behalf of unmarried men, and he used to give the horse of the person who could not arrive in battle to one moving on foot (towards the enemy).6

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4Qur'an 9: 41
5It is recorded by Abu Dawid in the section on sales. Al-Zayla`i, vol. 3, 377.
6It is recorded by Ibn Abi Shaybah. Al-Zayla`i, vol. 3, 377.
Chapter 109

The Rules of Warfare

When the Muslims commence battle, and they have surrounded a city or a fort, they are to invite the inhabitants to accept Islam, due to what is related by Ibn 'Abbās (God bless them both) "that the Prophet (God bless him and grant him peace) did not commence combat with a people without first inviting them to Islam."

He said: If they respond positively, they are to refrain from fighting them, due to the attainment of the purpose.

If they refuse, they are to invite them to the payment of jizyāh, and this is what the Prophet (God bless him and grant him peace) ordered the commanders of the armies to do for it is one of the consequences upon the conclusion of battle, according to what the text has stated. This applies to those among them who are eligible to accept the payment of jizyāh. Those from whom jizyāh is not acceptable like the apostates or the idol worshippers from among the Arabs, there is no benefit in inviting them to accept jizyāh, because only Islam is acceptable from them. Allāh, the Exalted, has said, "Then shall ye fight, or they shall submit."

If they commence payment (badhalū), then they have the same rights as the Musims, and they have the same liabilities like those of the Muslims, due to the saying of 'Alī (God be pleased with him), "They have paid the jizyāh so that their blood (is protected) like our blood, and their wealth (is protected) like our wealth." The meaning of badhl here

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1 It is recorded by 'Abd al-Razzāq from Sufyān al-Thawrī. Al-Zayla'i, vol. 3, 378.
2 It is recorded by all the sound compilations, except al-Bukhārī. Al-Zayla'i, vol. 3, 380.
3 Qur'ān 48:16
4 It is gharīb, and is recorded by al-Dār'quṭnī in his Sunan. Al-Zayla'i, vol. 3, 381.
is acceptance, likewise the meaning of the term 'i'tar' that is mentioned in the Qur'an. Allah knows best.

It is not permitted to engage in battle those whom the invitation to accept Islam has not reached without first inviting them. This is based on the saying of the Prophet (God bless him and grant him peace) when he gave advice to the commanders of the detachments, "Invite them to witness that there is no god, but God." The reason is that through the invitation they come to know that we engage them in battle on account of our Din and not for purloining their wealth and enslavement of their families. Perhaps, they will respond positively. If the commander engages them in battle before communicating the invitation, he commits a sin. Nevertheless, there is no financial penalty due to the absence of there being protection, which arises from Din or their being in the dar al-Islam. Thus, it becomes like the killing of women and children.

It is recommended that even those whom the invitation has reached already, be invited, so that there is an enhanced warning for them. This is not obligatory, however, as there is an authentic report "that the Prophet (God bless him and grant him peace) carried out a raid against Banu al-Mustaliq and caught them unawares. He also took an undertaking from Usamah (God be pleased with him) that he will raid Ubna in the early hours of the morning and then set it on fire." A raid is not undertaken to engage them in combat, due to the saying of the Prophet (God bless him and grant him peace), "If they refuse, then seek the help of Allah against them and engage them in combat." The reason is that it is Allah, the Exalted, who helps His friends and destroys His enemies, thus, His help is to be sought in all affairs.

If they reject the invitation, they are to seek the help of Allah and engage them in combat, due to the saying of the Prophet (God bless him and grant him peace) in the tradition of Sulayman ibn Buraydah, "If they reject this then invite them to accept the i'tar, till he said, "if they refuse that, then seek the help of Allah against them and engage them in combat." The reason is that it is Allah, the Exalted, who helps His friends and destroys His enemies, thus, His help is to be sought in all affairs.

There is no harm in taking women and copies of the Qur'an along with the Muslim soldiers if they are a huge army who can be relied upon for their security, because the usual in such a case is safety, and the usual is treated like something that stands realised.

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3 This has preceded earlier. Al-Zayla'i, vol. 3, 381.
4 It is recorded by al-Bukhāri and Muslim. Al-Zayla'i, vol. 3, 381.
5 This tradition has preceded. Al-Zayla'i, vol. 3, 382.
6 It is recorded by al-Tirmidhi. Al-Zayla'i, vol. 3, 381.
7 It is recorded in an earlier tradition. Al-Zayla'i, vol. 3, 385.
8 It is recorded by al-Bukhāri. Al-Zayla'i, vol. 3, 385.

forbade the killing of minors and females. When the Messenger of Allah (God bless him and grant him peace) saw a slain woman, he said, "This woman: she was not one who would engage in combat, so why was she killed?"

He said: Unless one of these persons have an advisory capacity in war or the woman is a ruler, due to the consequences of her injurious action towards the servants of Allah. Likewise any of these people who actually participates in battle for repelling their evil, because actual fighting permits this.

The insane person is not to be killed. The reason is that he is not addressed by the divine communication (creating liability), unless he is actually fighting in which case he is to be killed in order to avoid his evil.

It is considered disapproved that a man advance upon his father, who is among the polytheists, in order to kill him, due to the words of the Exalted, "Yet bear them company in this life with justice (and consideration), and follow the way of those who turn to Me." The reason is that it is obligatory upon him to spend on him for his survival, therefore, permission to kill him will negate this.

Negotiating Cessation of Hostilities and Safe Conduct

If the imām deems it proper to negotiate the cessation of hostilities with the residents of the dār al-ḥarb or with one group among them, and in this there is the securing of the interest of the Muslims, then there is no harm in it, due to the words of the Exalted, "But if the enemy incline towards peace, do thou (also) incline towards peace, and trust in Allah." The Messenger of Allah (God bless him and grant him peace) negotiated a cessation of hostilities with the residents of Makkah in the year of al-Ḥudaybīyah on the terms that the war between them and him will cease for ten years. The reason is that a negotiated settlement is jihad in meaning if it is in the interests of the Muslims, because the purpose is to repel the evil that will result from continued hostilities. It is not necessary to limit the duration of the settlement to what is narrated (ten years) due to the extension of the purpose in excess of that, as distinguished from the case where it is not in the interest of the Muslims, because that would amount to giving up jihad in both form and meaning.

If they commit a breach of the truce, he is to engage them in combat and is not to communicate the repudiation to them, if the breach is committed by them in agreement, because they have all broken the treaty, therefore, there is no need to terminate it. This is distinguished from the case where some of them enter our territory and commit highway robbery (qaṭ' al-fariq) where there is no one to restrain them, as this will not amount to a termination of the treaty. If there is some resistance to them...
and they openly fight with the Muslims, it will amount to a termination of the treaty on the part of these particular people, but not all of them. The reason is that it is without the permission of their king (ruler), thus, it does not bind the rest of them. If it was by permission of their ruler, it would amount to termination as it was with their agreement in meaning.

If the imām decides to conclude a truce with the enemy and he takes wealth from them for doing so, there is no harm in this. The reason is that when a settlement is permitted without wealth, it is permitted with wealth as well. This, however, is permitted when the Muslims are in a state of need. If there is no such need it is not permissible. The amount so taken will be utilised on the avenues on which jizyah is spent. This is the case when the Muslim armies have not descended into their plains, rather they have sent an emissary, for then it is in the meaning of jizyah. If, however, the army lays siege to them and takes wealth from them, it will be deemed spoils and from which a fifth will be taken and the rest will be divided among them, because it has been derived through the use of force in reality.

As for the apostates, the imām is to conclude a truce with them till he has examined their affairs. The reason is that coming back into the fold of Islam is desired from them, therefore, it is permitted to delay combat with them with a view to their coming back to Islam. He is not to take wealth for doing so, because it is not permitted to take jizyah from them, due what has been explained. If he does take it, however, he is not to return it, because it is (legally) unprotected wealth. If the enemy lay siege to the Muslims and demand a truce in lieu of wealth that the imām should pay them, then the imām is not to do so insofar as it amounts to degradation and the association of humiliation with the community of Islam. The exception is where he sees destruction in this, because depicting death is obligatory through all means possible.

They are not to sell weapons to the Ahl al-Harb nor to sell other assets to them, because the Prophet (God bless him and grant him peace) forbade the sale of weapons to the residents of the dār al-harb or to carry them over to them (by way of trade). The reason is that in this is the strengthening of their ability to wage war against the Muslims. Consequently, they are forbidden to do so. Likewise horses, due to the explanation we have given. So also the transportation of iron ore for that is the basis of weapons. The same restriction is to be observed after truce for that truce is likely to be terminated or will end and they will wage war on us. The analogy based on this applies to food and dresses as well, except that we have understood through the text that the Prophet (God bless him and grant him peace) ordered Thumamah to send supplies to the people of Makkah, who were at war with him.4

### 110.1 Safe Conduct

If a freeman, or a freewoman, grants amān (assurance of safety) to an unbeliever, or to a group, or to the residents of a fort, or the residents of a city, such assurance is valid, and none among the Muslims is permitted to engage them in combat. The basis for this is the saying of the Prophet (God bless him and grant him peace), "The blood of all Muslims is equal (with respect to qisās) and the least among them may strive to extend their assurance of safety," that is, the minimum number among them, which is one. The reason is that (being a freeman) he is eligible to participate in battle, and for this reason they may be apprehensive of him for he possesses the ability to restrain them, therefore, the granting of an assurance of safety is realised on his part, due to its linkage with the subject-matter of the assurance (that is, their apprehension) and thereafter extending to others besides him. The reason is that its cause is not divisible and that is imān (faith, affirmation). Likewise amān is not divisible and is completed like the authority to give in marriage.

He said: Unless there is an injury resulting from this in which case it is to be repudiated (and communicated to them). It is like the imām granting the amān himself, but then he comes to the conclusion that the securing of interests demands that it be repudiated, and we have elaborated that already. If the imām lays siege to a fort and one among the army

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3 It is ghārit in these words. It is recorded by al-Bayhaqi. Al-Zayla'i, vol. 3, 393.


5 It is recorded in the two Sahih. Al-Zayla'i, vol. 3, 393-94.

6 He says this to counter the interpretation that the least among them is the slave and even he can grant amān.

7 Just like the sighting of the moon of Ramadan is seen by one and then applies to the rest.

8 Where there are several awliya' with equal authority and one of them has given the woman away in marriage.
grants them amān, but the imām perceives an injury in this and terminates the assurance, as we have explained, then he is to discipline him for acting against his opinion. This is distinguished from the case where the granting of such assurance is a matter of interpretation, because the benefit is sometimes lost due to delay (in seeking the opinion of the imām), therefore, he is to be excused.

The amān granted by a slave under interdiction is not valid according to Abū Ḥanīfah (God bless him), unless his master has permitted him to participate in battle. Muhammad (God bless him) said that it is valid. It is also the opinion of al-Shāfi`ī (God bless him). Abū Yūsuf (God bless him) sides with Muhammad (God bless him) in one narration and with Abū Ḥanīfah (God bless him) in another narration. Muhammad (God bless him) relies on the saying of the Prophet (God bless him and grant him peace), “The amān of a slave is amān,” 9 which was related by Abū Mūsā al-Ashʿarī (God be pleased with him). The reason is that he is a muʾmin (believer) with the power to restrain, therefore, his amān is valid on the analogy of the slave authorised to participate in battle as well as on the analogy of permanent amān (for making an enemy a Dhimmi). The stipulation of having imān (faith) is that it is a precondition for ʿibādah (worship) and jihad is worship. The stipulation of the power to restrain is for the realisation of fear through it, while its effect is the dignity of religion and the securing of interests of the community of Muslims, when the assurance is given in such a situation. He does not possess the right to participate in battle (of his own authority), because in this there is the suspension of the benefits accruing to the master, but there is no such suspension through a mere statement. According to Abū Ḥanīfah (God bless him) he is placed under interdiction from participating in battle, therefore, his amān is not valid, because they do not hold him in awe. Consequently, the amān is not linked to its subject-matter, as distinguished from the slave authorised to participate in battle, because awe is realised in his case. Further, he does not possess the right to participate in battle insofar as it is a transaction that affects the right of the master in a manner that is not devoid of an injury resulting to his interests.

Amān is a type of combat and it consists of what we have mentioned. The reason is that the slave sometimes makes an error (in assessing the need for amān) and that is obvious (for he is not trained for warfare). In it is also the blocking of the means to the attainment of spoils. This is distinguished from the case of the authorised slave, because the master has agreed to his participation, and error is rare due to his direct participation in combat (and experience). It is also distinguished from the perpetual amān, which is the suspension of warfare required by Islam, thus, it has the status of an invitation extended to him (which is a benefit), and also in return for jizyah (which is a benefit). Finally, it is obligatory on the imām to respond to their request for the contract of dhimmah and the suspension of the obligation is a benefit, therefore, they are distinguished. If a minor, who does not possess discretion, grants amān his position is like that of the insane person. If he does possess discretion, his position is like the slave not authorised to participate in battle, along with the disagreement in it. 10 If, however, he is permitted to participate in battle, then the correct view is that it is valid. Allah knows what is correct.

9It is gharib. It is recorded by `Abd al-Razzāq. Al-Zayla`i, vol. 3, 396.

10With Abū Ḥanīfah (God bless him) saying that his amān is not valid and Muhammad (God bless him) saying that it is.
Chapter 111

Spoils of War and Their Division

When the imām conquers a land 'anwatan, that is by the use of force (mobilisation of the army), then he has a choice. If he likes he may divide it (the land) among the (combating) Muslims, as did the Prophet (God bless him and grant him peace) with the lands of Khaybar,' and if he likes he may leave the residents settled on it by imposing jizyah on them and kharāj on their lands. This is what ‘Umar (God be pleased with him) did with the Sawād lands of Iraq with the agreement of the Companions (God be pleased with them), while those who opposed it were not praised. In each of these there is a model, therefore, he is to make a choice. It is said that the first is to be adopted when the combatants are in need, and the second when there is no such need, so that it yields its benefits for those who come next. This is the position in the case of immovable property. As for the purely movable property, it is not permitted to make a grant by returning it to them (the residents), because the law (sharī') has not required this.

In the case of immovable property, there is a disagreement with al-Shāfi‘ī (God bless him), because in making a grant (for the residents) there is the annulment of the right or ownership of the combatants entitled to the spoils, therefore, it is not permitted without a counter-value that is equivalent to it. Kharāj is not equivalent due to its paucity. This is distinguished from ownership of slaves as the imām has the right to execute them and annul their right altogether. The evidence against him is what we have narrated. The reason is that this is subject to examination, for they are like agriculturists for the Muslims in general and proficient in the various ways of cultivation, while the financial burden of cultivation

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1It is recorded by al-Bukhārī in his Ṣaḥīḥ. Al-Zayla‘i, vol. 3, 397.
is removed (from the liability of the imām and the Muslims) along with the fact that it will benefit those who come later. Kharajī, even though it is meagre at the moment, will amount to an immense return over time. If the slaves and land are granted to them, the movable property is also to be given to them to an extent that will enable them to undertake work, and also for the reason that the act will move out of the disapproved category.\(^2\)

He is not to accept ransom for the captives, according to Abū Hanīfah (God bless him). The two jurists said he may accept ransom for them in the form of an exchange for Muslim prisoners, which is also the view held by al-Shāfī’i (God bless him). The reason is that in this there is release of the Muslim, which is better than the execution of a unbeliever or making use of him. The Imam (God bless him) argues that in this there is support for the unbelievers for he will return as a warring enemy against us. The repelling of his mischief hostility is better than the release of Muslim captives, because if they were to stay in their captivity would be a trial for them but would not be associated with us, while support by sending their captives to them will have direct repercussions on us. As for ransom by accepting wealth from them in return, it is not permitted according to the authentic view of our school, as we have elaborated. In al-Siyar al-Kabir it is stated that there is no harm in doing so if the Muslims are in dire need of funds, and this on the analogy of the captives of Badr.\(^3\) If the captive converts to Islam in our captivity, he is not to be exchanged for a Muslim who is in their captivity, because there is no benefit in doing so, unless he volunteers to go and when there is satisfaction with respect to his acceptance of Islam.

He said: It is not permitted to release them as a favour, that is, to the captives. Al-Shāfī’i (God bless him) disagrees and says that the Prophet (God bless him and grant him peace) released one of the prisoners of the Battle of Badr as a favour.\(^4\) We rely upon the words of the Exalted, “Then fight and slay the Pagans wherever ye find them.” The reason is that by captivity and subjugation the right to enslave is established against them, therefore, it is not permitted to extinguish this right without obtaining a benefit and compensation. What he has narrated is abrogated by what we have recited.

If the imām decides to return and with him are cattle that he cannot move to the dār al-islām, he is to slaughter them and burn them, but he is not to hamstring them or set them loose. Al-Shaﬁ’i (God bless him) prohibited the slaughtering of a goat except for purposes of consumption.\(^5\) We argue that the slaughter of an animal is permitted for a legally sound purpose, and there is no purpose better than the demolition of the power of the enemy. Thereafter, he is to burn them in order to sever the benefit that can go to the unbelievers. It is like the demolition of a building. It is different from burning them prior to slaughter for that is prohibited.\(^6\) This is distinguished from hamstringing the animal as that amounts to mutilation (muthlah). Weapons are to be set on fire as well, and what cannot be burned is to be buried where the unbelievers cannot find it so as to eliminate the benefit that can go to them.

The spoils are not to be divided in the dār al-harb, not until they are moved to the dār al-islām. Al-Shāfī’i (God bless him) said that there is no harm in doing so. The basic rule for this, in our view, is that the ownership of the combatants is not established in the spoils until they are gathered and moved to the dār al-islām. In his view such ownership is established (before that). From this rule arise a number of issues that we have mentioned in the Kifāyat al-Muntahi. He argues that the cause of ownership is the seizure of wealth when such wealth is permissible, as in the case of hunt. Seizure has no meaning except the affirmation of possession, and this stands realised. We argue on the basis of the tradition that the Prophet (God bless him and grant him peace) prohibited the sale of spoils within the dār al-harb,\(^6\) and the disagreement is established with respect to it (sale). Division is sale in meaning, therefore, it is included in it. Further, possession is both for protection and for transporting property. The second meaning (transportation) does not exist due to the ability of the unbelievers to have it released and the existence

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\(^2\)That is if their slaves and lands are given to them, but the rest of their wealth and families are taken away this would be a disapproved act, although the imām would be acting within his authority in doing so.

\(^3\)It is recorded by Muslim. Al-Zayla'i, vol. 3, 402.

\(^4\)It is recorded by al-Bukhārī as a tradition from Nāfi'. Al-Zayla'i, vol. 3, 404.

\(^5\)Qur'an 9:5

\(^6\)It is gharib and is recorded by Ibn Abi Shaybah. Al-Zayla'i, vol. 3, 406.

\(^7\)There are traditions on this recorded by al-Bukhārī and others. Al-Zayla'i, vol. 3, 407.

\(^8\)It is gharib in the absolute sense. Al-Zayla'i, vol. 3, 408.
of this ability is obvious (as the spoils are in their land). Thereafter, it is said that the disagreement is in the issue whether division will have its legal effects when the imām divides the spoils without examination (immediately), because the legal effects of ownership are not established without ownership (being transferred to the combatants). It is said that doing so would be disapproved and it is disapproval that is close to prohibition (taḥrīm) according to Muhammad (God bless him), for this is what he said in response to the view of Abu Ḥanīfah and Abu ʿUays (God bless them) that it is not permitted to divide the spoils in the dār al-harb. Thus, it is preferable according to Muhammad (God bless him) to divide the spoils in the dār al-islām. The reason for disapproval is that the evidence of prohibition has greater precedence yet it has been held back from giving rise to prohibition, but it cannot be held back from giving rise to disapproval.

He said: The supporting soldier in the army and the soldier participating directly in combat are the same (with respect to entitlement), due to their equivalence with respect to the cause, which is crossing over or witnessing the battle as is known. Likewise if a soldier has not been able to fight due to illness or another reason, due to what we have mentioned.

If reinforcements arrive prior to their transporting the spoils to the dār al-islām, they will participate with them in the spoils. Al-Shāfiʿi (God bless him) disagrees saying that this is not allowed after the cessation of hostilities, on the basis of his principle that we elaborated earlier (that ownership results from mere taking). In our view, the right of participation ends by the taking of possession, or by division by the imām within the dār al-harb, or by the sale by him of the spoils, because by each one of these acts ownership becomes complete cutting of the right of participation by the reinforcements arriving later.

He said: There is no entitlement in the spoils for the vendors in the market for the military, unless they participate in battle. Al-Shāfiʿi (God bless him) said that a share is to be given to them, due to the saying of the Prophet (God bless him and grant him peace), “The spoils are for those who witness the battle.” Further, the meaning of jihād is found due the swelling of numbers (present). We argue that their crossing over is not with the intention of participating in battle, therefore, the apparent cause

is absent, thus, the real cause is taken into account, which is participation in battle. The entitlement is implemented in accordance with the state of such a fighter as to whether he is a rider or a foot-soldier during battle. What he has related is mawqūf at Umar (God be pleased with him), or the interpretation is that if he witnesses the battle with the intention of participating in it.

If the imām does not possess the means of transportation for transporting the spoils, he is to divide the spoils among the entitled combatants, but it is a division among custodians, so that they can carry them over to the dār al-islām. Thereafter, he recovers the spoils from them and divides them. This feeble servant says: This is how it has been mentioned in al-Mukhtasar, and he did not stipulate their consent in this. It is a narration of al-Siyar al-Kabir. The general statement about this issue is that if the imām finds carriers within the spoils, then he is to transport the spoils on them, because both the carriers and the spoils are their wealth. Likewise if there are in the treasury surplus bearers, because that is the common wealth of the Muslims. If the carriers belong to the combatants or to some of them, he is not to compel them according to the narration in al-Siyar al-Ṣaghīr, because it is hire ab initio. It is as if a person's animal dies in a desolate place and his companion has an extra animal (that he rents). According to the narration in al-Siyar al-Kabir, they are to be compelled, because it is the repelling of a public injury by bearing a private injury.

The sale of spoils within the dār al-harb, prior to division, is not permitted, because there is no ownership prior to that. In this there is the disagreement of Al-Shāfiʿi (God bless him) and we elaborated the principle (on which it is based).

If a combatant entitled to spoils dies within the dār al-harb, then he has no entitlement to the spoils. If a combatant dies after the spoils have been moved out to the dār al-islām, then his share goes to his heirs, because inheritance operates where there is ownership and there is no ownership prior to possession (gathering); the ownership arises after that. Al-Shāfiʿi (God bless him) says that a combatant who dies after the cessation of hostilities his share is inherited due to the existence of his ownership in it in his view, and we have elaborated this.

He said: There is no harm if the army takes fodder from the dār al-harb and consumes the food that it finds. This feeble servant says: He (al-Qudūri) has made an unqualified statement and has not restricted it

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*What the Author says is correct. It is recorded by Ibn Abi Shaybah. Al-Zaylāʾi, vol. J. 468.*
to the case of need, when it is stipulated in one narration and not stipulated in another. The reason underlying the first narration is that it is common property for the combatants, therefore, utilising it is not permissible without a need, as is the case with animals and dresses. The underlying reasoning of the second narration is based upon the words of the Prophet (God bless him and grant him peace) about the food of Khaybar, “Eat it and use it for fodder, but do not carry it.” Further, the rule revolves around the evidence of need, and that is his being in the ḍār al-harb. The reason is that the combatant does not carry his food or the fodder of his ride himself during his stay there and the supplies are cut off. Consequently, the food consumed stays permissible due to need according to the original rule of permissibility. This is distinguished from weapons for he carries them with him, therefore, the evidence of need is non-existent. At times the need may arise and then the reality is to be taken into account. He may then use the weapons and return them to the spoils when he no longer needs them. Animals are like weapons, while food is like bread, meat, and what is used with them like fat and oil.

He said: They are to use wood, and in some manuscripts the word is perfume. They are to use oil for massage and to use it for oiling the hoofs of animals, due to the occurrence of need for all this.

They are to engage in combat with whatever weapons they can find, and all this without division of the spoils. The interpretation of this is that when they are in need of this and do not have weapons, and we have already explained this.

It is not permitted to them to sell any of these things or to convert them into other forms of wealth, because sale is based upon ownership and there is no ownership here, as has preceded. It is merely a state of permissibility and is like a person permitted to have food. His statement, "to convert them into other forms of wealth" is an indication that are not to sell them for gold, silver and goods for there is no need for them. If one of them does so he is to return the price to the spoils, because it is a counter-value for a thing that belonged to the whole army. As for dresses and items of use, it is considered disapproved to utilise them without need prior to the division due to common ownership, unless the imām distributes these among them within the ḍār al-harb when they are in need of dresses, animals and items of use. The reason is that even the need of dresses, animals and items of use. The reason is that even the prohibited becomes permissible at the time of necessity, therefore, the disapproved may be made permissible with less reluctance. Further, the arrival of reinforcements is probable and the need of these persons for these things is certain, therefore, it has a priority for consideration. He did not mention a division of weapons, but there is no difference in reality. Thus, if one of them needs them he is to be permitted to utilise them in both cases (that is, need for weapons and need for other things). If all of them need them, they are to be divided in both cases. This is distinguished from the case where they are in need of captive prisoners, for they are not to be divided; the need being for something additional and not a necessity.

He said: The person among them who converts to Islam, the meaning being in the ḍār al-harb, he protects himself through his Islam, because Islam negates the commencement of enslavement, and his minor children too, as they become Muslims as a consequence of his Islam. He also preserves all the (movable) wealth that is in his possession, due to the words of the Prophet (God bless him and grant him peace), “If a person converts to Islam while possessing wealth, the wealth belongs to him.” The reason is that he was the first, in reality, to take it into his possession as a conqueror. This applies to a deposit in the custody of a Muslim or Dhimmī. The reason is that it is a valid possession that is protected and the possession of the custodian is like his own possession.

If we conquer the enemy territory, then his real property (lands and buildings) are fay' (booty). Al-Shāfī'ī (God bless him) said that it belongs to him as it is in his possession and will be treated like movable property. We argue that the real property is in the possession of the residents of the territory and their authority, as it is a constituent part of the ḍār al-harb, therefore, it is not in his possession in reality. It is said that this is the opinion of Abū Ḥanīfah (God bless him) and one opinion of Abū Yusuf (God bless him). In the opinion of Muhammad (God bless him), which is also another opinion of Abū Yusuf (God bless him), it is like the rest of his wealth. This disagreement is based upon the rule upheld by the two jurists that (physical) possession of real property is not established in reality, while according to Muhammad (God bless him) it is established.

It is related by al-Bayhaqi, but similar traditions are recorded by others including al-Bukhārī. Al-Zayla`i, vol. 3, 409.
Property that is usurped and in the possession of a Muslim is booty according to Abū Ḥanīfah (God bless him). Muhammad (God bless him) said that it is not. This feeble servant says: This is how the disagreement is recorded in al-Siyar al-Kabir. The jurists have mentioned the opinion of Abū Yūsuf (God bless him) alongside the opinion of Muhammad (God bless him) in the commentaries on al-Jāmi’ al-Saḥīh. The two jurists maintain that wealth is subordinated to the person, and such wealth became protected through his conversion to Islām for it follows him for purposes of protection. The Imām argues that this wealth is permissible and is owned through seizure, while the person does not become protected through Islām. Do you not see that the person is not marketable wealth, and that it is prohibited to commit aggression against him according to the original rule, because he is a human being. The permissibility of aggression arises from the obstacle of his mischief, and such permissibility was done away with by his Islām. This is distinguished from wealth, which has been created for use, therefore, it is a valid subject-matter for ownership. Legally it is not in his possession, thus, legal protection (for such wealth) is not established.

When the Muslims are moving out of the dār al-harb, it is not permitted to them to take fodder from the spoils or to consume it, because the necessity stands lifted and permissibility was on account of it. Further, the right has come to be established so that his share is now inheritable wealth. The position is not like this prior to moving over to the dār al-Islām.

The surplus fodder and food that he has is to be returned to the spoils, which means if the spoils have not been divided. Al-Shāfi‘ī (God bless him) has an opinion like ours, but he has another opinion that says that he is not to return it on the analogy of stolen wealth. We argue that acquisition was due to the necessity of need, and this has been removed as distinguished from the one stealing (from the enemy territory). Further, the thief had a greater right to it prior to its transportation, and likewise after it. After distribution (if they are in possession of the fodder and food), they are to give it away as charity if they are rich and to use it if they are needy, because it is now governed by the rule of found property due to the difficulty of returning it to the combatants entitled to the spoils. If they utilise it after its transportation, they are to pay its value to the combatants entitled to the spoils. This is the case when the spoils have not been distributed. If the spoils have been distributed, they give away its value as charity if they are rich. There is no liability for the poor person, because the value stands in the place of the original thing, and thus is assigned its rule. Allāh knows what is correct.

### 111.1 Modes of Division

He said: The imām divides the spoils and (first) takes out a fifth from it, due to the words of the Exalted, “a fifth share is assigned to Allah, and to the Messenger,” which exempt a fifth.

He is to divide the (remaining) four-fifths among those entitled to the spoils, because the Prophet (God bless him and grant him peace) divided four-fifths among them.9

Thereafter, the rider gets two shares and the foot-soldier one share, according to Abu Ḥanīfah (God bless him). The two jurists said that the rider gets three shares, which is also the view of Al-Shāfi‘ī (God bless him). The basis is what is related by Ibn ‘Umar (God be pleased with both) “that the Prophet (God bless him and grant him peace) granted three shares to the rider and one share to the foot-soldier.”10 Further, the entitlement is on the basis of wealth owned. The rider’s contribution is three times that of the foot-soldier due to his being equal to those who launch an attack, those who retreat and those who remain firmly on the ground, while the foot-soldier is equal only to those who stand their ground. Abū Ḥanīfah (God bless him) relies on what is related by Ibn ‘Abbās (God be pleased with both) “that the Prophet (God bless him and grant him peace) granted the rider two shares and to the foot-soldier one share.”11 Further, it is related from Ibn ‘Umar (God be pleased with both) “that the Prophet (God bless him and grant him peace) divided the spoils giving the rider two shares and to the foot-soldier one share.”12 When the two traditions conflict, the tradition besides them has to be preferred. The reason is that those attacking and those retreating are one category, therefore, his contribution is twice that of the foot-soldier. Consequently, he is to be preferred over him by one share. In addition to this,
it is difficult to assess the excess of such contribution due to the lack of information about it. Accordingly, the rule is based upon the obvious reason when the rider shows two such causes: himself and his horse. The foot-soldier possesses one such cause, thus, he is given one share due to the deficiency.

The share is given to just one horse. Abū Yūsuf (God bless him) said that one share is to be given for two horses due what is reported "that the Prophet (God bless him and grant him peace) gave one share to two horses,"17 because one can be exhausted and he may need the other. The two jurists argue that the al-Barā’ ibn Aws brought two horses, but the Messenger of Allah (God bless him and grant him peace) gave a share to just one horse.18 Further, fighting is not undertaken with two horses at the same time, therefore, the obvious cause does not point to fighting with both, thus, the share is given to one. It is for the same reason that the share is not given for three horses. What he has related is interpreted to mean a reward, just as he gave a reward to Salamah ibn al-Akwah by giving him two shares when he was a foot-soldier.

The birdhawn (non-Arabian) and the ‘ātāq (thoroughbred Arabian horse) are the same, because the intimidation mentioned in the Qur’ān is attributed to the species of horses. Allāh, the Exalted, says, “Against them make ready your strength to the utmost of your power, including steeds of war, to strike terror into (the hearts of) the enemies of Allāh and your enemies.”19 The term horses is applied, through a single generic term, to mean barādhist (non-Arabian), ‘ārāb (Arabian), ḥajin (mother Arabian) and maqrīf (father Arabian). If the Arabian horse is better for pursuit and is stronger for purposes of intimidation, the birdhawn is smoother in manoeuvring, therefore, each one of them has an acknowledged benefit and are deemed equal.

If a person enters the dār al-harb on horseback, but his horse dies, he is entitled to the share of a rider. If a person enters on foot and then buys a horse, he is entitled to the share of a foot-soldier. The response given by al-Shāfi’i (God bless him) is the opposite of this in both cases. Likewise, Ibn al-Mubārak has narrated from Abū Ḥanifah (God bless him) that he (in the second case) is entitled to the share of a rider. The net result is that what is considered effective in our view is the state at the time of crossing over, while in his view it is the state at the time of termination of combat. He maintains that the cause is vanquishing and fighting, therefore, the state of a person at that time is to be considered. Crossing over is a means to the cause, like coming out of the house. The suspension of the rules upon fighting indicates that possibility of relying on it for deriving rules. If there is an obstacle in the way of doing so or there is a difficulty, then reliance should be placed upon the witnessing of the battle as that is the closest to it (actual fighting). In our view, crossing over to the enemy territory in itself is combat, because it is at this time that they are overcome by fear, and the state after this is one of continuation, therefore, it cannot be taken into account. Further, placing reliance upon the actual act of fighting is difficult, likewise the state of witnessing the combat for it is the time of formation of the lines of battle. Consequently, crossing over is made to stand in its place for it is the apparent cause of participating in combat when such crossing over is with the intention of fighting. Thus, the state of a person is determined by his state while crossing over as to whether he is a rider or a foot-soldier. If he enters on horseback and fights on foot due to the lack of space, he is entitled to the share of a rider by agreement. If he enters on horseback and then sells his horse, gifts it, rents it out, or pledges it, then according to a narration of al-Ḥasan from Abū Ḥanifah (God bless him) he is entitled to the share of a rider giving effect to the state at the time of crossing over. In the authentic narration (zāhir al-riwayāh) he is entitled to the share of the foot-soldier, because undertaking these transactions indicates that it was not his intention at the time of crossing over to fight on horseback. If he sells the horse after the battle is over, the share of the rider is not annulled. Likewise if he sells it during battle according to some jurists. The correct view, however, is that the share is annulled, because sale indicates that his purpose is to indulge in the trading of the horse, and that he was waiting for its value to go up.

As for the fifth (set aside at the beginning), it is divided into three shares: a share for the orphans, a share for the needy, and a share for the wayfarer. The poor among the near relatives are included in these types, and are to be given precedence over them, but nothing is to be given to the rich near relatives. Al-Shāfi’i (God bless him) said that they are to be given a fifth of the fifth with the poor and rich being equal. The fifth is to be divided among them on the basis of two shares for the male and

17It is recorded by al-Dār qutul in his Sunan, Al-Zayla’i, vol. 3, 418.
18It is gharib. In fact, there is a tradition that gives the opposite meaning. Al-Zayla’i, vol. 3, 419.
19Qur’ān 8: 60.
one for the female, and it will be for the Banū Hāshim and the Banū al-
Muţṭalib, but not for others, due to the words of the Exalted, “For the
near relatives,” where no distinction has been made between the rich
and the poor. We argue that the four Khulā' Rashīdūn (God be pleased
with them) divided the fifth in the manner that we have stated, and their
acts are sufficient as a model for us. The Prophet (God bless him and
grant him peace) said, “O People of the Banū Hāshim, Allāh has deemed
disapproved for you the filth of the people and in return has granted you
a fifth of the fifth.” A substitute counter-value is established in favour
of those in whose favour the original counter-value was established, and
these are the poor relatives. The Prophet (God bless him and grant him
peace) granted this to them for their support. Do you not see that the
Prophet (God bless him and grant him peace) declared the underlying
cause as, “They continued to be with like this during the Jahiliyyah as
due to their support, and in return has granted you a fifth of the fifth.”

He said: The mentioning of the name of Allāh, the Exalted, in relation
to the fifth is for commencing the statement and as a blessing through
His name. The share of the Prophet (God bless him and grant him
peace) lapsed with his death as did the right to make the first choice
(safīyya). The reason is that the Prophet (God bless him and grant him
peace) was entitled to it due to his mission and there is no prophet after
him. Safiyya is a thing that the Prophet (God bless him and grant him
peace) would choose for himself from the spoils like a coat of mail, sword
or a slave girl. Al-Shāfi‘ī (God bless him) said that the share of the
Prophet (God bless him and grant him peace) is to be transferred to the
khudhān, but the argument against him is what we have presented.

The near relatives were entitled to a share, during the lifetime of the
Prophet (God bless him and grant him peace) due to their support, on
the basis of what we have related and due to poverty after his time. This
feeble servant, may Allāh protect him, says: The statement mentioned (by
al-Qudūrī) is the opinion of al-Karkhi (God bless him). Al-Tahāwī (God
bless him) said that the share of the poor among them has also lapsed on
the grounds of consensus, which we related. Further, it includes within
it the meaning of charity in consideration of the avenue of expenditure,
therefore, it is prohibited just like the prohibition of the wages of sadaqah.
The reasoning underlying the first view, and it is said that this is the sound
view, is based on the report that ‘Umar (God be pleased with him) did
give it to the poor among them, while the consensus took place about the
extinction of the share of the rich. As for their poor they are included in
the three categories of the fifth.

If one or two persons enter the dar al-ḥarb without the permission of
the imām, and acquire something it is not to be subjected to the taking
of a fifth. The reason is that spoils are taken after conquest and overpow-
ering and not through pilferage and theft, and the setting aside of a fifth
is from the spoils. If one or two persons enter with the permission of
the imām, then in this case there are two opinions. According to the well
known opinion a fifth is taken, because the imām by granting them per-
mission made their help binding on himself through support, therefore,
they become like a military contingent.

If a group, that possesses military strength, enters and takes some-
thing it is subjected to the fifth even when the imām did not grant them
permission for entry, because it was taken with the use of force and dom-
ination, therefore, it is like spoils. Further, it is obligatory upon the imām
to lend them support if he withdraws support it will result in weaken-
ing the Muslims, as distinguished from one or two persons in whose case
it is not obligatory on him to help them. Allāh knows what is correct.

111.2 Rewards

He said: There is no harm if the imām promises rewards during battle
in order to encourage the soldiers to fight. Thus, he may say, “Whoever
kills an opponent may take the belongings on his person,” or he may
say to a detachment, “I promise you a fourth after the fifth is set aside.”
This means after a fifth has been taken from the spoils. The reason is that
encouragement is recommended (mandūb). Allāh, the Exalted, has said,
“O Prophet! Rouse the Believers to the fight.” The granting of rewards
is a form of encouragement. Thereafter, encouragement is undertaken
through what has been said and sometimes it is through other methods,

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except that it is not for the imām to give away the entire spoils as reward as in this there is annulment of the right of all. If he does that while sending a raiding party then it is permitted, because this is left to his discretion and the securing of interests may demand this.

He is not to make a reward after the spoils have been secured within the dār al-Islām, because the rights of others are now entrenched in the spoils after their collection.

He said: The exception is the fifth, because the combatants winning the spoils have no right in it.

If he does not grant the belongings on the person of the enemy combatant to one who slays him, then they form part of the total spoils, and the slayer and others have equal rights with respect to them. Al-Shāfi‘ī (God bless him) said that the salāb (belongings on the person of the combatant) belong to the slayer, if he is one who is eligible for a share and when he slays him in combat, due to the words of the Prophet (God bless him and grant him peace), “Whoever slays an enemy is entitled to the belongings on his person.”

It is obvious that this tradition a mandatory provision of the law (not discretionary reward), because he was sent for this. Further, a person slain in frontal combat results in a greater benefit (for jihād), therefore, the person slaying him has the exclusive right to his belongings as an expression of the difference between him and the others. We maintain that it has been acquired through the power of the army, thus, it is a part of the spoils, and is to be divided in the manner laid down in the text (verse). The Prophet (God bless him and grant him peace) said to Ḥabīb ibn Salamah, “You have no right to the personal belongings of the person you slay except with the consent of your imām.”

What he has related probably implies a mandatory provision of the law and it probably implies a reward, therefore, we construe it to mean the latter on the basis of what we have related. The additional benefit is not taken into account for a single species (advancing and retreating), as we mentioned.

Salāb includes the clothes worn by the slain fighter, his weapons, ride, and whatever is on his ride like a saddle or instruments. It also includes what is upon his load animal in his bag or around his waist. What is besides this is not part of the salāb. The things that may be with his slave on another animal are not part of the salāb. Therefore, the right to a reward cuts off the right of the rest over it. As for ownership it is established after gathering in the dār al-Islām, as has been stated earlier. Thus, if the imām were to say, “Whoever captures a female she belongs to him,” and thereafter a person does make a female captive, establishes that she is not with child, it is not permitted to him to have intercourse with her. Likewise, he is not to sell her. This is the position according to Abū Ḥanīfah and Abū Yūsuf (God bless them). Muhammad (God bless him) maintains that he has the right to have intercourse with her and to sell her too, because ownership is established through tanfīl (promise of reward) in his view, just as it is established through division (of the spoils) within the dār al-ḥarb and purchase from an enemy. The obligation of compensation as a consequence of destruction, it is said, is also based upon this disagreement. Allah knows what is correct.

25 It is recorded by all the sound compilations, except al-Nasā‘ī. Al-Zayla‘ī, vol. 3, 418.

Chapter 112

Conquests by the Unbelievers

If the Turks (Unbelievers) overcome the Byzantines, enslave them and seize their wealth, it belongs to them, because seizure is realised in wealth that it permissible (for them), and that is the cause, as we shall elaborate, God, the Exalted, willing. If we overcome the Turks, then whatever we find of this wealth with them is lawful for us, on the analogy of their remaining wealth.

If they seize our wealth and, God forbid, are able to secure it within their territory, they come to own such wealth. Al-Shafi'i (God bless him) said that they do not come to own it as such seizure is prohibited initially (in our territory) and finally (in their territory after seizure). The prohibited does not become a cause for ownership, as is known through the principle upheld by the opponent (al-Shafi'i). We maintain that seizure has taken place with respect to permissible wealth, therefore, it occurs as a cause of ownership to meet the needs of the subject, just like seizure of their wealth by us. This is so, as protection of wealth is established in contravention to the evidence1 due to the necessity of enabling the owner to utilise the thing. If such a facility is eroded, the wealth reverts to its original state of permissibility, except that seizure of wealth does not take place unless it has been secured within the dār. The reason is that seizure is an expression of exercising control over the subject-matter by way of present use (in our territory) and as a final consequence (in their own). A thing prohibited due to an external factor (but not prohibited in itself), if it can be a valid cause for something that is superior to ownership (as in the case of prayer in unlawfully possessed property), which is spiritual reward, then what do you think about ownership in the temporal world.

1"It is He Who hath created for you all things that are on earth." Qur'an 2:39
If the Muslims come to seize the wealth and the owners come across it prior to division, then the wealth belongs to them without any compensation, but if they come across it after division, they may take it by paying its value if they so wish. This is based upon the saying of the Prophet (God bless him and grant him peace), “If you find it prior to division, it is yours without any cost, but if you find it after division, then it is yours after paying its value.” The reason is that the ownership of the original owner has been extinguished without his consent, therefore, he has a right to repossess it taking his interest into account (as the property is not owned by others as yet), except that repossessing it after division results in an injury to the person from whom it is taken by extinguishing his private ownership, thus, he is to take it by paying its value so that the interests on both sides are balanced. The joint ownership prior to division is public, therefore, the injury is less and it is for this reason that he can take it without paying its value.

If a trader enters the dar al-harb, buys this property and brings it over to the dar al-islam, then the original owner has an option: if he likes he can buy it for the price that the trader paid for it, or he may leave it. The reason is that taking it without compensation will result in an injury. Do you not see that he has paid a counter-value in exchange for it, therefore, the balanced view is to be found in what we have said. If he has bought it in exchange for goods, he is to pay him the value of the goods. If they made a gift of the property to the Muslim, he is to pay its value, because private ownership is established for him and it cannot be eroded without payment of value. If the property is (now) part of the spoils, and it is fungible, he may take it prior to the division, but he cannot take it after division, because taking it by giving a similar is futile. Likewise if it is gifted property, he cannot take it on the basis of what we have said. Similarly, if he has purchased it with a similar corresponding in quantity and description.

He said: If a slave is made captive and a man buys him then brings him over to the dar al-islam, but his eye is lost and he takes compensation for that, the master may acquire the slave by paying the price for which he bought him from the enemy. As for taking him for the price it is due to what we have stated. He (the master) does not take the compensation (for the eye). The reason is that the ownership in the slave is valid.

If he takes him, he takes him by paying a similar, which is futile. No part of the price is reduced, because the attributes are not a counter-value for any part of the price. This is distinguished from pre-emption (shuf'ah) as in the bargain, when it is transferred to the pre-emptor, the property is in possession of the buyer through a purchase that is vitiated (fasid). The attributes are subject to liability in this case, as in the case of usurpation. In the case under examination, however, the sale is valid, thus, the distinction is made.

If they take a slave prisoner and a man buys him for one thousand dirhams, but they take him prisoner again moving him to the dar al-harb where another man buys him for one thousand dirhams, then the first master does not have the right to take him from the second buyer by paying the price, because imprisonment did not take place during his ownership. The first buyer may take him from the second on paying the price, because imprisonment took place during his ownership. Therefore, the first master may take him by paying two thousand dirhams, if he likes. The reason is that he came to own him through two prices, therefore, he is to be taken on payment of both. Likewise, if the person from whose possession he was made captive the second time (the first buyer) is missing, the original owner cannot take him (from the second buyer) on the analogy of the situation when he was present.

The enemy cannot come to own, by defeating us, our mudabbar slaves, ummahat al-awlād, mukātab slaves, or our free persons, while we come to own all such persons against their claim. The reason is that the cause gives rise to ownership in its subject-matter when the subject-matter is permissible wealth. The free person is completely protected, and so also those besides him, because freedom stands established in their case in some respects. This is distinguished from their slaves as the shar' (law) has annulled their protection as a recompense for their offence and turned them into slaves. There is, on the other hand, no offence on the part of our slaves.

If a slave owned by a Muslim runs away entering enemy territory and they capture him, they do not come to own him according to Abū Hanīfah (God bless him). The two jurists said that they do come to own him, because protection was linked with the master due to the existence

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1. As the sale was valid in this case, the buyer was not holding property with liability. In shuf'ah and other cases of vitiation, he does hold it with the accompanying liability.

of his possession and this has been extinguished, therefore, if they capture him from the dār al-Islām they come to own him. The Imam argues that he comes to acquire possession over himself by moving out of our territory, because it was suspended due to the intervening possession of the master over him so as to enable him to benefit from him. As the possession of the master is removed, his own possession over himself emerges and he becomes protected in his own right; he is no longer a subject-matter of ownership. This is distinguished from the case of the runaway (within the dār al-Islām), because the possession of the master over him still remains due to the possession of the residents of the dār, and this prevents the emergence of his own possession. When ownership is not established for them according to Abū Ḥanīfah (God bless him), the original owner takes him without paying anything, irrespective of his being gifted, bought or taken as part of spoils, before or after division, and the compensation is to be paid from the treasury, as it is not possible to reverse the division due to the different persons entitled to spoils and the difficulty of their coming together. Further, he (the combatant or the trader) cannot claim the reward (jirī) for the capture of the slave for he was acting on his own account under the assumption that he owned him.

If a camel runs away to their side and they catch it, they come to own it, due to the realisation of control over it. The reason is that the camel has no way of exercising possession over itself on going out of our territory as distinguished from the slave on the basis of what we stated.

If a man buys the camel and brings it over to the dār al-Islām, the (former) owner has the right, if he likes, to take it for the price paid, as we elaborated.

If a slave runs away and with him are a horse and assets, and all these are captured by the polytheists, but thereafter a man buys all these and brings them over to the dār al-Islām, then the owner will take the slave without compensation, while he will take the horse and the assets with compensation. This is the view according to Abū Ḥanīfah (God bless him). The two jurists say that if he likes he will take the slave and what was with him for the price paid. This is based upon the analogy of a group of things upon individual things, and we have elaborated the rules for each individual case.

If an enemy enters our territory on safe-conduct and buys a Muslim slave taking him over to enemy territory, the slave stands emancipated according to Abū Ḥanīfah (God bless him). The two jurists said that he is not emancipated. The reason is that the surrender of possession resulted through a specified way, which is sale, and the authority to restrain him ended (upon his entry into enemy territory), therefore, he remains in his possession as a slave. Abū Ḥanīfah (God bless him) argues that the release of the Muslim from the degrading control of an unbeliever is obligatory, therefore, a condition is stipulated, which is the difference of territories, and is made to stand in the place of the underlying cause; namely, emancipation to secure his release. It is just like making three menstrual periods in place of separation when one of the spouses from the enemy territory embraces Islam.

If a slave owned by an enemy embraces Islam and then moves over to our territory or if the territory is conquered, then he stands emancipated. Likewise if their slaves come over to the military camp of the Muslims, they stand emancipated. This is based upon the report that some of the slaves of Ṭā'if converted to Islam and came over to the Messenger of Allah (God bless him and grant him peace), so he gave a decision about their emancipation. He said, "They are emancipated by Allah." Further, he preserved his own self by coming over to us and relinquishing his master, or by aligning himself with the protective power of the Muslims when they conquer the enemy territory. Considering him to have possession over himself is superior to considering the possession of Muslims over him, because his possession over himself was established first, thus, what is needed in his interest is to strengthen it, while it is in their interest to establish possession over him ab initio (but his possession is superior), therefore, his possession is preferred. Allah knows what is correct.

\[\text{\textsuperscript{486}}\]

\[\text{\textsuperscript{It is recorded by Ahmad and Ibn Abi Shaybah in their Munads. Al-Zayla'i, vol. 3.}}\]
Chapter 113

Entering Enemy Territory on Amān

If a Muslim enters the dār al-ḥarb as a trader, it is not lawful for him to transgress against any of their wealth or their persons. The reason is that by seeking amān he undertook not to be aggressive against them. Transgression after this amounts to treachery, and treachery is prohibited, unless the enemy ruler commits treachery against these traders by taking their wealth or imprisoning them, or someone from among the enemy does that with the knowledge of the ruler, who does not prevent them from doing so. In this case, they are the ones who committed breach of the assurance. This is distinguished from the case of the prisoner for he is not on safe-conduct, therefore, transgression is permitted for him, even if they voluntarily let him move around freely.

If he deceives them, that is the trader and takes something and returns with it, he owns it through a prohibited ownership, due to seeking control over permitted wealth, except that it has been acquired through deception, and this gives rise to an element of wickedness in it. He is to be ordered to give it away as charity. The reason is that prohibition due to an external factor does not prevent the cause (of ownership) from taking effect, as we have explained.

If a Muslim enters the dār al-ḥarb on amān and an enemy gives him a loan, or he gives the enemy a loan, or one of them usurps the property of the other, and thereafter he comes back and grants the enemy amān, the claims of one against the other are not admissible. The reason is that adjudication relies on authority (jurisdiction), and there was no authority at all at the time of the giving of the loan nor at the time of the adjudication against the person on amān, because he did not agree to be bound by the āḥkām of Muslims in his transactions occurring in the past;
he did so for future transactions. As for usurpation, the property moved into the ownership of the usurper who misappropriated it due to control over unprotected wealth, as we have explained. The same applies if two enemy persons undertake these transactions and then come over to our territory, due to what we have said.

If two enemy persons come over to us after embracing Islam, the issues of their debts are to be adjudicated, but not the case of usurpation. As for the loan transactions they were concluded in a valid manner due to the existence of consent, and jurisdiction is established at the time of adjudication due to their agreeing to abide by the al-kāmā of Islām. As for usurpation it is controlled by what we elaborated, that is, he came to own it and there is no element of sin in the enemy's wealth so that he may be asked to return it.

If a Muslim enters the dār al-harb and usurps an enemy's property after which both come over as Muslims, then he is to be ordered to return the usurped property, but a judgement (decree) is not to be rendered about usurpation. As for the absence of a decree, it is due to what we have elaborated, that is, it is his wealth now. In the case of the order for returning the property, it means by issuing a fatwā about it insofar as there is an irregularity pertaining to the wealth for he committed breach of his compact.

If two Muslims go to the dār al-harb on amān and one of them kills the other, intentionally or by mistake, then the killer has to pay diyyah (blood-money) from his own wealth, while he is liable for expiation in the case of mistake (manslaughter). As for expiation, it is based upon the absolute meaning in the Qur'ān, while diyyah is paid as the protection established within the dār al-Islām through preservation is not annulled due to the incident of entering the enemy territory on amān. Retaliation (qisās) does not become obligatory, because it is not possible to extract it without controlling power (jurisdiction), and there is no such power without the presence of the imām and a community of the Muslims, but they are not found in the dār al-harb. Diyyah is to be paid from his personal wealth as the 'aqilah does not pay on account of murder, and in the case of mistake too, because they (members of the 'aqilah) do not have the ability to prevent him due to a difference of the dārs when the obligation of payment is placed upon them for neglecting such prevention.

If they are both prisoners and one of them kills the other, or a Muslim trader there kills a Muslim prisoner, then there is no liability for the killer nor is there expiation in the case of mistake, according to Abū Hanīfah (God bless him). The two jurists say in the case of prisoners that he is liable for diyyah in the case of mistake and intentional killing. The reason is that protection is not annulled due to the incident of imprisonment, just as it is not annulled due to the incident of seeking amān, as we have elaborated. Retaliation is denied due to the absence of the preventive power of the state (jurisdiction), while diyyah is imposed on his personal wealth as we stated. Abū Hanīfah (God bless him) argues that through imprisonment he comes to fall under their control as a result of being in their overpowering possession. It is for this reason that he becomes a resident through their travel, therefore, the original preservation is annulled, and he becomes like a Muslim who has not migrated to our territory. Expiation is specific to mistake, because there is no expiation in the case of intentional homicide in our view. Allah knows what is correct.

113.1 GRANTING ENTRY TO THE ENEMY

He said: If an enemy enters our territory as a musta'min he is not to stay for more than a year, and the imām will convey to him the statement, "If you stay for a whole year I will impose jizyah on you." The basis is the rule that an enemy cannot stay permanently in our territory, except through slavery or on payment of jizyah. The reason is that he becomes a spy for them and grants support against us, and this will cause an injury to the Muslims. He will be enabled to stay for a short period, because denying this will result in the termination of supplies and acquisitions, and it will close the door of trade. Consequently, we separated these two situations with the duration of a year for that is a period for which jizyah is imposed, thus, stay is allowed in the interest of jizyah. Thereafter, he is to return to his land after the communication from the imām prior to the completion of one year then there is nothing to stop him. If he stays on for a year he becomes a Dhimmi. The reason is that when he stays on after the directive of the imām he agrees to bind himself to the payment of jizyah, thus, he becomes a Dhimmi. The imām has the discretion to fix a period for this that is less than a year like a month or two months.

If he stays for the period (of a year), after the communication from the imām, he becomes a Dhimmi, due to what we said and thereafter he is not permitted to return to the dār al-harb. The reason is that the
contract of dhimmah cannot be terminated, for in this is the termination of jizyah and making his children declare war on us. In this there is injury for the Muslims.

If an enemy enters our territory on amān and buys kharāj land, then the imposition of kharāj on him turns him into a Dhimmi. The reason is that kharāj on land is like kharāj on the person, and if he commits to pay it he consents to staying on in our territory. He does not, however, become a Dhimmi by the mere purchase for he may be buying it for purposes of trade. When it becomes binding on him to pay the kharāj, he becomes bound to pay the jizyah for the next year, as he has become a Dhimmi due to the imposition of kharāj and the period is worked out from the time of his presence. His statement in the Book: “When kharāj is imposed on him he is a Dhimmi,” is a clear statement about the condition of imposition, therefore, many of the rules are to be extended from it, so do not be oblivious of this.

If a woman enters on amān and marries a Dhimmi, she becomes a Dhimmīyyah, because she has accepted the obligation of staying in subordination to her husband. If a male enemy enters on amān and marries a Dhimmi woman, he does not become a Dhimmi. The reason is that it is possible for him to divorce her and return to his land, therefore, he has not accepted the obligation of staying on.

The wealth of the residents of the enemy territory that is gathered by the Muslims without fighting will be spent upon the interests of the Muslims like the avenues of kharāj. The jurists said that it is like land from which the residents have been expelled and is like jizyah, thus, there is no fifth in it. Al-Shafi`i (God bless him) said that it is subject to a fifth on the analogy of spoils. We rely on the report that “the Prophet (God bless him and grant him peace) took jizyah, and so also `Umar and Mu`adh (God be pleased with them) and they deposited this in the treasury without taking a fifth from it.” The reason is that it is wealth that has been acquired due to the strength of the Muslims without engaging in battle. This is different from spoils for these are owned by the direct action of the combatants entitled to them and also through the strength of the Muslims, therefore, a fifth is due from the spoils. The fifth is due on the basis of one reason, while the combatants are entitled to spoils for another reason. In

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1It is recorded by Abū Dāwūd in Kitāb al-Kharāj. Al-Zayla`ī, vol. 3. 437.

2Qur`ān 4: 92
insofar as it has granted the authority to annul it. The apostate and the 
musta'min in our territory are legally presumed to be in their territory 
due to their intention to migrate to their dār.

If a person kills a Muslim, who has no heirs, by mistake or he kills 
an enemy who was visiting us on amān and had embraced Islam, then 
the diyyah (blood money) is to be paid by the 'aqlah (supporting clan) 
to the imām, and he (the killer) is also liable to expiation. The reason is 
that he has killed a protected person by mistake and it must be judged 
on the analogy of all other protected persons. The meaning of his words 
"to the imām," is that he has the right to take it when there are no heirs. 
If he kills him intentionally, then the imām has the right to execute him 
(by way of retaliation) or to take diyyah. The reason is that the person was 
protected, the homicide was intentional, and the the wali is known, and 
these are the public or the sultān. The Prophet (God bless him and grant 
him peace) said, "The sultān is the wali (heir) of the person who does not 
have a wali." The meaning of his statement, "or to take diyyah," is that he 
does so by way of settlement (sulḥ), because intention gives rise to retaliation 
that is specified. The reason is that payment of blood-money is more 
beneficial in this case than retaliation, therefore, he has the authority to settle for money. He does not have the right to pardon, because the right 
belongs to the public and his authority is that of a fiduciary, and a fidu-
ciary cannot extinguish their rights without compensation. Allāh knows 
what is correct.

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Chapter 114

'Ushr and Kharāj

He said: All Arab lands are 'ushr lands, and they extend from 'Udhayb 
towards the highest rock formations at Mahrah in Yemen up to the 
boundary of Syria. The Sawād is kharāj land and it is between 'Udhayb 
up to 'Aqabat Ḥalwān and from al-Tha'labiyah, it is said from 'Alath, 
up to 'Abbādān. The reason is that the Prophet (God bless him and grant 
him peace) and the Khulafa' Rashidin (God be pleased with them) did 
not take kharāj from the lands of the Arabs, and that is because this land 
is like booty, therefore, such a charge is not established against their lands 
just as it is not established for their persons (jizyah). The basis is that a 
condition for the people of kharāj is that they abide by their unbelief, 
as was the case in the Sawād lands. Nothing besides Islam, or the sword 
(death), is acceptable from the Arab polytheists. 'Umar (God be pleased 
with him), when he conquered the Sawād, imposed kharāj upon it in 
the presence of the Companions (God be pleased with them), and he 
imposed it upon Egypt when it was conquered by 'Amr ibn al-`Āṣ. Like-
wise, the Companions (God be pleased with them) arrived at a consensus 
for imposing kharāj on Syria.

He said: The land of the Sawād is owned by its residents and their sale 
of the land is valid and so are their transactions with respect to it. The 
reason is that when the imām conquers land through the mobilisation of 
the armies and by force, he has a right to keep the residents settled on the 
land and to impose a per head kharāj on them. Consequently, the lands 
stay in the ownership of the residents, and we have presented this earlier.
He said: All land that has been surrendered by its residents, or has been conquered by the mobilisation of the armies, and is distributed among those entitled to the spoils is 'ushr land. The reason is that there is a primary need to distribute it among Muslims, and imposition of 'ushr is suitable for it insofar as it carries within it the meaning of worship. Further, it is lighter as it pertains to the produce itself.

All land that is conquered by the mobilisation of the armies and the residents allowed to remain settled on them, is kharaj land. Likewise if the land is annexed through negotiation, because the need primarily is to distribute it among the unbelievers, and kharaj is suitable for this. Makkah is excluded from this, because the Messenger of Allah (God bless him and grant him peace) conquered it through the mobilisation of the armies, and left it for its residents without imposing kharaj on them.1

It is stated in al-Jami' al-Saghir that all land conquered by the mobilisation of forces, when the water of canals passes through it, is kharaj land. The land that does not get water from the canals and relies on springs, is 'ushr land. The reason is that 'ushr pertains to the produce of land and its produce is through its waters, therefore, what is taken into account is irrigation whether through the water of 'ushr or the water of kharaj.

He said: If a person revives barren land, then according to Abū Yūṣuf (God bless him) it is to be assessed according to its proximity. If it is within the bounds of kharaj land, that is, near it, it is kharaj land, but if it is within the bounds of 'ushr land, it is 'ushr land. Basrah, in his view, is 'ushr land on the basis of the consensus of the Companions (God be pleased with them). The reason is that the boundaries of a thing give it its governing rule, like the courtyard of a house is given the rule of the house so that the owner is permitted to use it. Similarly, it is not permitted to take land that is within a settlement. Analogy dictated that Basrah be kharaj land, because it is within the sphere of kharaj land, except that the Companions (God be pleased with them) imposed 'ushr on it, therefore, analogy is given up due to their consensus (ijmā').

Muhammad (God bless him) said that if he revives the land with a well that he dug, or with a spring that he unearthed, or the water of the Tigris or the Euphrates, or a large stream that no one owns, then it is 'ushr land. Likewise if he revives it with rainwater. If he revives it with the canals that were dug by non-Arabs, like the Nahr al-Malik and Nahr al-Yardjard, then it is kharaj land, due to what we said, by taking the water into consideration as that is the cause of development. The reason is that it is not possible to impose kharaj on a Muslim ab initio against his will, therefore, the water is taken into account, because irrigation with kharaj water is a binding evidence.

He said: The kharaj imposed by 'Umar (God be pleased with him) on the people of Sawād was one Hashmi cafiz for each jarib irrigated by water, and this was one ǧāf and a dirham. On a jarib of ratbah (clover, rich pasture land) it was five dirhams, while on a jarib of continuously planted vines (vineyard) or continuously planted date-palms it was ten dirhams. This is what is transmitted from 'Umar (God be pleased with him) He sent 'Uthmān ibn Ḥunayf to undertake a cadastral survey of the Sawād of Iraq, while he made Hudhayfah supervise his work. He surveyed the land and it came to 36,000,000 jaribs on which he imposed the kharaj that we have mentioned. This took place in the presence of the Companions (God be pleased with them) and there was no one who opposed this, thus, it resulted in a consensus on their part. The burden of producing varies. Thus, the burden to be borne for (expense and labour) vineyards is the least, for crops it is the maximum, while the burden for the ratbah is in between these two. The imposition of the levy varies according to the burden. Accordingly, the obligation in case of vineyards is the maximum, for crop cultivation it is the least, while for ratbah is the average of the two.

He said: In the categories besides these, like saffron and garden produce and others, the imposition is varied according to the ability to produce, because there is no imposition narrated for them from 'Umar (God be pleased with him), and he too (presumably) took into account the ability to produce, therefore, we take the ability to produce into account in anything in which there is no imposition (from him). The jurists said: The maximum for the ability to produce is that the obligation for payment reach one-half of the produce, and it is not to exceed this. The reason is that imposition of one-half is based upon true fairness, for we
had the right to divide up the land among those entitled to the spoils. *Bustān* is each land that has a boundary wall around it and it includes various kinds of date-palms as well as other trees. In our lands the imposition on all land is on the basis of *dirhams* and the reduction as well, because estimation must be on the basis of the ability to produce in whatever terms it is worked out.

He said: If they are unable to pay what is imposed on them, the *imān* is to reduce the imposition. Decreasing the imposition due to less production is valid on the basis of consensus (*ijmāʿ*). Do you not examine the statement of `Umar (God be pleased with him), “Perhaps, you two have placed a greater burden on the land than it can bear.” They replied, “No. In fact, we imposed what it can bear, and had we increased it, the land would bear that too.” This indicates the permissibility of decreasing the burden. As for increasing the levy with an increase in production, it is permitted according to Muhammad (God be pleased with him) on the analogy of decrease in case of loss of production. According to Abū Yūsuf (God bless him), it is not permitted, because `Umar (God bless him) did not increase it when he was told about the greater paying ability.

If the *kharāj* land is covered with water (flood or water-logging), or its supply of water is cut off, or the crop is struck by some calamity, then there is no *kharāj* on it. The reason is that the possibility of harvesting is lost, which is the estimated production that is taken into account for the imposition of *kharāj*. In the case where the crop has been affected by a calamity, the estimated production is lost for part of the year, whereas the land being productive throughout the year is a condition as in the case of wealth subject to *zakāt* (therefore it is not imposed) or the rule depends upon the actual production when it is actually produced.

He said: If the owner suspends production, he is liable for *kharāj*. The reason is that the ability is there and it is he who has caused its loss. The jurists said: If a person moves to cheaper of two products without an excuse has to pay the *kharāj* for the more expensive product, because it is he who has caused the waste of the excess. This is known, but a ruling will not be issued on this basis so that the unjust do not acquire the justification to extort the wealth of people.

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4 It is recorded by al-Bukhārī in his *Saḥīḥ* Al-Zayla’i, vol. 3, 441.
5 This too is found in the tradition recorded by Abū ` Ubayd, Al-Zayla’i, vol. 3, 441.
Jizyah (Poll Tax)

Jizyah is of two kinds: First is jizyah that is imposed by consent and negotiation and it is determined according to the agreement that takes place, just like the Messenger of Allah (God bless him and grant him peace) made a treaty with the people of Najrān for the payment of twelve hundred hullah (dresses). As the reason is consent, therefore, it is not permitted to transfer it to something other than what is agreed upon. The second type is jizyah that the imām initiates and he imposes it when he defeats the enemy and keeps the residents settled on their property. He imposes on one who is apparently rich forty-eight dirhams per year by taking four dirhams from him every month. On a person of average means a sum of twenty-four dirhams is imposed taking two dirhams every month. On a poor person who is capable of working a sum of twelve dirhams is imposed taking one dirham every month. This is so in our view. Al-Shafī‘ī (God bless him) said that on each major person one dinār or what is equivalent is imposed, and the rich and poor are the same for this purpose. This is based upon the words of the Prophet (God bless him and grant him peace) to Mu‘ādh (God be pleased with him), “Take from each male and female who has attained puberty a dinār or its equivalent in ma‘āfīr (cloth in Yemen).” This tradition does not provide any detail (for making a distinction). The reason is that jizyah is imposed in place of death so that it is not imposed on one whose slaying is not permitted due to unbelief, like minor children and women. This meaning includes both rich and poor (males). Our view is transmitted from ‘Umar, ‘Uthmān and ‘Alī (God be pleased with them). No one

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among the Muhājirūn or the Ānṣār opposed them in this. Further, it is imposed to support the fighters, therefore, it is to be imposed according to a graded scale in the same manner as kharāj on land. This is so as it is made obligatory in place of help in terms of life and wealth, and such help (from the warriors) varies too with respect to what is contributed, being more or less, likewise what is its substitute (contribution through jizyah). What he (al-Shāfi‘ī) has related is interpreted so as to apply to imposition after negotiation. It is for this reason that he ordered him to take it from a major female as well even though jizyah is not taken from her.

He said: Jizyah is imposed on the People of the Book and the Magians, due to the words of the Exalted, “from among the People of the Book, until they pay the Jizya with willing submission, and feel themselves subdued.” The Prophet (God bless him and grant him peace) imposed jizyah on the Magians.4

He said: And on the non-Arab idol worshippers. Al-Shāfi‘ī (God bless him) disagrees with this. He says that fighting them is obligatory due to the words of the Exalted, “And fight them on until there is no more persecution or oppression, and the religion becomes Allah’s.” But if they cease, let there be no hostility except to those who practice oppression.5 We have identified (he says) the permissibility of relinquishing fighting in the case of the People of the Book through the Qur‘ān, and in the case of the Magians through the tradition, and those who remain besides them are governed by the original rule. We argue that as enslaving them is permitted, therefore, imposition of jizyah is also permitted, because each one of these includes the meaning of taking away their personality (person) from them. Thus, such a person earns and pays the Muslims, while his own support is through his personal earning.

If he conquers their territory prior to this (imposition), then their men and women are booty, due to the permissibility of their enslavement.

Jizyah is not to be imposed on Arab idol worshippers nor on the apostates, because their unbelief is of an extreme nature. As for the Arab polytheists, the reason is that the Prophet (God bless him and grant him peace) grew up among them and the Qur‘ān was sent in their language.

Therefore, the miracle is clearly manifest in their case. The apostate, on the other hand, has denied his Lord, after he was guided to Islam and came to know of its merits.

There is no jizyah on women or minors, because it is imposed as a substitute for execution or a substitute for combat, and they are neither slain nor do they participate in combat due to the lack of legal capacity.

He said: And there is no jizyah on the invalid nor on the blind. Likewise the paralysed person and the enfeebled old man, on the basis of what we have elaborated. According to Abū Yusuf (God bless him) it is imposed if he has wealth, for he then fights in its broad meaning if he is consulted. There is also no jizyah on the poor man who is not able to work. Al-Shāfi‘ī (God bless him) disagrees with this. He relies on the unqualified meaning of the tradition of Mu‘adh (God be pleased with him).6 We rely on the report that ‘Uthmān (God be pleased with him) did not impose it on the poor man who was unable to work,7 and this took place in the presence of the Companions (God be pleased with them). The reason is that kharāj is not imposed on land that is unable to produce. Likewise this kharāj. The tradition gives the probable meaning of one who can work.

It is not imposed on the owned slave, the mukātāb slave, the mudabbār slave or on the umm al-walad, because it is imposed as a substitute for slavery with respect to them and is a means of support for us, and on the second consideration it is not to be imposed (for they have no wealth), therefore, it is not imposed due to the doubt inherent in it. Their owners are not pay on their behalf, because they will be bearing additional jizyah on their account.

It is not to be imposed on monks who do not mingle with the people. This is how it is mentioned here, while Muḥammad (God bless him), narrating from Abū Ḥanīfah (God bless him), has stated that it is to be imposed on them if they are able to work, and this is also the opinion of Abū Yusuf (God bless him). The underlying reasoning for imposing it on them is that the ability to work has been wasted by the monk and he has become like kharāj land whose cultivation has been suspended. The reasoning for not imposing it on them is that they are not to be slain when they do not mix up with the people, while jizyah with respect to them is a

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1Qur‘ān 9:29
2Qur‘ān 2:193
3There are several traditions on this and among them is one recorded by al-Bukhārī in his Sahih, Al-Zayla‘î, vol. 3, 448.
4Qur‘ān 9:29
5See preceding notes.
6By this he means ‘Uthmān ibn Ḥunayf (God be pleased with him). It is recorded by Ibn Zanjawiyyah in kitāb al-Anwār, Al-Zayla‘î, vol. 3, 453.
substitute for killing. It is essential for a person who is considered capable of work that he be in sound health, and it is sufficient that he enjoy sound health for a major part of the year.

If a person embraces Islam when he owes jizyah, the claim against him is extinguished. Likewise if he dies in a state of unbelief, with al-Sháfí’i (God bless him) disagreeing with this. He maintains that it is imposed as a substitute for (the guarantee of) protection or for residence. As this benefit has reached him, the compensation should not be extinguished due to this obstacle, as in the case of wages and the amount due on account of negotiated settlement for intentional homicide. We rely on the words of the Prophet (God bless him and grant him peace): “There is no liability of jizyah on a Muslim.” The reason is that it is imposed as a penalty for unbelief, and it is for this reason that it has been called jizyah for compensation (reward) and jizyah have the same meaning. The penalty for unbelief is extinguished due to Islam. Further, it is not awarded after death, because the laying down of a punishment in this world is only for the repelling of the mischief, and this mischief stands repelled due to death and by the acceptance of Islam. In addition to this, it has been made obligatory as a substitute for support with respect to us, and such help he provides through his own person after acceptance of Islam. Protection, on the other hand, is established for he is a human being, and the Dhimmi resides on his own property, therefore, imposing it as a substitute for protection or residence has no meaning.

If the claim of two years comes to be combined, the two are merged into one. In al-Jâmí’ al-Šaghír it is stated that a person from whom the per head kharaj is not taken up to the passage of one year, and the next year arrives, it is not to be taken. This is the view according to Abú Hanifah (God bless him). Abú Yusuf (God bless him) said that it is to be taken, which is also the opinion of al-Sháfí’i (God bless him).

If he dies upon the completion of the year, it is not to be taken from him according to their unanimous view. Likewise if he dies during the year. As for the issue of death, we have already mentioned it. It is said that the kharaj on land is also governed by this disagreement. It is also said that two claims cannot be merged into one (in the case of land). The two jurists arguing about the disputed issue say that Kharaj is imposed as a counter-value and counter-values when they come together, when

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115.1 RIGHTS AND DUTIES OF THE DHIMMIS

It is not permitted to construct new synagogues and churches within the dâr al-İslâm, due to the words of the Prophet (God bless him and grant
There is no castration in Islam nor a church. The meaning here is construction afresh.9

If the old synagogues and churches are demolished they may reconstruct them. The reason is that buildings do not last forever. As the ummah has let them settle in the land, he has given them an assurance to rebuild them, except that they are not allowed to move them (to another location) as that amounts to new construction in reality. The monks cell meant for seclusion is like the synagogue as distinguished from the place of prayer within a house as that is subservient to residence. This is the case in cities and not in villages, because it is the cities in which the symbols of rites are established and are not to be confronted through the expression of what goes against them. It is said in our lands that they are to be prevented from constructing them in villages. In the Arab lands, it is said, that this is forbidden (Abu Hanifah) about the villages of Kufah, for the majority of the residents were Dhimmis. In the Arab lands, it is said, that this is forbidden in the cities as well as the villages, due to the words of the Prophet (God bless him and grant him peace), "Two dins cannot come together in the Arabian peninsula." 10

If a Dhimmi refuses to pay the jizyah, kills a Muslim, uses foul language for the Prophet (God bless him and grant him peace), or has unlawful intercourse with a Muslim woman, his compact is not to be terminated. The reason is that the end result of fighting is the imposition of jizyah not its actual payment, and the obligation persists. Al-Shafi’i (God bless him) said that using foul language for the Prophet (God bless him and grant him peace) amounts to a breach of his compact, for the reason that had he been a Muslim his faith would be annulled, likewise his assurance of safe-conduct is annulled for the compact of Dhimmah is a substitute for belief. We argue that using bad language for the Prophet (God bless him and grant him peace) is an expression of unbelief on his part and the unbelief associated with him does not prevent his compact, and the recurring unbelief does not remove the assurance.

His compact is not terminated unless he moves over to the dar al-harb or the enemy subdue a territory and they wage war against us. The reason is that in this case they have become our warring enemies and the compact of dhimmah has become devoid of utility, which is repelling the mischief of the enemy. Allâh knows what is correct.

115.2 CHRISTIANS OF BANU TAGHLIB

The Christians of Banu Taghlib are required to pay on their wealth twice the amount of zakât that the Muslims are required to pay, because ‘Umar (God be pleased with him) made a settlement with them for this in the presence of the Companions (God be pleased with them).11 This amount is required to be paid by their women, but not their minor children. The reason is that the settlement was made for double of the zakât and such a payment is obligatory for women, but not minors, so also in the case of double payment. Zufar (God bless him) said that it is not to be taken from their women either, which is also the opinion of al-Shafi’i (God bless him). The reason is that in reality it is jizyah as was stated by ‘Umar (God be pleased with him), “This is jizyah, so divide it up as you like.” 12 It is for this reason that it is spent on the avenues specific to jizyah, and there is no jizyah for women. Our argument is that it is wealth that has become due through a settlement and a woman is eligible for the imposition of such a liability on her. The avenues are the interests of Muslims, because it is wealth that belongs to the treasury and this wealth is not linked with jizyah. Do you not see that the conditions of jizyah are not observed for it.

The (Muslim) client (mawla) of a Taghlibi (freedman) is required to pay the kharaj, that is, jizyah, while the kharaj on land has the status of the mawla of a Qurashi (where it is not taken). Zufar (God bless him) said that it is to be doubled, due to the words of the Prophet (God bless him and grant him peace), "The mawla of a people is one of them." 13 Do you not see that the mawla of a Hashimi is linked to him for purposes of the prohibition of zakât. Our argument is that this (taking double) is a kind of leniency (as compared to jizyah for there is no accompanying humiliation), and the mawla is not essentially linked to such leniency. Accordingly, jizyah is imposed on the client of a Muslim when he is a

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9It is recorded by al-Bayhaqi in his Sunan Al-Zayla’i, vol. 3, 453.
10It is recorded by Ishâq ibn Rahawayh in his Muraqad Al-Zayla’i, vol. 3, 453.
11This has preceded towards the end of the section on zakât on horses. It is recorded by al-Bayhaqi in a lengthy tradition. Al-Zayla’i, vol. 2, 362.
12It is in the tradition above.
13This has preceded in the chapter on who is entitled to zakât and who is not. Al-Zayla’i, vol. 3, 455.
Christian as distinguished from the prohibition of sadaqah, because prohibitions are established by doubt, therefore, the client is associated with the Hashimi with respect to it (that is, for prohibition of sadaqah). If the question is raised: what about the client of the rich man? we say: This is not binding in the case of the client of a rich freedman insofar as zakāt is not prohibited for the rich, for the rich man is entitled to take from zakāt (especially if he is one of the collectors). Affluence prevents it, but it is not found in the case of the client. As for the Hashimi, he is not entitled to this support at all for he is protected due to his nobility and honour from the filth of the people, therefore, his client stands linked to him.

He said: What the imām collects from kharāj, from the wealth of the Banū Taghlib, from what is paid as a tribute to the imām by the enemy, and from jizyah is to spent for the welfare of the Muslims like fortifications for defence, arched bridges, and embankments. He also gives from this to the Muslim judges, officials and jurists what is sufficient for their subsistence. In addition to this, he pays from this for the rations of the fighters and their families. The reason is that it is the wealth of the treasury, and it has reached the Muslims without fighting, therefore, it is meant for the welfare of the Muslims, and these persons are their officials. The allowances of the children are the liability of their fathers. If he does not pay what is sufficient for them, they would be in need of earning and would not be free for engaging in battles.

If a person dies during the middle of a year, he has no share from the grant, because it is a type of support and is not a debt. It is for this reason that it has been called 'aṭa' (grant). Thus, it cannot be owned prior to its being taken into possession; and it is extinguished upon death. Those entitled to the grant ('aṭa') in our times are like the qādī, the teacher and the muftī. Allāh knows best.

Chapter 116

Rebels (Bugḥāt)

When a group of Muslims take control of a land and move out of obedience to the imām, he is to invite them to return to the main community and is to remove the doubts that they have. The reason is that 'Ali (God be pleased with him) did in the case of the people of Ḥārūra before engaging them in battle. The reason is that this is the easier of the two choices and, perhaps, the mischief will be repelled through this, therefore, he begins with it.

He is not to commence hostilities until they start them. If they commence hostilities, he is to engage them till the dispersal of their group. This feeble servant (Author) says: This is how al-Quddūrī (God bless him) has stated it in his Mukhtasar. The Imām known as Ḥuwāhar'zadah (God bless him) has mentioned that in our view it is permissible to engage them in battle if they arm themselves and gather for hostilities. Al-Shāfiʿī (God bless him) said that it is not permitted to engage them in battle till they actually commence hostilities, because it is not permitted to kill a Muslim, except in defence, and these people are Muslims. This is distinguished from the case of unbelievers for their unbelief itself is a permitting factor, in his view. We rely on the argument that the rule revolves around the evidence, which is their gathering together and assuming military strength. The reason is that if the imām waits for long for their actual attack, it is possible that he may not be able to defend, therefore, he relies on the evidence due to the necessity of repelling their mischief. If the report reaches him that they have taken up arms and are poised for battle, it is necessary for him to capture them and to imprison them till they give up their resistance and to offer repentance. This is for repelling their
mischief as far as possible. The narration from Abū Ḥanīfah (God bless him) about staying in the houses (during such resistance) is construed to mean the situation when there is no imām. When there exists a lawful ruler it is obligatory to assist him if one has the means and the ability to do so.

If they have a group supporting them, then their wounded are to be slain and those retreating are to be pursued, in order to repel their mischief and so that they do not join up with their group.

If they do not have a group supporting them, their wounded are not to be slain nor are those retreating to be pursued, because when they give up fighting their slaying is no longer permitted in both cases, because when they give up fighting their slaying is no longer in defence. The response to him is what we mentioned that what is taken into account is the evidence (of their ability to attack) and not its having taken place in reality.

Their families will not be enslaved nor will their wealth be (taken as spoils and) divided up. This is based on the saying of ‘Ali (God be pleased with him) during the Battle of Jamal: “No prisoner will be slain, the privacy of families will not be violated and wealth will not be taken.”

This is treated as a model in such cases. He is statement about prisoners is construed to mean “when they do not have a supporting group.” If there is such a supporting group, the imām is to execute the prisoner, but if he likes he can imprison him, due to what we have said, for these people are Muslims and Islam grants protection to life and wealth.

There is no harm if the Muslims use their weapons in combat, if they are in need of doing so. Al-Shāfī‘ī (God bless him) said that it is not permitted. The same disagreement applies to using their riding animals. He maintains that it is wealth of a Muslim, therefore, utilising it without his consent is not permitted. We reply on the report that ‘Ali (God be pleased with him) divided the weapons among his companions at Basrah, and it was a division due to need not for ownership. Further, the imām has a right to do so in the case of wealth owned by those supporting him, therefore, doing so in the wealth of rebels has higher approval. The underlying meaning is the bearing of a smaller injury to ward off a more grievous injury.

The imām is to take their wealth into custody, and is not to return it until they repent. If they do repent he is to return it to them. As for not dividing it up, we have already elaborated it. In the case of custody, it is done to ward off their mischief by weakening their power, therefore, he takes it into custody away from them even if he is not in need of it. He is, however, to sell the riding animals as preserving the price is more rational and easier. As for returning the wealth after their repentance, the reason is that the necessity is over and their is no demand to convert them into spoils.

What the rebels have collected by way of kharāj and ‘uṣhr, from the lands that they came to control, is not to be collected a second time by the imām. The reason is that the authority of the imām to collect is based upon the protection he accords to the residents, and he was not able to protect them.

If they spent the collected amount on lawful avenues, the person from whom it was collected stands rewarded, because the right of the beneficiary has reached him, but if they did not spend it on the rightful avenue, then the matter for the residents is between them and Allāh with respect to its repayment, because what is due has not reached the rightful beneficiaries. This humble servant (Author) says: They (the Masha’ilch) said that there is no repayment for them in the case of kharāj, because those who took them were warriors, even if they were rich. In the case of ‘uṣhr (there is no repetition) if they were poor, because it is the right of the poor. We have elaborated this in the topic of Zakāt. In the future, the imām will take the dues as he is protecting them due to his regaining control and authority.

If a person kills another, and both were from the military force of the rebels, after which their area is conquered, then they (the killer) is not liable for anything. The reason is that the lawful imām had no authority over them at the time of the homicide, therefore, it did not give rise to liability, as in the case of homicide in the dār al-harb.

If they take control of a city and a resident of the city intentionally kills another resident of the city, and thereafter the city is conquered, qīsās is to be extracted from the killer. The interpretation is that when they did not implement their own laws on the residents and were dislodged before they could do that. In such a case, the authority of the imām is not severed, therefore, retaliation is obligatory.

\[1\]It is recorded by Ibn Abī Shaybah. Al-Zayla‘i, vol. 3, 463.
If a person from among the Ahl al-Adl (those in lawful authority) kills a rebel, he will inherit from him. If the rebel kills him and says, "I believed I was on the lawful side, but I am now on the lawful side," he inherits from him. If he says, "I killed him knowing that I was on the unlawful side," he will not inherit from him. This is the position according to Abu Tlanifah and Muhammad (God bless them). Abu Yusuf (God bless him) said that the rebel will not inherit in either case. This is also Al-Shaфи’s opinion. The basis is that the ‘adil, if he kills a rebel or destroys his wealth, he does not compensate nor has he committed a sin, because he is commanded to fight them to repel their mischief. If the rebel kills an ‘adil, he is not liable in our view, but he does commit a sin. Al-Simwi in an earlier opinion said that he is liable for compensation. On the same disagreement if an apostate repents, when he has destroyed life or wealth, he (Al-Shafi) maintains that he has destroyed protected wealth or he has killed a protected person, therefore, he is to compensate, on the analogy of the position prior to the use of force. We rely on the consensus (ijma’t) of the Companions (God be pleased with them) that has been reported by al-Zuhri. Further, he has killed on the basis of a fasyid evidence, and such an evidence is linked with one that is valid when it is supported by the use of force as an evidence of defence, just like the use of force in the case of the enemy and its justification. The absence of compensation is due to the fact that the rules (in this world) are based upon obligations and duties, and there is no duty due to the existence of permissibility on the basis of justification. There is also no obligation due to the absence of authority and the existence of hostilities, however, authority remains prior to hostilities, and in the absence of a justification obligation is established as a matter of belief, as distinguished from sin, because hostilities do not affect the right of the Lawgiver. When this is established, we say that the killing of a rebel by an ‘adil is justifiable homicide, therefore, it does not prevent inheritance. According to Abu Yusuf (God bless him) in the case of killing of an ‘adil by a rebel the irregular justification is acknowledged for purposes of repelling mischief, while the need here is to establish entitlement to inheritance, therefore, the justification cannot be acknowledged with respect to inheritance. The two jurists argue in this that there is a need for doing away with prevention of inheritance, because being a near relative is the cause of inheritance, therefore, an irregular evidence will be acknowledged for this purpose. The condition here, however, will be that it is based on his morality. Thus, if he were to say, "I knew that I was on the unlawful side," the repelling of prevention will not be found and compensation will be due.

He said: It is disapproved to sell weapons to those who do mischief or to their military contingents, because it amounts to supporting disobedience. There is no harm in selling at Kufah to the residents of Kufah when the person selling does not know them to belong to the group of rebels. The reason is that domination in the cities is of the law-abiding people. Thereafter, it is disapproved to sell the weapons alone and not those things that are not used for fighting, but are in the manufacture. Do you not see that it is disapproved to sell musical instruments and the wood. The same is relationship between wine and grapes. Allah knows what is correct.
Al-Hidāyah

BOOK FOURTEEN

Laqīṭ (Foundling)

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Chapter 117

The Legal Status of the Foundling

The term *laqīt* (foundling) is used keeping in view its future insofar as it is taken into custody. Picking up (taking into custody) is recommended as in this there is the survival of the child. If the person is convinced that the child will die, taking into custody is obligatory.

He said: The foundling is a free person. The original rule for a human being is freedom. Likewise, the dār al-Islam is the dār of free persons, and the rule assigned is that for the majority.

The maintenance of the foundling is the responsibility of the bayt al-māl (treasury). It is related from `Umar and `Alī (God be pleased with them). The reason is that the foundling is a Muslim, who is unable to earn and has no wealth, nor does he has close relatives. Thus, he resembles a cripple (invalid) who has no wealth or relatives. Further, the treasury inherits his estate, therefore, *al-kharāj bi'-d-damān* (earning is based on the liability to bear loss or to give compensation), for which reason compensation for his offences is also the liability of the treasury. The person taking the foundling into custody is deemed to make a voluntary donation by spending on the foundling due to the absence of wilāyah, unless he is ordered by the qādī to do so that it becomes a debt against the foundling due to the general authority of the qādī.

He said: If a person takes the foundling into custody then no other person has the right to take the child away from him, because his right comes to be established due to his prior possession.

If a claimant claims that the foundling is his child, then his statement is to be accepted, and this means when the person taking custody has not claimed paternity of the child. This is based upon *istihsān*, while analogy
dictates that his statement is not admissible, because it amounts to negating the right of the person taking custody. The basis of istihsan is that it is an acknowledgement that will be of benefit for the minor, because the foundling will gain respect through paternity and will be dishonoured in its absence. Thereafter, it is said that the claim is valid with respect to paternity, but not for negating the custody of the person who found him. It is also said that negation of custody is based upon the success of his claim of paternity. If the person who has taken custody claims paternity, it is said that it is valid both by way of istihsan as well as qiyas. The correct view, however, is that it is based upon the difference between qiyas and istihsan (as mentioned), and its rule was known in Kitab al-Asl.

If two persons claim him and one of them points to a mark of identification on his body, he is to be given preference. The reason is that the apparent facts support his claim due to the conformity of the mark of identification with his statement. If none of them describes a mark of identification, then he is considered the child of both due to their equality in terms of the cause. If, however, the claim of one of them was prior, the foundling will be considered his child, as his claim was undisputed at that time, unless the other person comes up with testimony for testimony is stronger (in terms of proof).

If a child is found in one of the cities of the Muslims or in one of their villages and a Dhimmi claims it to be his son, the paternity of the child is assigned to him, but the child is a Muslim. This is based upon istihsan, because his claim includes paternity, which is beneficial for the minor, while negation of Islam is established through the dar (territory) and this is harmful for the child. Consequently, his claim is allowed in what is beneficial for the child and disallowed in what is harmful for him.

If a child is found in one of the villages of the People of the Dhimmah, or in a synagogue or a church, then he is deemed to be a Dhimmi. This is the unanimous response when the person who finds him is a Dhimmi. When the person finding him in such a location is a Muslim or is a Dhimmi finding him in the locations specific to the Muslims, then the narrations vary. In the book of the Laqit, the location has been given precedence as that comes first, while in the Book of Da`wā, in some manuscripts, the finder is given precedence. This is a narration of Ibn Samā`ah from Muhammad (God bless him) based upon the strength of possession. Do you not see that status is determined on the basis of the dar, thus, if one of them was taken captive along with the minor, the
Chapter 118

Managing the Affairs of the Foundling

If some wealth is found on the person of the foundling, tied to him, then it belongs to the foundling, on the basis of the obvious conclusion. Likewise, if this wealth is tied to his riding animal when he is riding it, due what we have mentioned. Thereafter, the finder is to spend it on him according to the orders of the qāḍī. The reason is that it is found wealth and it is the qāḍī who has the authority to spend such wealth. It is said that he may spend it without the directive of the qāḍī, because it obviously belongs to the foundling. He has the authority spend on, and to buy, things that are necessary for the foundling, like food and clothing as they are part of expenditure.

The person finding the child does not have the authority to marry her, due to the absence of the basis of such authority based on kinship, ownership or judicial authority.

The finder does not have the authority to undertake transactions in the wealth of the foundling, on the analogy of the mother. The reason is that the authority to undertake transactions is for the growth of such wealth, and this is established on the basis of perfect managerial judgement and abundant affection for the child, and each one of them (mother and finder) possesses one of these traits.

He said: It is permitted to him to accept a gift on behalf of the foundling, because that carries pure benefit. It is for this reason that the minor possesses such authority on his own when he possesses discretion. This authority is also possessed by the mother and the guardian.

He said: It is permitted to him to hand him over for apprenticeship in a trade, because this is for training him and for ensuring his survival.
He said: He may also offer his services for hire. This feeble servant says: This is the narration of al-Qudūrī (God bless him) in his Mukhtasar. It is stated in al-Jāmi‘ al-Ṣaghīr that he is not to offer his services for hire. It is mentioned in the disapproved acts, and this is the correct view. The reasoning for the first view is that it pertains to his training. The reasoning underlying the second view is that he does not possess the authority to destroy his benefits, and in this the finder resembles the uncle and not the mother, because she possesses this authority, as we will be mentioning in the chapter of disapproved things. Allāh knows what is correct.
Ch. 119: The Legal Status of Found Property  
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Chapter 119

The Legal Status of Found Property

He said: Found property is a trust (amānah) when the finder takes witnesses that he is acquiring it to preserve it and that he will return it to the rightful owner. The reason is that taking possession of property in this way (in the presence of witnesses) is permitted according to the shari‘ah; in fact, it is preferred according to the jurists generally. It is obligatory when there is fear of loss, according to what the jurists said. When this is the rule it is not liable to compensation. Likewise if the owner and the finder confirm that he took possession on behalf of the owner, because their confirmation is proof in their favour and becomes like testimony. If he acknowledges that he took possession for himself, he is liable on the basis of consensus (ijmā‘), because he acquired the wealth of another without his permission, and also without the permission of the shari‘ah. If witnesses do witness the act of taking and he says, “I took possession on behalf of the owner,” but the owner rejects his claim, he is to compensate the property, according to Abū Ḥanīfah and Muḥammad (God bless them). Abū Yūsuf (God bless him) says that he is not to compensate the loss, and his statement will be given preference, because the act of taking prima facie supports him, because he preferred the fear of Allāh in doing good to the commission of sin.

The two jurists argue that he acknowledged bringing about the cause of compensation, which is the taking of the wealth of another and claimed what is meant to absolve him of liability, that is, taking on behalf of the owner, but in this doubt has occurred, therefore, he is not absolved of liability. What he (Abū Yūsuf) mentions about the prima facie position is opposed by another similar position, because it is obvious that the person undertaking the transaction was acting on his own account. It is sufficient
in the taking of witnesses to say, "If you hear a person calling out for lost property, then you are to guide him to me." This is the rule whether the found property consists of a single item or many, because luqta is a generic term.

Chapter 120

Claims on Found Property and its Identification

He said: If the found property is worth less than ten dirhams then he is to keep it available for identification for several days, but if it is valued at ten dirhams or more he is to make it available for identification for a whole year. This feeble servant (Author) says: This is the narration from Abū Ḥanifah (God bless him). His words, "several days," mean in accordance with what he considers appropriate. Muhammad (God bless him) determined it in Kitāb al-Aqīl to be one year without giving details about the value being less or more. This is also the opinion of Mālik and al-Shāfiʿi (God bless them), due to the words of the Prophet (God bless him and grant him peace), "If someone finds property he is to have it identified for a year," and there is no detail in this. The reasoning for the first view is that the determination of one year was laid down about found property that was valued at one hundred dinars, which is equivalent to one thousand dirhams. Ten dirhams and what is more than this comes within the meaning of one thousand insofar as it is relevant for amputation of the hand and the legalisation of marriage. In terms of zakāt, however, ten dirhams do not fall within the meaning of a thousand. Consequently, we have made identification obligatory for a year by way of precaution. What is less than ten does not fall within the meaning of one thousand in any way, therefore, we have left it to the discretion of the person facing the situation. It is said that none of these estimations are binding and the matter is to be left to the discretion of the finder, and he is to have it identified till he is convinced that the owner is no longer looking for it. Thereafter, he is to give it away as charity. If the found

*There are several traditions in this recorded by al-Dārʾqūṭnī and others. Al-Zaylaʿī, vol. 3, 466.*
argue that the original rule about the taking of another's property is prohibition, while permissibility is due the fear of loss. When the property is equipped with that with which it can defend itself such loss is rare, but there is a possibility of loss, therefore, the ruling given is that of disapproval and the recommendation of leaving it alone. We maintain that it is found property whose loss is likely, therefore, taking possession is recommended followed by identification so that the wealth of the public does not suffer a loss, just like the case of goats.

If the finder of property undertakes expenditure on it without the permission of the judge then such expenditure will be considered a donation, due to the lack of authority on his part over the liability of the owner. If he spends with the permission of the judge then it will amount to a debt against the owner, because the qāḍī has authority over the wealth of the missing person for his interest. His interests are preserved through expenditure, as we will elaborate.

When the matter is referred to the qāḍī, he is to examine it. If the animal has some utility, he is to give it on rent and spend on it from the rent received. The reason is that in this there is the survival of the corpus by keeping it in the ownership of the owner without placing the obligation of a debt on him. He does the same with a runaway slave. If the animal does not have such utility, and he fears that the expenditure will consume its value, he is to sell it and preserve its price, so as to preserve in meaning when it is difficult to preserve it in substance. If it is better to spend on it, he is to permit this (to the finder) and deem the expenditure to be a debt against the liability of the owner, for he has been appointed to watch over interests, and in this there is the securing of the interests of both sides. The jurists (Masha’ilāh) said that he is to order expenditure for two or three days estimating the time in which the owner is likely to turn up. If the owner does not come, he is to order the sale of the property, because the continued incurring of expenditure will lead to the loss of the property, therefore, his interest is not secured through expenditure over a long period.

The Author (God be pleased with him) said: In Kitāb al-Asl the stipulation of testimony (on the part of the finder) is made, which is correct. The reason is that such property may be in his possession as usurped property, in which case he is not to order expenditure rather he is to order its custody by way of deposit. Accordingly, it is essential to require testimony so as to uncover the true situation. The testimony given here is
not for purposes of adjudication. If the finder says that he has no supporting testimony, then the judge is to say to him, "Spend on it if you are speaking the truth with respect to your claim." Consequently, he will have recourse to the owner if he is truthful, but he will not if he is a usurper. His statement in the Book "and he is to deem the expenditure as a debt against the owner," is an indication of the direction that he has recourse to the owner if he turns up, but he is not to sell the found property if the qadi has stipulated recourse to the owner. This is one narration, and it is correct.

He said: When he appears, that is, the owner then the finder has the right to refuse delivery till he presents the amount incurred as expenditure. The reason is that the property is alive due to his expenditure. It is as if he is regaining ownership through him, and in this it resembles sold property. A closer case is that of one returning a runaway slave for he has the right to imprison the slave till the payment of the reward (ju'li), due to what we have mentioned. Thereafter, the debt arising as a result of expenditure is not extinguished due to the death of the property in the possession of the finder prior to restraining it, but it is extinguished if it dies after imprisonment (restraining), because by restraining it becomes like mortgaged property.

He said: Property found in the Hil and the Haram are the same. Al-Shafi'i (God bless him) said that it is obligatory to undertake identification of the property found in the Haram till the owner appears, due to the words of the Prophet (God bless him and grant him peace), "Property found in the Haram is not lawful, except for one who identifies it." We rely on the saying of the Prophet (God bless him and grant him peace), "Preserve its container and rope, and then have it identified for a year." This does not give details. The reason is that it is found property and in giving it away as charity after the passage of the period of identification there is the preservation of the ownership of the owner in some respects, therefore, he can come to own it as in the case of other types of found property. The interpretation of what he has related is that taking possession of found property is not permitted except for identification. The mentioning of the Haram is for the reason that this will not do away with  

the requirement of identification as it is a place that is obviously for the poor.

He said: If a man comes and claims the property it is not to be given to him until he brings testimony to the effect. If he does provide its identifying marks, it becomes lawful for the finder to give it to him, but he is not to be compelled to do so through adjudication. Malik and Al-Shafi'i (God bless him) said that he is to be compelled. The identifying marks are like stating the weight of the dirhams and their number, identifying the rope that ties them or the purse. These two jurists argue that the person in possession disputes the possession and not ownership, therefore, description alone is stipulated due to the existence of a dispute in some respects. The rendering of testimony is not stipulated due to the non-existence of the dispute in other respects. We maintain that possession is the intended right like ownership, therefore, he is not entitled to it without proof, and that is testimony on the analogy of ownership, except that it is lawful for him to deliver it due to the correct statement of the marks of identification. This is based upon the saying of the Prophet (God bless him and grant him peace), "If the owner appears and identifies it container and number, deliver it to him." The rule of permissibility is made by acting upon the well known tradition, which is the saying of the Prophet (God bless him and grant him peace), "Testimony is the obligation of the plaintiff." He is to take a surety for him for strengthening the transaction. There is no disagreement in this, because he is seeking the surety for himself as distinguished from an heir who is missing. It is said that if he does deem him truthful, he is not to be compelled to deliver, like the agent for taking possession of a deposit when he is deemed truthful. It is also said that he is to be compelled, because the owner in this case is not obvious, while the owner depositor is known.

The found property is no to be donated by way of charity to a rich person, because the thing ordered is the giving of charity, due to the saying of the Prophet (God bless him and grant him peace), "If he does not turn up," that is, the owner, "then donate it by way of charity." Charity

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2Testimony is given against a litigant who denies, but there is no one here to oppose the request. It is merely to discover the nature of the property.
3It is recorded by al-Bukhari and Muslim. Al-Zayla'i, vol. 3, 467.
4It is recorded by all the six Imams of the sound compilations. Al-Zayla'i, vol. 3, 468.
5It is recorded by Muslim. Al-Zayla'i, vol. 3, 468.
6The details of this tradition are provided in the chapter on da'wi, Al-Zayla'i, vol. 3, 468.
7This has preceded, and is recorded by al-Dar'quani and others. Al-Zayla'i, vol. 3, 468.
is not meant for the rich person, and in this it resembles the obligatory charity (zakāt).

If the finder of property is rich, it is not lawful for him to utilise the found property. Al-Shafi'i (God bless him) said that it is permitted due to the saying of the Prophet (God bless him and grant him peace) in a tradition from Ubayy (God be pleased with him), “If the owner comes deliver it to him otherwise utilise it,” although he was a rich person. The reason is that it is permissible for the poor person so that he may agree to take care of it, but this attribute is shared by the rich person. We maintain that it is the wealth of another person, therefore, its utilisation is not permitted without his permission, due to the unqualified meaning in the texts, while the permissibility for the poor person is due to what we related or due to consensus (ijmāʿ). Accordingly, what is beyond this (the rich man) continues to be governed by the original prohibition. The meaning of “rich person” can be construed from the tradition to apply to possibility of his need during the period of identification, while the poor man may be reluctant to accept it during this period. Further, utilisation by Ubayy (God be pleased with him) was based on permission by the Imam, and this permitted with his consent.

If the finder of the property is poor then there is no harm if he utilises it himself, insofar as there is the securing of interests in this from both sides. It is for the same reason that it is permitted to give it to a poor person other than him.

Likewise if the poor person is his father, his son or his wife, if he himself is rich, due to what we have said. Allāh knows best.

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8It is recorded in the two Sahihs. Al-Zayla’i, vol. 3, 469.
Al-Hidāyah

BOOK SIXTEEN

*Ibāq* (Runaway Slaves)

Ch. 121: The Legal Status of the Runaway Slave  
Ch. 122: Returning the Slave and Compensation
Chapter 121

The Legal Status of the Runaway Slave

Capturing the runaway slave is preferable for the person who has the strength to capture him, insofar as there is the revival of the right of the master in it. As for the lost slave, it is said that the same applies to him. It is also said that leaving him alone is better, because he is not likely to depart from his location, and this will lead to the owner discovering him, but this is not the case with the runaway slave. Thereafter, the person who captures the runaway slave brings him before the sultan, because he is not able to take care of him on his own, as distinguished from found property. When the runaway is brought to the sultan, he is to imprison him, but if the lost slave is brought to him he is not to imprison him. The reason is that he cannot be sure that the runaway will not run away a second time, as distinguished from the lost slave.

If a person brings back the runaway slave to his master from a distance of three days journey or more, then the reward of forty dirhams is due from the master to this person. If it is a distance that is less than this, then he is to be paid according to the estimated reward. This is based upon istihsān. Analogy dictates that there is no reward for him, unless it was stipulated. This is the opinion of al-Shāfi‘ī (God bless him). The reason is that he is voluntarily donating the benefits, therefore, it resembles the case of the lost slave. We rely on the report that the Companions (God be pleased with them) agreed upon the obligation of juyūl in principle, except that there were some among them who determined a reward of forty, while there were others who determined it to be less. Consequently, we determined it to be forty for the minimum distance of a journey and less than that for a smaller journey by reconciling and combining the varying reports. The reason is that the imposition of reward is construed
Chapter 122

Returning the Slave and Compensation

He said: If the slave runs away from the custody of one who was returning him, then he is not liable for anything. The reason is that he is a trust in his possession, but it applies where he took witnesses, and we have mentioned this in the topic of found property. The Author (God be pleased with him) said: It is mentioned in some manuscripts that he is not entitled to anything, and this too is true, because he is like the seller in relation to the owner. It is for this reason that he is to keep the runaway restrained till he receives the reward with the same status as the seller who restrains the sold property so as to claim the price. Likewise if the slave dies in his custody, he is not liable for anything, on the basis of what we said.

He said: If the master emancipates him as soon as he meets him, he is deemed to have taken possession through the emancipation. As in the case of the purchased slave. Likewise if he sells him to the person returning him so as to deliver the counter-value to him. Returning the slave has the hukm of sale, but it is sale in some respects alone, for it does not fall under the proscription laid down about the sale of something that is not taken into possession, thus, it is permitted (even without possession).

He said: It is essential that when he captures him he take witnesses to the effect that he is taking him into custody to return him. Taking of witnesses is obligatory upon him for such custody according to the opinion of Abū Ḥanīfah and Muḥammad (God bless them) so much so that if a person returns him without taking witnesses there is no jūţ for him in their opinion. The reason is that the relinquishing of witnesses is evidence of the fact that he captured him for himself. It is as if he bought him from someone who took him into custody or received him through a
gift or inherited him, and when such a person returns him to the master there is no *ju’l* for him, because he is returning him for himself, unless he takes witnesses that he is buying him for returning him to his master, in which case he will be entitled to *ju’l*, but he is making a voluntary donation in the payment of the price.

If the runaway slave had been pledged then the *ju’l* (reward) is to be paid by the pledgee, because he revived his financial value through the return, and that is his right. The reason is that satisfaction of his claim is through this value and the reward is in lieu of the revival of the value, therefore, he is liable for the reward. Return during the lifetime of the pledgor or after it is the same, because the pledge is not annulled due to death. He is liable for the reward when the value of the slave is equal to the debt or less than it. If it is more than this then it is estimated in the ratio of the debt and the rest is to be paid by the pledgor, because his right is involved to the extent of the liability for loss. It, thus, resembles the price of the medicine or retrieving him through ransom after the omission of an offence. If the slave is under debt (being an authorised slave) then the master if the master sells him choosing to repay the debt, he begins by paying the *ju’l* first and the rest is for the creditors, because the reward is a burden on ownership and ownership in the slave is suspended. The *ju’l* becomes obligatory on the person for whom the ownership is established. If the slave is an offender, then if the master decides to pay ransom so as to reclaim the benefit, he is obliged to pay the reward. It is to be paid by the *awliya’*, due to the return of the benefit to them, if the master decides to deliver him to them. If the slave had been gifted then it is due from the person to whom he had been gifted, even if the person gifting revokes the gift after the return of the slave. The reason is that the benefit did not accrue to the donor as a result of the return of the slave, but due to the donee’s relinquishing transactions in the slave after his return. If the slave was owned by a minor, then the *ju’l* is to be paid from his wealth as it is a burden of his ownership. If his guardian (*wasi*) returns the slave, then there is no *ju’l* for him, because causing the slave to return is part of his duties. Allāh knows what is correct.
Al-Hidāyah
BOOK SEVENTEEN

Mafqūd
(Missing Person)

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Chapter 123

The Missing Person and his Wealth

If a man disappears and his whereabouts (place of his location) are not known nor is it known whether he is alive or dead, the qādi is to appoint a person who will preserve his wealth, manage his affairs and secure his claims. The reason is that the qādi appoints an administrator for all those who are unable to administer their own affairs. The missing person has these attributes and has become more like a minor or insane person. In the appointment of an administrator for his wealth and an executor for his affairs, the qādi is performing his supervisory function. His statement (in the matn), “secure his claims” means that it is not known whether he (the mafqūd) took possession of his revenue, or took possession of his claim that has been acknowledged by one of his debtors, when all this pertains to the category of administration. He is to institute litigation for the recovery of debts arising out of his contacts, because he is now the principal for securing his rights. He is not to initiate litigation in matters for which authority was delegated to the mafqūd (wilāyah) nor for his share in real estate or goods that are in possession of another person. The reason is that he is neither the owner nor his deputy; he is an agent authorised by the qādi to take things into possession. He is not authorised to undertake litigation (of all types) according to the unanimous view. There is disagreement about litigation when he is an agent for taking possession of debt claims on behalf of the owner. As there is disagreement, his acts are to be approved judicially against the missing person. His acts are not valid, unless they are approved by the qādi, who gives a decision, as this is a matter that is subject to ijtihād. Thereafter, in things that he fears wastage, they are to be sold by the qādi if he is unable
to preserve them in their original form. This means that he is to preserve them in meaning (value, through the sale).

He is not to sell things in which there is no likelihood of wastage for the sake of maintenance or other reasons. The reason is that he does not possess authority (wilāyāt) over the missing person, except in matters that will preserve his wealth, therefore, he is not at liberty to go beyond the preservation of the form when that is possible.

He is to spend on his wife and children out of his wealth. This rule is not confined to his children alone, but in general for all close relatives of his children. The principle is that whoever is entitled to maintenance out of his wealth during his presence, without a decision from the qāḍī, is to be provided maintenance from his wealth during his absence. The reason is that a judicial order lends support to it. To each person who is not entitled to maintenance out of his wealth during his absence, because maintenance in such cases is through a judicial pronouncement against a person not present is not permissible. The first priority is that of minor children and old women to whom are linked old males as well. In the second level are brothers, sisters, maternal uncles and aunts.

His statement, "out of his wealth," means dirhams and dinārs. The reason is that their right pertains to food and clothing, and when this not found in his wealth, the satisfaction of this right is in need of a judicial pronouncement for conversion into value, and these are the two currencies. Metal (gold and silver) dust has the same status for this rule as it is a suitable for valuation like currencies. This (that we have stated) is the case when the wealth is in the possession of the qāḍī. If the wealth is in the shape of a deposit or a debt he is to spend out of it on them, if the custodian and debtor are acknowledging the debt and the deposit along with the existence of marriage (between the mafqūd and the beneficiary) and paternity, and this is so when these facts have not already been proved before the qāḍī. If the facts stand proved before him, there is no need for an acknowledgement. If one of the categories stands proved—deposit and debt or marriage and paternity—he is to stipulate acknowledgement for what is not proved. This is the sound view. If the custodian or the debtor pay without the order of the qāḍī, he is to hold the custodian liable and is not to absolve the debtor, because they have not paid to the one who rightfully owns the claim nor to his representative. This is different from the case where they pay on the order of the qāḍī, because the qāḍī is his representative.

If the custodian and the debtors deny the claims themselves or deny the existence of marriage or paternity, he is not to treat one the beneficiaries of the claim as parties to the litigation, because what they claim belongs to the missing person and has not been ascertained as proof of the existence of their right, which is maintenance. The reason is that maintenance just as it is due from this wealth is due from other wealth owned by the missing person.

1 Al-Quduri's.
Chapter 124

The Wife of the Missing Person

He said: He (the qādi) is not to cause a separation (divorce) between him and his wife. Mālik (God bless him) said that when four years have passed, the qādi is to pronounce a separation between him and his wife. She is to undergo the waiting period of one whose husband has died, and may then marry whom she likes. The reason is that ‘Umar (God be pleased with him) gave this decision in the case of a man who was enchanted away by spirits at Medina, and he (‘Umar) is suffices as an imām in this. Further, he (the husband) has denied her rights by disappearing, therefore, the qādi is to cause a separation between them after the passage of time on the analogy of īlā’ and impotence, and after this analogy he is to take the number four from īlā’ and years from the rule of impotence acting on the common attributes of both.

We rely on the saying of the Prophet (God bless him and grant him peace), “She is his wife till she receives clear evidence.” We also rely on the statement of ‘Alī (God be pleased with him) about such a woman that “She is a woman subjected to a trial. She is to wait patiently till death (of the mafqūtd) becomes evident or divorce is communicated to her.” This amounts to an elaboration of the term “evidence” stated in the marfū‘ tradition. Further, the proof of nikāḥ was established, absence does not lead to separation (divorce), death continues to be in the realm of probability, therefore, the termination of marriage continues to be uncertain. In addition to this, ‘Umar (God be pleased with him) changed his opinion

to that of 'Ali (God be pleased with him). There is no similarity with ḥa’ as that is prompt divorce, which is considered delayed in the law, thus, becoming a basis for separation. There is also no similarity with impotency, because absence is usually followed by return, while impotence rarely leads to recovery if it continues for a year.

He said: When he completes one hundred and twenty years from the date of his birth, a proclamation of his death is to be made. He (the Author, God be pleased with him) said: This is the narration of al-Hasan from Abū Ḥanīfah (God bless him). In the authentic narration of the School, it is to be estimated through ages of his contemporaries. In the report from Abū Yūsuf (God bless him), it is said to be one hundred years. Some of them determined it to be ninety years. The view that conforms most with analogy is that no standard be used to determine the period, while a compassionate view is that it be determined to be ninety years.

When a proclamation of his death is made, his wife is to observe the waiting period following death commencing from the time of the proclamation. His wealth is to be distributed among his heirs who are present at the time of the proclamation. It is as if he had died at that time with his death being witnessed. The reason is that the legal ruling is based upon the actual ruling.

An heir who dies before this is not to inherit from him. The reason is that the ruling of his death was not given during his life and it was as if the fact of his being alive was known.

The mafquūd (missing person) is not to inherit from anyone during his absence. The reason is that presumption of his being alive is based upon the presumption of continuity (istiḥāb al-hall) and that is not deemed a sufficient proof for establishing rights.

Likewise, if a bequest is made in favour of the mafquūd and the person making the bequest dies. Thereafter, the principle is that if there is an heir inheriting along with the mafquūd, who is not excluded by him, but whose share is reduced by him, he will be given the lesser share and the rest will be kept in suspension. If there is with him a relative who is excluded by him, he will not be given a share at all. The elaboration of this principle is: If a man dies leaving behind two daughters, a missing son, a son’s son and a son’s daughter. The wealth is in the hands of a stranger and they verify that the son is missing. If the two daughters demand their inheritance, they will be given one-half as that is certain and the remaining half

will be suspended. The son’s children will not be given anything as they are excluded by the mafquūd had he been alive. They are not entitled to inheritance on the basis of doubt.

The stranger is not to be dispossessed of the (remaining) wealth, unless he is shown to be dishonest. The similarity of this case is with pregnancy. Inheritance equal to the share of one son is held in abeyance according to the ruling fatwā. If, however, there is another heir with him whose share is neither eliminated not altered by the foetus, he is to be given his entire share. If there is an heir whose share can be eliminated by the foetus, he will not be given his share. If there is an heir whose share can be altered by the birth of the foetus, he is to be given the least share that is certain, as in the case of the mafquūd. We have elaborated this in Kifāyat al-Muntahi in greater detail. Allāh knows best and to Him return all things for decision.
Glossary

‘abd: slave.

‘abd ma‘dhūn: slave authorised by the master to trade on his behalf.

adab: court procedure; code of judicial conduct.

‘adālah: moral probity.

adillah: pl. of ḍalīl. The texts and the evidences in the texts that are the sources of the law. The general evidences for the law that contain within them the specific evidences. The Qur‘ān, for example, is a general evidence, while a verse of the Qur‘ān pointing to a ḥukm is a specific evidence or the ḍalīl tafsili.

‘adl: justice.

‘afw: forgiveness; commutation of sentence; surplus.

āhkām: pl. of ḥukm (rule).

ahl al-baghy: those who rebel against lawful authority. Those who support such authority are called ahl al-‘adl.

ahliyyah: legal capacity.

ajr: wages; reward.

‘aliqah: another name for mahr.

amah: slave-girl.

amān: undertaking of safe-custody for a foreigner or for a ḥarbi (enemy).

amīr: governor; ruler.

amwāl bāṭinah: invisible wealth.

‘anwatan: conquest after mobilisation of the armies.

‘aqd: knot; tie; contract.
### Glossary

- **aqilah**: clan or group responsible for paying diyah for a member.
- **aqil**: reason.
- **arkan**: pl. of rukn; essential elements.
- **arsh**: estimated compensation for injury.
- **asabiyyah**: family ties or bond.
- **atâq**: the act of emancipating a slave; manumission.
- **awliya’**: those granted authority or guardianship by the shari'ah as distinguished from guardians appointed by the awliya’ or the court.
- **'aym**: something that can be taken into physical possession as distinguished from rights.
- **'azl**: ejaculation outside the vagina to prevent conception.
- **bâ’im**: irrevocable divorce.
- **baras**: skin disease.
- **bayt al-mal**: treasury.
- **baynânah**: the state of irrevocable separation.
- **bhang**: hemp. The plant from which intoxicating substances are derived.
- **burghar**: rebels.
- **bulugh**: the age of puberty.
- **da'il**: evidence. See adillah.
- **dam**: sacrifice by way of atonement.
- **damân**: compensation; liability.
- **dâr**: house; territory.
- **dâr al-‘arâb**: enemy territory.
- **dâr al-Islâm**: the Muslim lands.
- **da'wah**: claim.
- **dayn**: debt; also applied to dinârs and dirhams, that is, currency.
- **Dhimmi**: non-Muslim citizen of the Islamic state who is supposed to have entered the contract of dhimmah, actual or implied.
- **dhimmah**: the equivalent of legal personality in positive law. A receptacle for the capacity for acquisition. Liability. A contract of liability entered into with non-Muslim citizens by the Islamic state.
- **diwan**: the treasury.
- **diyah**: compensation for bodily offences.
- **diyânah**: honesty; moral uprightness.
- **diyânat**: something that is morally wrong even though the law chooses to ignore it; moral verdict.
- **diyât**: pl. of diyah.
- **faqir**: needy.
- **farr**: person evading the rules of inheritance.
- **fâsid**: not valid; irregular; vitiated. 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 fâsid contract can become valid only if the offending condition is removed. It is an unenforceable contract.
- **fatwâ**: pl. fatâwâ. Legal rulings issued by the jurist.
- **fay’**: booty.
- **fidyah**: ransom.
- **fitnah**: evil; trial; disruption; insurrection.
- **fu’dhli**: unauthorised agent.
- **ghâlizah**: heavy; enhanced.
- **ghazi**: veteran soldier.
- **ghanîmah**: spoils of war.
- **ghârîb**: strange; stranger. In the context of traditions it refers to a report whose text or isnâd are not known. A principle or rule that is alien to the generally acknowledged propositions of the law.
- **ghârim**: debtor.
- **ghâšb**: usurpation; misappropriation; abduction.
- **hadânah**: Custody of the child after divorce or death of husband.
- **hâdâ**: fixed penalties. See also hujjâd.
- **hâkim**: the Lawgiver.
**GLOSSARY**

**halāk:** lawful.

**haqiqqiyah:** actual as distinguished from legal.

**harām:** prohibited.

**harbi:** enemy.

**hasan:** good.

**hasr:** siege; confinement.

**hawl:** one year. A period necessary for the imposition of zakāt.

**hayd:** menstruation.

**hibah:** gift.

**hibād:** mourning after divorce or death. Also ḫidād.

**hikmah:** wisdom; rationale of the rule.

**hirz:** place of safe-custody of property with reference to theft (ṣāriqah).

**hikmah:** legal as distinguished from actual.

**hukm shari:** see hukm.

**hujjah:** proof; demonstrative proof. An evidence in the sources that forms the basis of persuasive legal reasoning.

**hukm:** rule; injunction; prescription. The word hukm 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.

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**huquq:** pl. of haqq (right).

**iṣṭihād:** extended or chronic menstrual bleeding.

**iṣṭiḥsān:** the principle according to which the law is based upon a general principle, given preference over strict analogy pertaining to the issue. The principle is used by the Ḥanāfīs as well as by the Mālikīs. This method of interpretation may be employed for various reasons including hardship.

**iṭtiḥād:** emancipation of a slave; manumission.

**ja’)iz:** permitted; a terminable contract.

**jaḥr:** compulsion; used for mandatory atonement for violation of rights.

**jaldah:** stripes; lashes.

**jarīb:** measure used for land.

**jihād:** war.

**jināyah:** offence; tort; delict.

**jizyah:** poll-tax.

**ju’ālah:** reward; general offer of reward for doing something.

**kafalāh:** surety; guaranty.
kaffarah: expiation.
kawaghid: papers.
kharr: wine.
kharaj: tax imposed on lands belonging to the Dhimmis.
khata: mistake.
khayl: horses.
khilaf: disagreement of the jurists.
khilafah: caliphate.
khatib: communication.
khijar: option.
khijar al-bulagh: option of puberty.
khijar al-shart: option stipulated in a contract.
khul: redemption in marriage. Payment by woman to seek release from marriage.
khums: fifth of the spoils.
kitabah: the contract with a slave for his emancipation on payment of installments.
laqit: foundling.
litan: imprecation. A procedure followed when the husband accuses his wife of unlawful sexual intercourse for which he cannot produce four witnesses.
luqatah: found property.
maafir: sheets made in Yemen.
ma'dhan: slave authorised by master to trade on his behalf.
maphqay: missing person.
mahr: dower; amount paid to the wife as part of the marriage contract.
mahr al-mithl: reasonable dower.
mahram: husband or relative of the prohibited degree of marriage.
mak: wealth; property.
mrad al-mawt: death illness; terminal illness.
mariid: one suffering from a serious or terminal illness.
mashi'ah: leaving divorce at the discretion of the wife.
mawla: master of a slave who has been emancipated.
mawquf: suspended contract; a tradition whose chain stops at the Companion.
mijann: shield.
milk al-raqabah: exclusive ownership as distinguished from possession.
milk yamin: lawful possession.
miskin: poor.
mithqal: a unit of weight for gold.
mubara'ah: divorce granted to wife with no financial liability.
mudabbar: a slave who is to be emancipated on the death of his master. Mudabbarah is the female slave with this status.
mudarabah: the contract in which the owner of capital bears the entire loss.
mudarib: the worker in the contract of mudarabah.
musawadah: partnership in which the partners contribute all their wealth.
mufit: jurist who issues opinions upon request.
muharabah: war.
mudarib: working partner with no liability in a mudarabah.
mushan: married or once married through a valid contract.
mushanat: married women; free women.
mukatab: a slave who has agreed to buy his freedom by paying installments.
mursal: a tradition whose chain of transmission is not complete. The meaning assigned to it by the Hanafis differs from that adopted by the majority schools.
murtad: apostate.
mustahada: a woman with extended or chronic bleeding.
<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>musta'imin</td>
<td>a person visiting the dār al-Islām on assurance of safety.</td>
</tr>
<tr>
<td>muthlah</td>
<td>mutilation.</td>
</tr>
<tr>
<td>muzāhir</td>
<td>person pronouncing zihar.</td>
</tr>
<tr>
<td>muzakki</td>
<td>person undertaking tazkiyat al-shuhūd.</td>
</tr>
<tr>
<td>muzār'ah</td>
<td>share-cropping; tenancy.</td>
</tr>
<tr>
<td>nabbash</td>
<td>pickpocket.</td>
</tr>
<tr>
<td>nabidh</td>
<td>mead of dates.</td>
</tr>
<tr>
<td>nadhr</td>
<td>vow.</td>
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<tr>
<td>nahār</td>
<td>slaughtering an animal, especially a camel, while it is standing.</td>
</tr>
<tr>
<td>nasr</td>
<td>text of the Qur'ān or the Sunnah; text of the jurist; a word whose</td>
</tr>
<tr>
<td></td>
<td>meaning is absolutely clear.</td>
</tr>
<tr>
<td>niyāh</td>
<td>intention.</td>
</tr>
<tr>
<td>nisāb</td>
<td>minimum scale for the imposition of a duty, especially zakāt.</td>
</tr>
<tr>
<td>nisā'ah</td>
<td>texts. See nasr.</td>
</tr>
<tr>
<td>qadhīf</td>
<td>false accusation of unlawful sexual intercourse.</td>
</tr>
<tr>
<td>qadhīf</td>
<td>one who commits qadhīf.</td>
</tr>
<tr>
<td>qādī</td>
<td>judge.</td>
</tr>
<tr>
<td>qarn</td>
<td>a birth defect in a woman affecting her private parts.</td>
</tr>
<tr>
<td>qasāmah</td>
<td>a procedure for administering oath on the people of a locality</td>
</tr>
<tr>
<td></td>
<td>when the offender in homicide is not known.</td>
</tr>
<tr>
<td>qār' al-ṣariq</td>
<td>highway robbery.</td>
</tr>
<tr>
<td>qāt'</td>
<td>definitive.</td>
</tr>
<tr>
<td>qisās</td>
<td>retaliation; lex talionis.</td>
</tr>
<tr>
<td>qismāh</td>
<td>division; partition.</td>
</tr>
<tr>
<td>qītal</td>
<td>fighting.</td>
</tr>
<tr>
<td>qurū'ah</td>
<td>periods of menses or purity.</td>
</tr>
<tr>
<td>rādā'</td>
<td>fosterage.</td>
</tr>
<tr>
<td>rajah</td>
<td>retraction of revocable divorce.</td>
</tr>
<tr>
<td>rajīr</td>
<td>revocable form of divorce.</td>
</tr>
<tr>
<td>rajm</td>
<td>stoning.</td>
</tr>
<tr>
<td>ratq</td>
<td>a birth defect in a woman affecting her private parts.</td>
</tr>
<tr>
<td>ribā</td>
<td>usury; interest.</td>
</tr>
<tr>
<td>rukn</td>
<td>pillar. An act upon which a ritual or a contract is structured.</td>
</tr>
<tr>
<td>rushd</td>
<td>discretion.</td>
</tr>
<tr>
<td>sā'ah</td>
<td>a cubic measure.</td>
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<tr>
<td>sabab</td>
<td>cause.</td>
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<tr>
<td>šadaq</td>
<td>dower.</td>
</tr>
<tr>
<td>šadaqah</td>
<td>pl. šadaqāt. Charity.</td>
</tr>
<tr>
<td>šadaqat al-fitr</td>
<td>the amount paid before the 'id al-fitr prayer.</td>
</tr>
<tr>
<td>safar</td>
<td>journey. The extent of travel that gives rise to exemptions.</td>
</tr>
<tr>
<td>šafiyya</td>
<td>thing chosen by the imām from the spoils prior to their distribution.</td>
</tr>
<tr>
<td>şalab</td>
<td>belongings on the person of the warrior, like his weapons and</td>
</tr>
<tr>
<td></td>
<td>other things.</td>
</tr>
<tr>
<td>salam</td>
<td>contract in which an advance payment is made.</td>
</tr>
<tr>
<td>şarif</td>
<td>contract of currency transactions and loans.</td>
</tr>
<tr>
<td>sariqah</td>
<td>theft. Also called sariqah ṣuğhrā.</td>
</tr>
<tr>
<td>sariqah kubra</td>
<td>highway robbery.</td>
</tr>
<tr>
<td>shahāda</td>
<td>witnessing; testimony.</td>
</tr>
<tr>
<td>šahīd</td>
<td>martyr.</td>
</tr>
<tr>
<td>ša'ir</td>
<td>the law. The Author uses this term in the meaning of the texts of</td>
</tr>
<tr>
<td></td>
<td>the Qur'ān and the Sunnah as well.</td>
</tr>
<tr>
<td>ša'ir</td>
<td>legal; prescribed by law.</td>
</tr>
<tr>
<td>šarikah</td>
<td>partnership.</td>
</tr>
<tr>
<td>shawkah</td>
<td>power.</td>
</tr>
<tr>
<td>šaykh fāmi</td>
<td>enfeebled old man.</td>
</tr>
</tbody>
</table>
shibh al-'amd: quasi wilful homicide.
shubhah: pl. shubhāt. Doubt in the mind of the offender as to the legality of the act. It is to be distinguished from doubt in the mind of the judge during trial.
shubhah fi al-dalāl: doubt with respect to the applicability of evidence.
shubhah fi al-fīl: doubt in the commission of the act.
shubhah fi al-mahāl: doubt about the object of the act.
shufah: pre-emption.
siyar: relations with non-Muslims whether in enemy territory or within Muslim lands.
siyasah: policy; administration of justice.
šûh: negotiated settlement; truce.
sulṭān: ruler.
tadbir: the act of granting emancipation to the slave after the owner's death.
tafwīd: delegation of the right of divorce to wife.
takhrīj: extension of the law by reasoning from legal principles.
takhfīr: the granting of a choice.
talaq: divorce.
talaq al-sunnah: divorce recommended by the Sunnah.
tamlīk: granting the right of divorce, that is, making the wife own the right to pronounce divorce.
tanfīl: reward announced by the imām prior to the commencement of battle.
taqādum: limitation; being barred by time.
taqālid: following the opinion of another without lawful justification.
ta'zīr: penalties subject to the discretion of the gādī or imām.
tazkiyat al-shuhūd: the process of establishing moral probity.
tazwij: marriage.

umm al-walad: slave girl who has borne a child of her master. Pl. ummahat al-awlad
‘uqr: compensation for unlawful sexual intercourse.
‘urf: cusomary practice.
‘urūd: goods.
‘ushr: ten percent charge on the produce of the land.
wājib: obligatory.
wājib muwassā: obligation that provides enough time for the required act and another one like it.
wakālah: agency.
wakil: agent.
wali: guardian granted authority by the shari‘ah.
waqṣ: see awqās.
wafq: charitable trust.
wala‘: clientage.
wali: person granted legal authority by the shari‘ah over the person and property of a minor; heir with reference to claims of retaliation and blood-money.
waras: yellow dye.
wariq: silver.
wasaq: cubic measure equal to sixty ša‘s.
wāṣi: guardian appointed by the wali.
wāṣiyah: bequest.
wilāyah: delegated authority of guardian.
wujūb: obligation.
yamin: oath.
yamin ghamūs: false oath.
yamin laghw: superfluous oath.
zhāhir: apparent; the apparently strong opinion.
zāhir al-riwāyah: the authentic approved transmissions of the legal opinions of the school.

zakāt: poor-due.

zānī: person who commits unlawful sexual intercourse.

zānī: probable as distinguished from definitive.

zihār: injurious assimilation. A man prohibiting for himself intercourse with his wife by equating her with the back of his mother.

zinā: unlawful sexual intercourse.

zinā bi-al-jabr: rape.